Advisory Committee
on Public International Law

Advisory report on the accession of the Netherlands to the UN Convention on Jurisdictional Immunities of States and Their Property

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Members of the Advisory Committee on Issues of Public International Law

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On 3 February 2022, the government sent the bill for a Kingdom Act approving the United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004) to the House of Representatives.[1] On 29 June 2023, following the plenary debate on the bill in the House of Representatives, the Minister of Foreign Affairs asked the Advisory Committee on Issues of Public International Law (CAVV) to prepare an advisory report outlining its views on the accession of the Kingdom of the Netherlands to the UN Convention, in particular in the light of and including an assessment of:

> (a) how the amendment proposed by Democrats '66 (D66), the Labour Party (Partij van de Arbeid) and the Green Left Alliance (GroenLinks) on making a reservation to article 11, paragraph 2 (c) and (d) of the UN Convention relates to the Netherlands' other obligations under international law, in particular under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations;
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> (b) the risks arising from differences in interpretation between courts in States Parties to the UN Convention, in particular regarding the term 'commercial purposes' in articles 18 and 19 of the Convention, and whether the Netherlands should make a declaration or reservation in respect of these articles as a result of these risks; and
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> (c) the international debate on the confiscation of Russian assets and, in this context, the relationship between their confiscation and state immunity.

The CAVV recalls that it previously published an advisory report on the UN Convention in 2006.[2] However, it understands that the new request for advice relates to possible new developments and changed insights since the UN Convention's adoption in 2004,[3] in particular regarding articles 11, 18 and 19. In the present advisory report, the CAVV limits itself to answering the three questions posed by the Minister of Foreign Affairs and does not re-examine the entire UN Convention.

The report is organised as follows. By way of introduction, the CAVV briefly discusses the possibility and consequences of making reservations and (interpretative) declarations in respect of the UN Convention (section 1). It then answers the three questions posed by the Minister of Foreign Affairs regarding article 11 of the Convention (section 2), articles 18 and 19 of the Convention (section 3) and the confiscation of foreign state assets (section 4). The report ends with concluding remarks and a summary of the CAVV's advice (section 5).

— 1
Reservations and (interpretative) declarations made on accession to the UN Convention

The request for advice discusses the possibilities for the Netherlands to become a party to the UN Convention while potentially making certain reservations or (interpretative) declarations.

Article 2, paragraph 1 (d) of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines a reservation as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.[4] In addition, a state may ensure that its ratification of a treaty is accompanied by an (interpretative) declaration explaining how it interprets a specific article in the treaty in terms of its meaning or scope.[5] However, the aim of a 'declaration' is emphatically not to modify the legal effect of a treaty or a specific treaty provision.

The UN Convention mentions one possible reservation in article 27, paragraph 3, which provides that a state may indicate, on acceding to the Convention, that it does not consider itself bound by the rule laid down in article 27, paragraph 2, under which a dispute concerning the interpretation or application of the Convention may be referred to the International Court of Justice (ICJ).[6] In fact, several countries that have acceded to the UN Convention have made this reservation.

The UN Convention does not mention any other options for making reservations. This does not mean that reservations to other provisions are not permitted. After all, the Convention does not state that reservations can be made only to article 27, paragraph 2. Reservations to the Convention are thus possible to the extent that they are compatible with the object and purpose of the Convention, in accordance with the general rule laid down in article 19 at (c) of the VCLT. However, parties to the Convention have thus far not made any other reservations.

On the other hand, Finland, Italy, Liechtenstein, Norway, Sweden and Switzerland have all deposited (interpretative) declarations on such matters as military activities and the activities of armed forces, international humanitarian law, criminal proceedings and the protection of human rights.[7]

States Parties to the UN Convention have up to twelve months after the date of notification, or twelve months from the date on which they consented to be bound by the Convention, whichever is later, to raise an objection to a reservation. Articles 20 and 21 of the VCLT, which regulate the effects of reservations, are applicable here (if necessary as rules of customary international law).

