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STATE IMMUNITY FROM MEASURES OF CONSTRAINT: THE STATE INTERESTS PROTECTED

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Abstract. — *The rationale for State immunity from foreign judicial measures of constraint against State property is the sovereignty and consequent equality of States. Whereas a State is immune from foreign civil proceedings themselves where, in the circumstances at issue in the proceedings, it was acting in the exercise of sovereign authority, it is immune from foreign measures of constraint against its property in connection with civil proceedings where, at the time of the application for the measure, it is acting or, in some cases, intending to act in the exercise of sovereign authority through that property. The obligatory grant of State immunity from measures of constraint serves to safeguard a State's use of its property* jure imperii*. In so doing, it safeguards the State's use of that property for the good of the political community of which the State is the juridical embodiment in international law. In upholding the sovereignty of the State, the international law on State immunity from measures of constraint against State property upholds the public good served by that State.*

1. *Introduction.* — What interests of States are protected by the international legal rules governing State immunity from foreign judicial

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measures of constraint against State property in connection with civil proceedings? The question may seem pointless. After all, it is those rules, reflecting those interests, that bind States, not the interests themselves. Moreover, a national court to which an application for pre-judgment or post-judgment measures of constraint against the property of another State is made simply either applies those rules directly [1], if permitted to do so by the forum State's constitution, or — more remote still from the underlying State interests — applies national legislation giving effect to those rules. Additionally, insofar as the forum State may be bound by Article 6 of the European Convention on Human Rights to afford access to a court for the determination of civil rights, the European Court of Human Rights has held that this obligation is not breached when a contracting State, in conformity with "generally recognized rules of public international law on State immunity", bars execution of a civil judgment against property of another State situated in its territory [2]. In short, there appears no room for consideration to any practical end of the State interests that motivate or are collaterally served by the international law on the immunity of States from foreign judicial measures of constraint against their property [3].

[1] In the application of those rules, furthermore, the grant of immunity from measures of constraint in connection with proceedings, just as from proceedings themselves, "cannot [...] be made dependent 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 claimed", in the words of International Court of Justice, Judgment of 3 February 2012 in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, *I.C.J. Reports*, 2012, p. 145, para. 106.

[2] European Court of Human Rights (First Section), Judgment of 12 December 2002 in the case *Kalogeropoulou v. Greece and Germany*, application No. 59021/00, available at http://hudoc.echr.coe.int. The Court reasons that, while the right of access to a court under Article 6 is engaged by the grant of State immunity from execution in accordance with international law, the limitation on the exercise of the right posed by this grant is lawful. First, the grant of State immunity from execution "pursues the legitimate aim of complying with international law to promote comity and good relations between States". Secondly, if not exceeding "those limitations generally accepted by the community of nations as part of the doctrine of State immunity", the grant of State immunity from execution "cannot generally be regarded as imposing a disproportionate restriction" on the right. See also *ibid*. for the Court's dismissal of a claim based on Article 1 of Protocol 1 to the European Convention on Human Rights.

[3] Note that, although reference is commonly made to the immunity of State property, the immunity from foreign judicial measures of constraint from which State property may benefit is better conceived of in formal terms as the immunity of the State in respect of its property or, putting it another way, the immunity of the State from measures of constraint against its property. That said, it can be more convenient and is by no means unacceptable to speak of the immunity of State property as such. See O'Keefe, Tams, *Article 1*, in *The United Nations*

Yet there are indeed practical reasons for considering these interests. First, the precise content of the customary international law of State immunity from measures of constraint is not necessarily settled. If the judicial, legislative or executive organs of a State think it open to them to prefer one putative customary position over another [4], they may in practice be swayed, overtly or not, by weighing the State interests at stake against the competing interest of applicants for such measures. Secondly, the executive or legislative organs of a State may conduct a similar weighing exercise when deciding whether the State should become party to the sole universal treaty regulating in general terms State immunity from measures of constraint, namely the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (hereafter "UN Convention on State Immunity") [5]. Lastly, understanding the State interests protected by the international law on State immunity from measures of constraint assists to an extent in the application to the facts of a case of the concept of "government non-commercial purposes" that is central to the rules governing post-judgment measures against State property [6].

What follows examines the interests of States protected by State immunity from foreign judicial measures of constraint against State property in connection with civil proceedings — measures such as arrest, attachment and execution [7] — and, consequently, by the rules of international law that regulate it. It considers first the rationale that, from the start, has motivated States to agree, tacitly or explicitly, on rules obliging

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Convention on Jurisdictional Immunities of States and Their Property: A Commentary (O'Keefe and Tams eds.), Oxford, 2013, p. 35 ff. at p. 36 f.

[4] Formally, nonetheless, the question is one strictly of the identification, on the orthodox basis of State practice and *opinio juris*, of the binding rule of customary international law and of the application of that rule, in relation to the second of which see *supra* footnote 1.

[5] United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, UN Doc. A/RES/59/38, Annex (not in force).

[6] See *infra* sections 4 (*b*), 5.

[7] The term "measures of constraint" — as used in the UN Convention on State Immunity, Part IV and in International Court of Justice, *Jurisdictional Immunities*, cit., pp. 145-148, title of Part IV and paras. 110, 112-114, 118 f. — is intended as a generic term covering all judicial measures, in connection with civil proceedings, that are directed towards restraining the use or altering the possession or ownership of property. It is immaterial how these measures may be styled or framed under national law. The term encompasses both measures against property as such, for example arrest, attachment and execution, and measures *in personam* in relation to the use or disposal of that property, for example injunctions or orders for specific performance or for the recovery of property. See *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 55 f.

each of them to refrain, in the context of civil proceedings, from judicial measures of constraint against another State's property situated in their territory. It then looks at the State interests collaterally served by these rules.