When a state becomes a party to a treaty that has an (interpretative) *declaration*, the wording of the declaration should be examined in order to determine whether or not it amounts to a disguised reservation that aims to modify the operation of the treaty. A state may object to such a declaration on the grounds that it effectively amounts to a reservation and also runs counter to the object and purpose of the treaty.

Because other states parties to a treaty may object to a reservation, whether or not it is presented as a 'declaration', it is important to consider the substantive reasons for making the reservation or declaration.[8] This can be an indication of whether or not an interpretative declaration amounts to a reservation in legal terms.

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Article 11 of the UN Convention

This section discusses how the amendment proposed by Democrats '66, the Labour Party and the Green Left Alliance on making a reservation to article 11, paragraph 2 (c) and (d) of the UN Convention relates to the Netherlands' other obligations under international law, in particular under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In this context, the CAVV focuses more specifically on the question of whether it is necessary or desirable to make a reservation to these provisions in order to protect the legal status of local staff at embassies, consular missions and permanent representations to international organisations. Incidentally, it is

worth noting that none of the states that have ratified the UN Convention have made a reservation to article 11.[9]

Article 11 concerns immunity in respect of disputes arising from an employment contract between the sending state and an individual for work performed in the forum state. This provision aims to strike a good balance between the interests of the sending state (protecting sovereign acts) and those of the forum state (exercising jurisdiction). Article 11 articulates the general rule that states cannot invoke immunity in respect of employment disputes, thereby recognising that states that act as employers are in principle on an equal footing with private parties. However, the second paragraph contains a number of exceptions to this general rule in order to protect the sovereign interests of foreign states. Under subparagraph (a), for example, states can invoke immunity in the case of a proceeding involving an employee who 'has been recruited to perform particular functions in the exercise of governmental authority'. For the purposes of this exception, the nature of the work in question is thus of decisive importance. Given that such work entails the exercise of government tasks, the immunity of the state must be maintained. Another key issue for the present advisory report is that states can invoke immunity, under subparagraph (c), if 'the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual' and, under subparagraph (d), if 'the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State'. Article 11, paragraph 2 thus recognises that decisions concerning the recruitment, renewal of employment or reinstatement of an individual (subparagraph (c)) and the determination of a state's security interests (subparagraph (d)) should be regarded as sovereign acts to which immunity applies.

Before examining these specific provisions, this section briefly discusses the relationship between article 11 of the UN Convention and the Vienna Conventions on Diplomatic and Consular Relations in order to determine to what extent the Vienna Conventions affect the scope and/or application of article 11. To begin with, article 26 of the UN Convention broadly states that the provisions of the UN Convention do not affect the rights and obligations of States Parties under existing international agreements that relate to matters dealt with in that Convention as between the parties to those agreements. In other words, the rights and obligations of states under the Vienna Convention on Diplomatic Relations and/or the Vienna Convention on Consular Relations continue to apply in full. The UN Convention also includes an Annex that sets out 'understandings' pertaining to the interpretation of certain provisions of the Convention. Pursuant to article 25 of the UN Convention, the Annex forms an integral part of the Convention. With respect to article 11, the Annex refers to four provisions that appear in the Vienna Conventions on Diplomatic and Consular Relations. The first two are article 41 of the Vienna Convention on Diplomatic Relations and article 55 of the Vienna Convention on Consular Relations. These provisions concern persons enjoying privileges and immunities and provide that such persons have a duty to respect the laws and regulations of the receiving state. The Annex to the UN Convention specifically identifies labour laws as falling under this obligation. These two provisions are particularly relevant in the case of employment contracts concluded between diplomats and local service staff who are not directly employed by the embassy. Diplomats who act as employers are thus expected to respect the labour laws of the receiving state in relation to employment contracts entered into with local service staff. The Annex also refers to article 38 of the Vienna Convention on Diplomatic Relations and article 71 of the Vienna Convention on Consular Relations, which concern staff who are nationals or permanent residents of the receiving state. The second paragraphs of these provisions, which apply to administrative or technical staff and private servants who are nationals or permanent residents of the receiving state, is particularly relevant. These two provisions grant the receiving state control over the privileges and immunities enjoyed by such persons, but, according to the understandings, 'the receiving State has a duty to exercise its jurisdiction [over those persons] in such a manner as not to interfere unduly with the

performance of the functions of the mission or the consular post'.[10] What this means is not defined in detail, but relevant examples are said to concern matters such as the timing of hearings.[11] These provisions thus provide a general framework for the application of article 11 of the UN Convention but do not as such impose any direct restrictions on the forum state.