2. *State immunity from measures of constraint as the safeguard of States' sovereignty.* — State immunity from foreign measures of constraint against State property in connection with civil proceedings did not originate to safeguard any material or functional interest of States. The common concern of States that gave rise to it was more abstract. It originated simply as a corollary of each State's sovereignty, which it served to uphold. Nor has this rationale changed over time. On the contrary, the development of the rules of the customary international law of State immunity that prohibit foreign judicial measures of constraint against a State's property has represented merely a recalibration in content, not a revolution in *raison d'être*. The fundamental justification for these rules remains the sovereignty and consequent equality of States under international law.

3. (a) *The origin of State immunity from measures of constraint.* — Under international law, each State is deemed sovereign. The essence of sovereignty (or "*suprema potestas*", "supreme power") is having no authority superior by right to one's own [8]; and if each sovereign has no authority superior to its own, each must be equal. Were one sovereign, however, to arrogate to itself judicial authority over another, it would be to deny the other's equality and, more fundamentally, its sovereignty [9]. It was in a reflection of this logic [10] that, according to the classical absolute doctrine of State immunity (also known as sovereign immunity), a State

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[8] See e.g. Permanent Court of International Justice, Advisory Opinion of 5 September 1931 on *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, Individual Opinion of Judge Anzilotti, *P.C.I.J.*, *Publications*, Series A/B, No. 41, p. 57; *Oppenheim's International Law. Volume 1: Peace*[9] (Jennings and Watts eds.), London, 1992, p. 122.

[9] *Par in parem non habet imperium* ("An equal has no authority over an equal"), in the words of the commonplace of the law of nations.

[10] For the sovereign equality of States as the basis of State immunity, see e.g. International Court of Justice, *Jurisdictional Immunities*, cit., p. 123, para. 57; European Court of Human Rights (Grand Chamber), Judgment of 21 November 2001, in the case *Al-Adsani v. United Kingdom*, application No. 35763/97, para. 54, available at http://hudoc.echr.coe.int, as well as subsequent case-law of the European Court of Human Rights; Council of Europe, *Explanatory Report to the European Convention on State Immunity*, 1972, para. 1; *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 56.

was entitled under customary international law to complete immunity from the civil jurisdiction of the courts of another State [11], both from judicial proceedings and from judicial measures of constraint in connection with those proceedings [12]. For these purposes, a State's property was cloaked in the sovereignty of the State itself, which was entitled to immunity from foreign civil jurisdiction in respect of both itself and its property. As a consequence, the forum State was obliged to ensure that its courts did not order the taking against another State's property of any measures of constraint, such as attachment, arrest or execution, in connection with civil proceedings in those courts, whether prior to or after judgment, unless and to the extent that the other State consented to such measures.

It is not self-evident why a State's property should have been draped this way in the mantle of the sovereignty of the State. The explanation may be historically contingent. Initially, the only property of a State that in practice stood to be protected by State immunity was, first, the property of the State's embassies and, secondly, the State's warships and any of its other military property present with the local sovereign's consent. This is because these were the only property of the State ever likely to be present in the territory of a foreign State in time of peace and thereby exposed to the coercive authority of the foreign State's courts. A State's embassies and its warships and other military ware were mani-

[11] In an expression of its sovereignty, however, a State was always free to consent to the exercise by the forum State's courts of jurisdiction over it or its property.

[12] For the distinction between a State's immunity from proceedings (also known, confusingly, as immunity from jurisdiction) and its immunity from measures of constraint against its property in connection with proceedings, see International Court of Justice, *Jurisdictional Immunities*, cit., p. 146 f., para. 113; *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 56; European Court of Human Rights (First Section), Judgment of 20 June 2013, in the case *Wallishauser v. Austria* (No. 2), application No. 14497/06, para. 71, available at http://hudoc.echr.coe.int; Wood, *Immunity from Jurisdiction and Immunity from Measures of Constraint*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 13 ff.; Brown, O'Keefe, *Part IV: State Immunity from Measures of Constraint in Connection with Proceedings before a Court*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 287 ff. at pp. 287-289. For the explicit affirmation that State immunity from measures of constraint against State property in connection with proceedings is, like State immunity from proceedings themselves, founded on the sovereign equality of States, see European Court of Human Rights (First Section), *Kalogeropoulou*, cit.; *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 56; Högsta Domstolen (Sweden), Judgment of 1 July 2011 No. Ö 170-10, paras. 7, 9, unofficial English translation available at https://www.italaw.com; Cour constitutionnelle (Belgium), Judgment of 27 April 2017 No. 48/2017, paras. B.8.4, B.10.1, available at https://www.const-court.be.

festly instruments of its sovereign authority [13]. This atypically sovereign connotation of diplomatic property and military property [14], deriving from their use, may well have given rise to a State's entitlement under customary international law to immunity in respect of its property from foreign civil jurisdiction, an immunity applicable in the event to all other State property, whether an instrument of the State's sovereignty or not.

4. (b) *From absolute to restrictive State immunity from measures of constraint*. — As over time States came to engage in commercial activities and to hold commercial assets in foreign territory, the absolute immunity accorded to them in foreign courts from civil proceedings in respect of contracts for the sale of goods, commercial debts and so on, as well as from court-ordered measures of constraint against their commercial property in connection with civil proceedings, came to be perceived as an injustice to private parties. It was an injustice, moreover, that undermined the forum State's commercial attractiveness. In response, there emerged under customary international law over the second half of the twentieth century the restrictive doctrine of State immunity, according to which, in essence, a State is entitled to immunity in respect of itself and its property only to the extent that it and its property manifest its sovereignty [15]. Today States generally concede that, broadly speaking, a

[13] Consider e.g. Supreme Court (United States), Judgment of 24 February 1812, *Schooner Exchange v. McFaddon*, 11 U.S. 116, 139-140, 144 (1812).