The amendment proposed by Democrats '66, the Labour Party and the Green Left Alliance focuses specifically on the exceptions listed in article 11, paragraph 2 (c) and (d). As already explained above, the Vienna Conventions play only a very limited role in relation to these exceptions. Before considering the exceptions, it should be noted that they are to be interpreted strictly. As discussed below, this is evident from the text of the UN Convention and the *travaux préparatoires*. A strict interpretation of the exceptions is also supported by the case law of the European Court of Human Rights (ECtHR).[12]

Article 11, paragraph 2 (c) provides that a state can invoke immunity if '*the subject-matter of the proceeding* is the recruitment, renewal of employment or reinstatement of an individual' (emphasis added). This exception is without prejudice to the ability of the court of the forum state to exercise jurisdiction in a proceeding relating to the performance of an employment contract, because although it *relates* to the contract, recruitment, renewal of employment or reinstatement is not the *subject matter of the proceeding*.[13] It can be concluded from the discussions that led to its adoption that the strict wording of article 11, paragraph 2 (c) was a conscious choice that enjoyed broad support among states.[14] In practice, this means that states can only invoke immunity in respect of decisions on the recruitment, renewal of employment or reinstatement of an individual. For example, a state can invoke immunity in cases where a person challenges before the courts of the forum state a refusal to renew an employment contract or to reinstate them after dismissal.[15] In contrast, a state cannot invoke immunity in cases where an employee goes to court to complain about working conditions, such as breaches of maximum working hours, discrimination in the workplace or sexual harassment.[16] Furthermore, article 11, paragraph 2 (c) does not prevent employees from claiming compensation for the financial consequences of decisions concerning their recruitment, renewal of employment or reinstatement. The International Law Commission (ILC) explicitly refers to this possibility in its commentary on the provision, in which it states that: 'The rule of immunity applies to proceedings for recruitment, renewal of employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for "wrongful dismissal" or for breaches of obligation to recruit or to renew employment.'[17] Recognising immunity in respect of such decisions therefore does not prevent the court from awarding damages when it can be shown that the decision not to renew a contract, for example, was made on unlawful grounds.[18] This is also evident from the case law on this provision.[19]

In light of this strict interpretation of article 11, paragraph 2 (c) and the relevant practice, the CAVV believes that the court of the forum state has sufficient scope to protect employees. It is also of the opinion that the immunities granted to the foreign state under article 11, paragraph 2 (c) are required under international law. Decisions concerning the selection of staff are dependent on policy considerations that fall within the sovereignty of the foreign state. The lawfulness of such decisions under national law may be assessed by the court of the forum state with a view to awarding damages, but such an assessment cannot lead to the foreign state being obliged to recruit or reinstate a person. This would violate the sovereignty of the foreign state. Further support for this position can be found in the ECtHR's approach to the exceptions contained in article 11.[20] The ECtHR does not regard these exceptions as a disproportionate restriction on the right of access to a court under article 6 of the European Convention on Human Rights (ECHR). In this regard, the ECtHR starts from the premise that states are not permitted to grant more immunity than they are required to under customary international law. A reservation or interpretive declaration in respect of article 11, paragraph 2 (c) does not seem an obvious course of action under these circumstances.

Article 11, paragraph 2 (d) concerns proceedings

relating to the dismissal or termination of employment of an individual, where such proceedings would interfere with the security interests of the employer state. The Annex to the UN Convention clarifies that the term 'security interests' primarily relates to 'matters of national security and the security of diplomatic missions and consular posts'. On the basis of this provision, the court of the forum state is not permitted to rule in a proceeding of which the subject matter is the dismissal or termination of employment of an individual if the head of state, head of government or minister of foreign affairs of the employer state determines that such a proceeding would interfere with the security interests of the state concerned.[21] One example of this is the dismissal of an employee based on the findings of a security background check. Such a situation arose in the *Van der Hulst* case (1989). In its judgment, the Supreme Court of the Netherlands ruled that the foreign state is entitled to make the decision whether or not to enter into an employment contract dependent on the outcome of a security background check and, moreover, that this outcome cannot be reviewed by the opposing party or the court of the host country.[22] However, article 11, paragraph 2 (d) is broader in scope and also applies to situations in which the mere initiation of a proceeding in a dispute concerning the dismissal or termination of employment of an individual would interfere with the security interests of the employer state. A state can thus assert that a proceeding interferes with its security interests without those interests constituting the grounds for dismissal.

Since the consequences of invoking security interests are far-reaching (the employee concerned must bring a case before the court of the foreign state in order to claim a redundancy payment), a key follow-up question is whether the court in the forum state can – or even should – assess whether a specific invocation of security interests is plausible and/or whether that court can or should make a proportionality assessment. In its aforementioned judgment in the *Van der Hulst* case, the Supreme Court of the Netherlands assumed that this was not the case, although it should be noted that imposing restrictions on state immunity was less accepted at the time. However, the UN Convention, which seeks to strictly regulate state immunity in article 11, does not specify whether an assessment is permitted or required. This lack of clarity was the main reason why the CAVV recommended a reservation in 2006.[23] However, an obligation on the part of the court to make an assessment can be inferred from the more recent case law of the ECtHR. Whereas previous rulings, such as *Cudak v. Lithuania* (2010) and *Sabeh El Leil v. France* (2011), implied the existence of such an obligation but did not provide a definite answer in this regard,[24] the ECtHR ruled in *Radunović v. Montenegro* (2016) that article 11, paragraph 2 (d) was not applicable, as 'neither the domestic courts nor the Government have shown how the applicants' duties could objectively have been linked to the security interests of the USA.'[25] This shows that the ECtHR expects the court of the forum state to assess whether invoking security interests is objectively well-founded. The French Court of Cassation came to a similar conclusion in 2019 in a case brought against Ghana, in which it held that article 11, paragraph 2 (d) reflected customary international law but that the existence of a declaration did not relieve the lower court of its obligation to determine whether there was a risk of interference with the security interests of the foreign state.[26] In the case in question, Ghana had argued that the employee had in practice carried out political tasks, but it was unable to provide evidence of this. In contrast, there was counter-evidence indicating that, in her role as a secretary, the employee in question had been responsible for managing the ambassador's social (not political) calendar. The Court of Cassation subsequently held that no security risks could be inferred from this and rejected the assertion.[27] On the basis of this practice, the CAVV believes that the court of the forum state has sufficient scope to protect employees. The objections formulated by the CAVV in 2006 have been removed by the case law of the ECtHR. A reservation or interpretative declaration in respect of article 11, paragraph 2 (d) does not seem an obvious course of action under these circumstances.

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The term 'commercial purposes' in articles 18 and 19 of the UN Convention

The CAVV was also asked to advise on the risk of

differences in interpretation between courts in States Parties to the UN Convention, in particular regarding the term 'commercial purposes' in articles 18 and 19 of the Convention, and whether this risk should lead the Netherlands to make a declaration or a reservation in respect of these articles.

First and foremost, the CAVV points out that article 18 of the UN Convention, which concerns immunity from pre-judgment measures of constraint, does not as such provide for an exception to this immunity for foreign state assets that are used for commercial purposes. In advisory report no. 17, the CAVV noted that article 18 is not consistent with Dutch legal practice, which generally employs the criterion of whether or not a property of a foreign state is intended for commercial purposes or, put differently, whether it is intended for the public service.[28] At the time, the CAVV therefore advised the Netherlands to make a reservation to article 18.[29] In 2016, the Supreme Court of the Netherlands subsequently ruled that article 18 does not have the status of customary international law and that the rule on post-judgment measures of constraint laid down in article 19 at (c) – immunity does not apply to assets intended for commercial purposes – also applies to pre-judgment measures of constraint.[30] To prevent the Netherlands from having to amend its case law, the Netherlands intends to make a reservation to article 18 extending the exception under article 19 at (c) to article 18.[31] The CAVV supports this intention and sees no reason to reconsider the advice it gave in 2006 with respect to article 18. However, it points out that other States Parties to the UN Convention could object to this reservation.