[14] The atypicality of a State's diplomatic property and its warships is reflected today in the special legal regimes applicable to much of the former and to the latter, which encompass not only immunity from judicial measures of constraint but also inviolability. See Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in United Nations, *Treaty Series*, vol. 500, p. 95 ff., Article 22, paragraphs 1, 3, Articles 24, 30; United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in United Nations, *Treaty Series*, vol. 1833, p. 3 ff., Articles 32, 95, 96 and International Tribunal for the Law of the Sea, Order for Provisional Measures of 15 December 2012, in the case *"ARA Libertad" (Argentina v. Ghana)*, *ITLOS Reports*, 2012, p. 348 f., paras. 93-100. See also UN Convention on State Immunity, Article 3, paragraph 1 (*a*), Article 26; O'Keefe, *Article 3*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 73 ff.; D'Aspremont, *Article 26*, *ibid*., p. 372 ff. Insofar, nonetheless, as some diplomatic property, including bank accounts, and much military property is covered only by State immunity, see *infra* sections 4 (*b*), 5.

[15] See generally Council of Europe, cit., paras. 2-7; *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, pp. 36-41 and reports of the special rapporteur cited therein; Australian Law Reform Commission, *Foreign State Immunity*, ALRC Report No. 24, 1984; Schreuer, *State Immunity: Some Recent Developments*, Cambridge, 1988; *State Practice Regarding State Immunities* (Hafner, Kohen and Breau eds.), Dordrecht, 2006; Yang, *State Immunity in International Law*, Cambridge, 2012, pp. 6-32; Fox, Webb, *The Law of State Immunity*[3], Oxford, 2015, pp. 133-166.

State is not entitled to immunity from foreign civil proceedings in respect of commercial or similar acts that a private party could perform ("*acta jure gestionis*"), rather than acts in the exercise of sovereign authority ("*acta jure imperii*"), while it is not entitled to immunity from foreign post-judgment measures of constraint against its property in connection with the same or other civil proceedings where that property is in use, or perhaps just intended for use, for commercial, and as such non-sovereign, purposes.

Under the restrictive doctrine of State immunity, it is not the case that, where a State is not immune from the foreign proceedings themselves, its property is *ipso facto* not immune from pre-judgment and post-judgment measures of constraint in connection with those proceedings. State immunity from civil proceedings and State immunity from measures of constraint in connection with civil proceedings are legally independent of each other [16]. The fact that a respondent State did not act in the exercise of sovereign authority in the circumstances at issue in the proceedings does not imply that any of its property targeted for the execution of a potential or actual judgment in those proceedings ceases to manifest the State's sovereignty. It is the purpose of the use to which the property is being put, and perhaps will continue to be put, by the State that determines whether State property manifests or not the sovereignty of the State and is consequently immune or not from post-judgment measures of constraint in connection with the same or, indeed, other civil proceedings. A State's property is taken not to manifest the State's sovereignty in this context only when and for as long as it is in use, or perhaps just intended for use, for commercial purposes — or, in the negative and partly redundant wording of the UN Convention on State Immunity, only when it is "in use or intended for use by the State for other than government non-commercial purposes" [17]. Con-

[16] See *supra* footnote 12. Indeed, the proceedings themselves may be against another party. In this regard, see UN Convention on State Immunity, Article 6, paragraph 2 (*b*), on indirect impleading of a State. See generally Brown, O'Keefe, *Article 18*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 293 ff. at p. 300; *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 24 f.; Grant, *Article 6*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 105 ff.

[17] UN Convention on State Immunity, Article 19 (*c*). The essence of this rule was held to be consonant with customary international law in International Court of Justice, *Jurisdictional Immunities of the State*, cit., p. 148, para. 118, although the Court was silent on where the property, although in use at the time for government non-commercial purposes, is intended for

versely, State property is taken to manifest the sovereignty of the State, justifying its immunity from post-judgment measures of constraint in connection with civil proceedings, when, at the time of the application for any such measure, the State is using that property for non-commercial — or, as per the Convention, "government non-commercial" — purposes and, perhaps, is not intending to use it otherwise.

At least as State immunity from measures of constraint is embodied in the UN Convention on State Immunity [18], however, the non-sovereign purpose of the use to which State property is being or is intended to be put does not always, of itself, deprive that property of immunity. Even where that property is in use or intended for use for other than government non-commercial purposes, a State remains entitled under the Convention to immunity from measures of constraint against its property in connection with proceedings until judgment is rendered. Absent the consent of the State to any such measure [19], the Convention does not permit pre-judgment measures of constraint, such as attachment or arrest, against State property, whatever the use to which the property is being or is intended to be put. While the explanation for this owes more to compromise than to consistency [20], it is not devoid of principle. The concern is for the sovereign freedom of the State to deal with its property as it pleases, the thinking being that no constraint on this sovereign freedom can be justified unless and until the merits of any claim have been adjudged [21]. The Convention's relaxation of strict logic in relation to pre-judgment measures of constraint thereby reflects in its own way the concern of States to respect each other's sovereignty.

Government non-commercial purposes, as the UN Convention on

use otherwise. See also Cour constitutionnelle (Belgium), Judgment of 27 April 2017 No. 48/2017, para. B.17.3, cited above note 12. See generally Brown, O'Keefe, *Article 19*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 308 ff.; Fox, Webb, *op. cit.*, pp. 213-218, 282-286, 484-500, 509-518; Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, *European Journal of Int. Law*, vol. 17, 2006, p. 803 ff.

[18] For the divergent position under the legislation of some States, see Brown, O'Keefe, *Part IV*, cit., pp. 289-290; Code judiciaire (Belgium), Article 1412-*quinquies*, paragraph 2 (3). Consider also UN Convention on State Immunity depositary notification C.N.280.2006.TREATIES-2 (Norway: Ratification), 6 April 2006.

[19] See UN Convention on State Immunity, Article 18 (*a*), (*b*).

[20] See Brown, O'Keefe, *Article 18*, cit., p. 297 f. See generally *ibid*., pp. 293-307; Fox, Webb, *op. cit.*, pp. 213, 281 f., 500-503.