In the present request for advice, however, the Minister of Foreign Affairs asks the CAVV to devote particular attention to the scope of the term 'commercial purposes' in the context of state immunity from execution, both in relation to article 18 (in light of the planned reservation) and in relation to article 19. On this issue, the UN Convention provides that no post-judgment measures of constraint may be taken unless and except to the extent that it has been established that the property in question 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 forum state, provided that said property has a connection with the entity against which the proceeding was directed. The UN Convention does not as such provide a definition of the term 'commercial purposes' and leaves its application and interpretation in specific cases to legal practice.

In its 'autumn judgments' of 2016, the Supreme Court of the Netherlands regarded article 19 (c) of the UN Convention as a rule of customary international law.[32] It also started from the premise that the property of foreign states is not susceptible to attachment or execution, 'unless and except to the extent that it has been established that it has a [commercial] purpose that is not incompatible with such measures.'[33] According to the Supreme Court, foreign states are not obliged 'to provide information showing that their property has a purpose that precludes attachment or execution.'[34] When it comes to the question of whether the assets of a foreign state are susceptible to attachment or execution, the obligation to furnish facts and the burden of proof lie with the creditor who attaches or seeks to attach them, meaning that the creditor must show that these assets have a commercial, non-public purpose.[35] In the case of cash and credit balances that the foreign state uses for various purposes, both public and (exclusively) commercial or otherwise, the Supreme Court held that the creditor who attaches or seeks to attach them 'will have to assert and show that – and the extent to which – the cash and credit balances in question are susceptible to attachment and execution.'[36]

A discussion subsequently arose within Dutch legal practice as to whether it was sufficient for a creditor to show that the *immediate* purpose of a state property was commercial (non-sovereign), even if its *ultimate* purpose was sovereign (for example because the proceeds of the property ultimately benefitted the state's population). Between 2017 and 2019, some lower Dutch courts applied the 'immediate purpose' criterion.[37] However, in the *Samruk/Kazachstan* case (2020), the Supreme Court of the Netherlands interpreted the UN Convention as meaning that 'immunity from execution is not limited to assets whose immediate purpose is public.'[38]

Foreign case law, for example in Canada, the United Kingdom, Sweden and France, sometimes places more emphasis on the (known) present use of state property and less on its (occasionally still unknown) intended use.[39] For example, immunity from execution is not always granted in the case of debt claims arising in the context of commercial transactions where the credit balances from those transactions are immediately used for investment or payment purposes within such transactions.[40]

The CAVV notes that, although there is international agreement on the rule that assets with a commercial purpose are in principle susceptible to attachment,[41] the case law on the practical application of this criterion is not uniform. The CAVV does not necessarily regard this as problematic. After all, there is no obvious need to provide a more detailed definition of the UN Convention term 'commercial purpose'.[42] Ultimately, the question of whether or not a property of a state has a commercial purpose is largely a question of fact that can be left to the appraisal of the court, based on all of the circumstances and the available evidence.[43] The CAVV therefore does not consider a reservation or declaration in respect of articles 18 and 19 concerning the interpretation of the term 'commercial purpose' to be necessary.