[21] See Brown, O'Keefe, *Part IV*, cit., p. 289.

State Immunity labels them, are sovereign purposes. [22] What makes a purpose sovereign is that it represents an exercise by the State of sovereign authority. [23] In other words, under the restrictive doctrine of State immunity, a State is entitled to immunity from foreign civil proceedings where, in the circumstances at issue in the proceedings, it was acting in the exercise of sovereign authority, while it is entitled to immunity from foreign post-judgment measures of constraint against its property in connection with civil proceedings where, at the time of the application for the measure, it is using the property for purposes that represent the exercise of sovereign authority and is not intending to use it otherwise. In short, since the essence of sovereignty is having no authority superior to one's own, what is safeguarded by restrictive State immunity, both from proceedings and from post-judgment measures of

[22] As indicative of the national case-law that Article 19 (*c*) of the UN Convention on State Immunity sought to codify, see Bundesverfassungsgericht (FRG), Judgment of 13 December 1977 No. 2, BvM 1/76, operative part of judgment, section C chapeau paragraph, section C.II.1 ("if, at the time of the initiation of the measure of execution, such property serves sovereign purposes of the foreign State"), unofficial English translation available at *International Law Reports*, vol. 65, p. 146 ff., and Bundesverfassungsgericht (FRG), Judgment of 12 April 1983 No. 2, BvR 678/81, 679/81, 680/81, 681/81, 683/81, section B.III.2.*d*, unofficial English translation available at *International Law Reports*, vol. 65, p. 215 ff.; Oberstes Gerichtshof (Austria), Judgment of 30 April 1986 No. 3, Ob 38/86, unofficial English translation available at *International Law Reports*, vol. 116, p. 526 ff.; Corte di cassazione (sez. un. civ.) (Italy), Judgment of 4 May 1989 No. 2085, available at *Il Foro italiano*, vol. 112, 1989, p. 2804 ff., unofficial English translation available at *International Law Reports*, vol. 87, p. 56 ff. For case-law subsequent to the adoption of the Convention and referring explicitly to it, see Högsta Domstolen (Sweden), Judgment of 18 November 2021 No. Ö 3828-20, paras. 28 ("purposes of a sovereign nature"), 44 ("purpose of a sovereign nature"), 45 (ditto), unofficial English translation available at https://www.domstol.se.

[23] For case-law subsequent to the adoption of the UN Convention on State Immunity and referring explicitly to it, see Cour de cassation (First Civil Chamber) (France), Judgment of 28 March 2013 No. 11-10.450 ("*des ressources se rattachant nécessairement à l'exercice par cet Etat [étranger] des prérogatives liées à sa souveraineté*") and Cour de cassation (First Civil Chamber) (France), Judgment of 28 March 2013 No. 11-13.323 (ditto), both available at https://www.legifrance.gouv.fr; Högsta Domstolen (Sweden), Judgment of 1 July 2011 No. Ö 170-10, para. 14 ("property ... used for the State's exercise of its sovereign actions"), unofficial partial English translation available at *Internation: Law in Domestic Courts* 1673 (SE 2011), and Högsta Domstolen (Sweden), Judgment of 18 November 2021 No. Ö 3828-20, para. 19 ("when the property is used by the State to exercise its sovereignty"), paras. 29, 47, unofficial English translation available at https://www.domstol.se. For pre-Convention case-law, see e.g. Tribunale federale (Switzerland), Judgment of 24 April 1985, ATF 111 Ia 62, ground 7.*b* ("property of a foreign State which is allocated for the performance of sovereign functions"), unofficial English translation available at *International Law Reports*, vol. 82, p. 30 ff., and Tribunale federale (Switzerland), Judgment of 30 April 1986, ATF 112 Ia 148, ground 4.*a* ("assets [...] designated for [...] tasks incumbent upon [a foreign State] in the exercise of its sovereign powers", citation omitted), unofficial English translation available at *International Law Reports*, vol. 82, p. 38 ff.

constraint in connection with proceedings, is a State's exercise of sovereign authority, in the latter case by means of its property. Putting it another way, whereas under the absolute doctrine of State immunity a State and by extension its property were considered *per se* to embody sovereignty, under the restrictive doctrine of State immunity a State is considered to embody sovereignty only when it exercises sovereign authority, while its property is considered by extension to embody sovereignty only when the State exercises sovereign authority through it. The rationale for State immunity, namely to safeguard the sovereignty of each other State, nonetheless remains the same.

That the gist of restrictive State immunity from post-judgment measures of constraint against State property in connection with civil proceedings, like the gist of restrictive State immunity from civil proceedings themselves, is to safeguard a State's exercise of sovereign authority is illustrated by Article 21, paragraph 1(*a*), (*b*) and (*c*), of the UN Convention on State Immunity. Article 21, paragraph 1, of the Convention specifies five categories of State property that under no circumstances shall be considered as "in use or intended for use by the State for other than government non-commercial purposes" and exposed thereby to foreign post-judgment measures of constraint in connection with proceedings [24]. The effect of this deeming provision is that, absent the consent of the State [25], no post-judgment measures of constraint may ever be taken against any such property by a foreign court. The motivation, generally speaking, is to guarantee, in the event of doubt in a specific case, the protection from non-consensual judicial constraint and ultimately dispossession of certain State property situated abroad that is considered of particular importance to States. In a historical continuity, the categories of State property deemed by Article 21, paragraph 1 (*a*) and (*b*), respectively not to be in use or intended for use for other than government non-commercial purposes are "property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to

[24] See generally Brown, O'Keefe, *Article 21*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 334 ff.; Fox, Webb, *op. cit.*, pp. 518-535.

[25] See UN Convention on State Immunity, Article 21, especially paragraph 2, cross-referenced with Article 19 (*a*) and (*b*).

organs of international organizations or to international conferences [26]" and "property of a military character or used or intended for use in the performance of military functions [27]". The characteristic or definitional use by the State of each of these types of property is for a purpose — the first the conduct of diplomatic and consular relations and similar representation, the second the pursuit of national defence — that clearly represents an exercise of sovereign authority. The same goes, *mutatis mutandis*, for the State property deemed by Article 21, paragraph 1(*c*), of the Convention to be neither in use nor intended for use for other than government non-commercial purposes, *viz* "property of the central bank or other monetary authority of the State [28]". This is characteristically used by the State for the pursuit of its monetary policy, again a patent exercise of sovereign authority. What is more, the particular importance of the types of State property covered by Article 21, paragraph 1(*a*), (*b*) and (*c*), of the Convention that is taken to justify their blanket immunity from non-consensual post-judgment measures of constraint lies precisely in the particular importance of the exercises of sovereign authority for which they are used [29].

In two scenarios, however, under the UN Convention on State Immunity, while State immunity from post-judgment measures of constraint against State property could indeed be said to safeguard a State's

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[26] UN Convention on State Immunity, Article 21, paragraph 1 (*a*). Given the carve-out in Article 3, paragraph 1 (*a*), of the Convention in relation to diplomatic, consular and similar law, the State property covered by Article 21, paragraph 1 (*a*), is considerably more limited than may at first be thought. See generally Brown, O'Keefe, *Article 21*, cit., pp. 340-342; Fox, Webb, *op. cit.*, pp. 521-526; Ryngaert, *Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors*, *Leiden Journal of Int. Law*, vol. 26, 2013, p. 73 ff., and Id., *Immunity from Execution and Diplomatic Property*, in *The Cambridge Handbook of Immunities and International Law* (Ruys and Angelet eds.), Cambridge, 2019, p. 285 ff.

[27] UN Convention on State Immunity, Article 21, paragraph 1 (*b*). See generally Brown, O'Keefe, *Article 21*, cit., p. 342; Fox, Webb, *op. cit.*, p. 526 f.; Happold, *Immunity from Execution of Military and Cultural Property*, in *The Cambridge Handbook of Immunities and International Law*, cit., p. 307 ff. at pp. 307-314, 323-326.

[28] UN Convention on State Immunity, Article 21, paragraph 1 (*c*). See generally Brown, O'Keefe, *Article 21*, cit., pp. 342-344; Fox, Webb, *op. cit.*, pp. 216-218, 284, 528-531; Zhu, *State Immunity from Measures of Constraints* [sic] *for the Property of Central Banks: The Chinese Perspective*, *Chinese Journal of Int. Law*, vol. 6, 2007, p. 67 ff; Wuerth, *Immunity from Execution of Central Bank Assets*, in *The Cambridge Handbook of Immunities and International Law*, cit., p. 266 ff.

[29] The particular importance of the exercises of sovereign authority for which these types of State property are used in turn lies, at least in part, in the particular importance of these exercises of sovereign authority to the maintenance of the sovereignty of the State.

exercise of sovereign authority, this is not the actual motivation for the retention of immunity in all non-consensual circumstances.

The fourth category of State property, in practice situated abroad, that is placed off-limits to post-judgment measures of constraint by Article 21, paragraph 1, of the UN Convention on State Immunity is "property forming part of the cultural heritage of the State or part of its archives", as per Article 21, paragraph 1 (*d*) [30]. Such property, insofar as it does not form part of an exhibition referred to in Article 21, paragraph 1 (*e*) [31], is not obviously used by the State in the exercise of sovereign authority, for the simple reason that it is not obviously used by the State [32]. Undoubtedly, insofar as the State could be said to "use" it, the characteristic purposes of any such use would indeed represent exercises of sovereign authority: in the case of State-owned cultural heritage situated abroad, the custodianship and promotion of that heritage on behalf of the State's people; and in the case of State-owned archives situated abroad, effectively the same, along with perhaps the administration of its organs of State. In this way, it could be said that Article 21, paragraph 1(*d*), of the Convention serves to safeguard the exercise by the State of its sovereign authority. But the safeguarding of this exercise is not the *raison d'être* of the special deeming effected by the provision. The particular importance of property forming part of the cultural heritage or archives of a State that motivates the complete barring of foreign non-consensual post-judgment measures of constraint against such property does not lie in the particular importance of the exercises of sovereign authority for which the property might be said to be characteristically used [33]. The particular importance of the property that motivates Article 21, paragraph 1 (*d*), is instead precisely that, the particular importance of

[30] UN Convention on State Immunity, Article 21, paragraph 1 (*d*), adding the rider "and not placed or intended to be placed on sale". See also Declaration on Jurisdictional Immunities of State-Owned Cultural Property, 29 August 2013, Council of Europe Doc. CAHDI (2013) 10, p. 7, asserting the customary status of the rule in UN Convention on State Immunity, Article 21, paragraph 1 (*d*). See generally Brown, O'Keefe, *Article 21*, cit., p. 344 f.; Fox, Webb, cit., pp. 531-533; Happold, cit., pp. 307-310, 314-326.

[31] See immediately *infra* in the text.

[32] It is nonetheless certainly characterizable as not in use or intended for use by that State in other than the exercise of sovereign authority, to adapt the negative formula of the chapeau to UN Convention on State Immunity, Article 21, paragraph 1, and of Article 19 (*c*).

[33] This is in contrast to the particular importance of States' diplomatic and similar property, of their military property and of the property of their central banks or other monetary authorities, as specially protected by UN Convention on State Immunity, Article 21, paragraph 1 (*a*), (*b*) and (*c*). Recall immediately *supra* in the text.

the property, which is of special significance to present and future generations of a State's people and, indeed, of humanity and which, unlike the property protected by Article 21, paragraph 1 (*a*), (*b*) and (*c*), of the Convention, is generally irreplaceable.

Much the same can be said of the last category of State property deemed by Article 21, paragraph 1, of the UN Convention on State Immunity to be neither in nor intended for use for other than government non-commercial purposes, *sc*. "property forming part of an exhibition of objects of scientific, cultural or historic interest", as per Article 21, paragraph 1 (*e*) [34]. The only difference is that such property is genuinely used by the State, by definition by way of exhibition. It is true that one frequent purpose of the exhibition abroad by a State of its State-owned objects of scientific, cultural or historic interest is "cultural diplomacy", with a view to the cultivation of bilateral relations and the garnering of "soft power". This purpose, which falls within the scope of the State's foreign affairs, doubtless represents an exercise of sovereign authority by the State. To this extent, it could be said that Article 21, paragraph 1 (*e*), serves to safeguard the exercise by the State of its sovereign authority. But it is not the safeguarding of this exercise of sovereign authority that motivates Article 21, paragraph 1 (*e*). The rationale for the provision lies instead in the particular importance to each State of the property itself and to States generally of international exhibitions of objects of scientific, cultural or historic interest [35]. The

[34] UN Convention on State Immunity, Article 21, paragraph 1 (*e*), again adding the rider "and not placed or intended to be placed on sale". See also Declaration on Jurisdictional Immunities of State-Owned Cultural Property, cit., asserting the customary status of the rule in UN Convention on State Immunity, Article 21, paragraph 1 (*e*). See generally Brown, O'Keefe, *Article 21*, cit., p. 345; Fox, Webb, cit., pp. 533-535; Happold, cit., pp. 307-310, 314-326; Gattini, *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* (Buffard *et al*. eds.), Dordrecht, 2008, p. 421 ff.; Frigo, *Protection of Cultural Property on Loan: Anti-Seizure and State Immunity Laws: An Italian Perspective*, *Art Antiquity and Law*, vol. 14, 2009, p. 49 ff.; van Woudenberg, *State Immunity and Cultural Objects on Loan*, Leiden, 2012 and Id., *Developments Concerning Immunity from Seizure for State Cultural Property on Loan*, in *Intersections in International Cultural Heritage Law* (Carstens and Varner eds.), Oxford, 2020, p. 343 ff.; Pavoni, *Sovereign Immunity and the Enforcement of International Cultural Heritage Law*, in *Enforcing International Cultural Heritage Law* (Francioni and Gordley eds.), Oxford, 2013, p. 79 ff.; Chechi, *State Immunity, Property Rights, and Cultural Objects on Loan*, *Int. Journal of Cultural Property*, vol. 22, 2015, p. 279 ff.

[35] Regarding the latter, see e.g. Declaration on Jurisdictional Immunities of State-Owned Cultural Property, cit. ("Recognizing that the exchange of cultural property significantly contributes to the mutual understanding of nations").

provision reflects a desire to remove the disincentive to exhibit State-owned collections abroad that is posed by the risk of foreign post-judgment measures of constraint against objects from those collections [36].

In sum, the modern, restrictive doctrine of State immunity from foreign measures of constraint against State property in connection with civil proceedings is underpinned conceptually by States' desire to safeguard their exercise, by means of their property, of their sovereign authority. As evidenced, however, by Article 21, paragraph 1 (*d*) and (*e*), of the UN Convention on State Immunity, this immunity and consequently the law governing it also serve to defend certain more concrete interests of States.

5. *State immunity from measures of constraint as the safeguard of the public good.* — It is not only, however, within the confines of Article 21, paragraph 1 (*d*) and (*e*), of the UN Convention on State Immunity that State immunity from measures of constraint serves to defend more concrete interests of States. While the original and continuing rationale of State immunity from foreign judicial measures of constraint, just as from foreign judicial proceedings, is to avoid the conceptual oxymoron of the subjection of sovereignty, defined as supreme authority, to another's authority and thereby to uphold the sovereignty and consequent equality of States, less abstract State interests are today also served by this immunity [37]. This should come as no surprise. The sovereignty of a State

[36] See e.g. Declaration on Jurisdictional Immunities of State - Owned Cultural Property, cit. ("Resolved to promote the mobility of State-owned cultural property through temporary cross-border loans for public display").

[37] Note that, leaving aside the State interests considered in the text, it is commonly argued that respect for State immunity from foreign judicial measures of constraint against State property serves to prevent disputes between States. See e.g. European Court of Human Rights (First Section), *Kalogeropoulou*, cit. ("The Court is [...] in no doubt that the Greek State's refusal to expropriate certain German property situated in Greece was in the 'public interest', since it was intended to avoid disturbances in relations between Greece and Germany." and "[T]he Greek Government could not be required to override the principle of State immunity [...] and compromise their good international relations in order to allow the applicants to enforce a judicial decision delivered at the end of civil proceedings."); Cour constitutionnelle (Belgium), Judgment of 27 April 2017 No. 48/2017, para. B.15.3, cited above note 12. But the argument goes to the interests of States served by compliance with the international legal rules governing this immunity, whatever the content of those rules, rather than to the interests of States served by that content, which is the question here. It is really an argument simply as to the forum State's interest in not injuring another State through breach of an international obligation owed to that State, whatever that obligation may entail. It is not an argument as to the interest or interests of the other State — and, by extension, of all States,

is not an end in itself. It is a means to secure the good of the political community of which the State is the juridical embodiment in international law. In safeguarding the sovereignty of a State, the immunity of State property from foreign measures of constraint in connection with civil proceedings safeguards the public good served by that State [38].

But precisely how does State immunity from foreign judicial measures of constraint against State property safeguard the public good served by each State?

6. (a) *Protection of public money?* — It might be said that the immunity of State property from foreign judicial measures of constraint safeguards the public good served by a State by protecting public money. The argument would run like this. The property of a State, which is by definition public property, takes the form of money or of other property whose replacement would cost the State money. Either way, the loss of State property in execution of a foreign civil judgment would represent a loss of public money, public money that could otherwise be spent on the public good. Foreign judicial measures of, or with a view to, execution of judgment against State property would therefore be to the detriment of the public good served by that State. Conversely, the immunity of State property from such measures safeguards the public good by protecting public money that is ultimately at the service of that good.

Clearly such an argument could not represent the rationale of restrictive State immunity from foreign judicial measures of constraint, since it would justify the immunity from such measures of all State property. Were it the basis of the immunity of State property, it would have resulted in the continuing absolute immunity of State property from measures of constraint. Alternatively, and amounting in effect to the same thing, it would result under the restrictive doctrine in such an expansive understanding of use for government non-commercial purposes as to negate in practice the abrogation of immunity from post-judgment measures for any State property in or intended for use otherwise. In short, if the concern of States that animated the contemporary

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as potentially in an analogous position — protected by what is entailed by the forum State's obligations with respect to State immunity from measures of constraint.

[38] It ought to go without saying that what is discussed in the text is the ideal theory that underpins the law. Whether in reality the Government of a given State works for the public good is a separate question.

law of State immunity from measures of constraint were the public good ultimately served by all State property, all State property would be granted such immunity, which is simply not the case with respect to post-judgment measures [39].

But there is no reason in principle why instead — within the bounds of the positive international law of State immunity from measures of constraint, motivated by States' concern to safeguard the exercise through their property of their sovereign authority — this law could not be said also to protect public money ultimately at the service of the public good. The argument, however, calls for qualification in two respects.

First, for the purposes of State immunity, the property of a State is not, in reality, by definition public property. As such, execution of judgment against State property would not always represent a loss of public money to the value of the property. The reasons for this are themselves twofold.

To begin with, the concept of "property" of a State is not limited under the international law of State immunity to property owned by a State, as opposed to, for example, merely possessed or controlled by a State. The international law of State immunity does not in fact define what is meant by a State's "property", a term general enough to encompass not only property owned by a State but also, at a minimum, property possessed or controlled, for example leased or held as bailee, by it. If the notion of State property for the purposes of State immunity from measures of constraint is capable of encompassing property merely possessed or controlled by a State, execution of judgment against State property — which, where that property is merely possessed or controlled by a State, would comprise execution of a judgment rendered against the owner of the property [40] — would not always equate to a loss to the State

[39] See e.g. Högsta Domstolen (Sweden), Judgment of 18 November 2021 No. Ö 3828-20, para. 28 ("Only the circumstance that the State will in the future have the option of utilising the value of the property for State activities or that the value will benefit future generations cannot be considered to be sufficient."), cited above note 22. See also *ibid*., paras. 45, 47.

[40] What is at stake in practice is whether the forum State's court may make an order for a measure of constraint against property owned by a third party, in connection with proceedings against that third party, where the property is in the possession or under the control of another State. Examples include an order for execution against a privately-owned artwork of a judgment secured against the owner of the artwork where the artwork is at the time on long-term loan to the national gallery of another State; an order for execution against a privately-owned building of a judgment secured against the owner of the building where the building is at the time leased to another State; and an order for execution against a

of the value of the property. To this extent, immunity from measures of constraint against State property would not always function to protect public money.

Furthermore, the "State" whose property is protected under international law by State immunity from foreign judicial measures of constraint consists in reality of a variety of distinct municipal legal persons each capable of owning property in its own right, persons which include, where empowered to act and acting in the exercise of sovereign authority, separate corporate entities [41]. Execution of judgment against property owned by a separate corporate entity, in circumstances where that entity counts as a "State" under international law for the purposes of State immunity, would not translate into a loss of public money to the value of the property. Again, to this extent, immunity from measures of constraint against State property would not always function to protect public money.

The second necessary qualification of the argument that State immunity from foreign judicial measures of constraint protects public money ultimately at the service of the public good is that the argument carries weight only insofar as those measures consist or would necessarily culminate in execution of judgment against the property. In reality, however, pre-judgment measures of constraint are prohibited against State property regardless of the eventual outcome of the proceedings on the merits, which by definition is unknown prior to judgment. In other words, State immunity bars measures of constraint against State property before judgment even where any judgment eventually rendered is not adverse and where therefore no execution against the property could possibly occur. To this extent once more, immunity from measures of constraint against State property would not always function to protect public money.

In sum, to a certain extent but to that extent only, the immunity of

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privately-owned ship of a judgment secured against the owner of the ship where the ship is at the time operated by another State pursuant to requisition or under a charter of demise.

[41] As a matter of international law, a State is a unitary entity with a single juridical personality. As a matter, however, of municipal law, under which property is owned, this State will be possessed of a variety of distinct juridical personalities. Each of these municipal juridical persons, whether legal or natural, is capable of counting under international law as the foreign State for the purposes of State immunity. See e.g. UN Convention on State Immunity, Article 2, paragraph 1 (*b*); Grant, *Article 2(1) (a) and (b)*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, cit., p. 40 ff.

State property from foreign judicial measures of constraint could be said to safeguard the public good served by a State by protecting public money, public money that is ultimately at the service of that public good. But safeguarding public money is not as such the principal way in which this immunity safeguards the public good served by a State. It is not the foremost concrete interest of States safeguarded by the international law on the immunity of State property from measures of constraint in connection with civil proceedings.

7. (b) *Protection of the use of the property for the public good.* — The principal way in which the immunity of State property from foreign judicial measures of constraint could be said to safeguard the public good served by a State is by preventing the restraint or frustration of the State's current or, in some cases, envisaged use of the property for that public good. Whereas the argument that the immunity of State property from measures of constraint protects public money looks to the use for the public good to which the value of the property could ultimately be put, this second argument looks to the use for the public good to which the property itself is presently being or, in certain cases under Article 21, paragraph 1 (*a*) and (*b*), of the UN Convention on State Immunity, is presently intended to be put. The argument is straightforwardly that any foreign judicial measure of constraint against State property, whether or not comprising or necessarily culminating in execution of judgment against that property, restrains or, in the event of execution, renders impossible the use by the State of that property for government non-commercial purposes, which is to say for sovereign purposes. Such purposes are, by definition, with a view to securing the public good served by the State [42]. Any foreign judicial measure of constraint is therefore to the detriment of that public good. Conversely, the immunity of State property from any such measure safeguards the public good by securing to the State the use of the property for that good.

That State immunity from foreign judicial measures of constraint prevents the restraint or frustration of a State's use of its property for the public good is consistent with the positive international law of such

[42] Indeed, the equally-authentic French texts of Articles 19 (*c*) and 21 respectively of the UN Convention on State Immunity speak of property used or intended to be used by the State otherwise than "*à des fins de service public non commerciales*".

immunity [43]. The argument is not premised on the public ownership of the "property of a State" against which such measures are prohibited. Nor does it depend on the nature of the measure as one of, or necessarily culminating in, execution against the property. Nor, for that matter, would the argument justify the immunity from post-judgment measures of constraint of State property in use or intended for use for other than government non-commercial purposes.

The reasoning that State immunity from foreign judicial measures of constraint prevents the restraint or frustration of a State's use of its property for the public good also brings together the public interest collaterally served by State immunity from measures of constraint and the rationale for such immunity. The rationale for such immunity is the safeguarding of a State's exercise, by means of its property, of its sovereign authority, and a State's exercise of its sovereign authority is, by definition, with a view to the public good served by the State. Indeed, going further, the argument brings together, on the one hand, both the public interest collaterally served by State immunity from measures of constraint and the rationale for such immunity and, on the other, the positive international law of this immunity. In preventing the restraint or frustration of a State's use of its property for governmental non-commercial purposes, State immunity from foreign measures of constraint in connection with civil proceedings safeguards the State's exercise, by means of that property, of its sovereign authority, an authority exercised, by definition, for the public good that the State serves.

That the concrete interest of States furthered by State immunity from foreign judicial measures of constraint is the prevention of the restraint or frustration of a State's use of its property for the public good is illustrated again by Article 21, paragraph 1 (*a*), (*b*) and (*c*), of the UN Convention on State Immunity. In protecting from post-judgment measures of constraint in all non-consensual circumstances "property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, [*etc.*]", Article 21, paragraph 1 (*a*), of the Convention prevents the State from being temporarily restrained from using or permanently deprived of the use of that property for the conduct of its

[43] Pre-judgment measures of constraint under the UN Convention on State Immunity, Article 18, in fact go beyond this to prevent the restraint of any use by the State of its property. Recall *supra* section 4 (*b*).

diplomatic and consular relations and the like, relations that it conducts with a view to the good of its people jointly and of its nationals severally [44]. Article 21, paragraph 1 (*b*), of the Convention, in barring in all non-consensual circumstances post-judgment measures of constraint against "property of a military character or used or intended for use in the performance of military functions", prevents the State from being restrained from using or deprived of the use of that property to defend itself, a use manifestly for the good of its people. For its part, Article 21, paragraph 1 (*c*), of the Convention, by prohibiting in all circumstances, absent the consent of the State, post-judgment measures of constraint against "property of the central bank or other monetary authority of the State", prevents the restraint or frustration of the State's use of that property to conduct its monetary policy, a policy aimed at securing the health of its economy and thereby the good of its people.

The argument, however, again requires qualification by reference to Article 21, paragraph 1 (*d*) and (*e*), of the UN Convention on State Immunity. To the extent that the former could be said to implicate the State's use of the property at all [45], both provisions prevent the restraint or frustration of the State's use of its property for the public good. But the protection of this use is not the main way in which Article 21, paragraphs 1 (*d*) and (*e*), safeguards the public good served by a State. Insofar as such property does not form part of an exhibition, the public good, as served by the State, that is safeguarded by placing off-limits to foreign non-consensual post-judgment measures of constraint property, situated abroad, "forming part of the cultural heritage of the State or part of its archives" is principally the intangible benefit to present and future generations of the State's people of the property itself, which is to say of that people's cultural heritage and documentary history. The public good, as served by the State, that is safeguarded by ensuring the immunity, in all non-consensual circumstances, from foreign judicial measures of constraint of "[State] property forming part of an exhibition of objects of scientific, cultural or historic interest" is again chiefly the intangible benefit of the property itself to the State's people. That said, it is less this

[44] Conversely, diplomatic and consular relations with the sending State secure the concrete interests of the receiving State, which are therefore also collaterally served by the immunity from measures of constraint, ordered by the receiving State's courts, of the relevant property of the sending State.

[45] Recall *supra* section 4 (*b*).

in itself that explains Article 21, paragraph 1 (*e*), and more the benefits to all peoples and individuals of international exhibitions of such objects, which would be impeded by the risk of foreign judicial measures of constraint against objects of this sort from State collections [46].

It nonetheless remains the case that the principal way in which the immunity of State property from foreign judicial measures of constraint could be said to safeguard the public good served by a State is by preventing the restraint or frustration of the State's use of the property for that public good.

8. *Conclusion.* — Like State immunity from foreign civil proceedings themselves, State immunity from foreign judicial measures of constraint against State property in connection with civil proceedings is founded on the sovereignty and consequent equality of States. Whereas a State is immune from foreign civil proceedings where, in the circumstances at issue in the proceedings, it was acting in the exercise of sovereign authority, it is immune from foreign measures of constraint against its property in connection with civil proceedings where, at the time of the application for the measure, it is acting or, in some cases, intending to act in the exercise of sovereign authority through that property. The obligatory grant of State immunity from measures of constraint serves to safeguard a State's use of its property *jure imperii*. In so doing, it serves to safeguard the State's use of that property for the good of the political community of which the State is the juridical embodiment in international law. In upholding the sovereignty of the State, the international law on State immunity from measures of constraint against State property upholds the public good served by that State. Whether, as a matter of morality or policy, all of this is compelling enough to trump the interests of an eventual judgment creditor is a question for another forum.

[46] Recall *supra* footnotes 35, 36.