Nevertheless, the CAVV does wish to comment on the requirement set out in article 19 at (c) of the UN Convention that post-judgment measures of constraint may only be taken against property 'that has a connection with the entity against which the proceeding was directed'. This provision entails that Dutch courts would be obliged to recognise the division of a foreign state's property between its various legal entities. For example, the property of an agency of a foreign state would only be susceptible to attachment if the proceeding in question was directed against that agency.[44] However, the Annex to the UN Convention indicates that the term 'property' should be interpreted broadly and states that article 19 does not prejudge 'the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues', as also noted in the government's explanatory memorandum.[45]

The question may arise of whether the requirement set out in article 19 at (c) is consistent with customary international law. In this context, it is worth noting that, in its judgment in the *Jurisdictional Immunities of the State* case (2012), the ICJ indicated that it would not address the issue of the customary law status of article 19 at (c), although it did find that 'there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim'.[46] The ICJ did not specifically address the requirement that the taking of measures of constraint ought to be limited to property 'that has a connection with the entity against which the proceeding was directed'. In 2016, the Supreme Court of the Netherlands held that it was not necessary to determine whether this connection requirement could be regarded as a codification of customary international law.[47]

The CAVV also believes that it is unnecessary to determine whether this requirement has a basis in customary international law. From a legal-political perspective, the CAVV nevertheless supports this requirement, because it prevents creditors from attaching the property of state entities that were not in any way parties to the underlying dispute, which could in turn result in the emergence of a form of forum shopping in states where foreign state property is located. The CAVV therefore advises against making a reservation to the connection requirement, but also warns against applying the requirement too strictly. The CAVV believes that it should even be possible to attach the assets of a foreign state entity in cases where the entity concerned does not 'own' them in a formal legal sense, but nevertheless possesses, controls or has a legal interest in them. Moreover, in exceptional cases of abuse, such as the deliberate undercapitalisation of a state entity, Dutch courts should be able to

grant permission to attach the assets of another state entity. However, the Netherlands does not need to make a reservation or a declaration in this regard, as the Annex to the UN Convention appears to support a broad interpretation of the connection requirement.

Finally, the CAVV notes that there is an apparent conflict between the rule laid down in article 19 at (c) of the UN Convention and the one laid down in article 11 of the European Convention on State Immunity, adopted by the Council of Europe in 1972, to which the Netherlands is a party.[48] In particular, the UN Convention offers broader scope for execution: whereas the European Convention only allows for execution in cases where the foreign state has expressly consented thereto,[49] article 19 at (c) of the UN Convention also permits execution in respect of foreign state assets that are used for commercial purposes, even if the foreign state has not consented to this. This raises the question of the relationship between the UN Convention and the European Convention. However, the importance of this issue should not be overstated, as only eight states are Contracting Parties to the European Convention. The rule laid down in article 11 of the European Convention is therefore applicable at most to relations between those states.

Article 26 of the UN Convention states that nothing in the Convention shall affect the rights and obligations of states under existing (earlier) international agreements relating to matters dealt with in the UN Convention. At the request of the Advisory Division of the Council of State, the government's explanatory memorandum states as follows regarding the relationship between the UN Convention and the European Convention: 'In the government's opinion, the provisions of [the European Convention] are compatible with the provisions of the UN Convention on Jurisdictional Immunities of States and Their Property.'[50] However, the CAVV sees at least one potential incompatibility with regard to immunity from execution.

In 2006, the CAVV's advisory report noted as follows regarding the relationship between the two Conventions in the light of their potential incompatibility:

'The CAVV's civil service adviser has indicated that consultations are taking place between the Contracting Parties to the European Convention concerning the relationship between [the UN Convention] and the [European] Convention. The CAVV considers these consultations worthwhile. In the light of these talks, the CAVV does not wish to express its opinion at this stage on the possibility of denouncing the European Convention. It calls attention to the global character of the [UN] Convention because of the desirability of achieving uniformity in this area.'[51]

Between the publication of the CAVV's 2006 advisory report and the Netherlands' decision to accede to the UN Convention, as explained in the government's explanatory memorandum, consultations took place within the Committee of Legal Advisers on Public International Law (CAHDI), which brings together the legal advisers of the ministries of foreign affairs of the member states of the Council of Europe. It was agreed that, upon the entry into force of the UN Convention, the (eight) states that were also Contracting Parties to the European Convention could potentially denounce the European Convention in order to rule out any incompatibility between the two Conventions.[52] The CAHDI will reexamine this issue in due course.[53] The CAVV supports a decision at regional level, since a joint decision of the member states of the Council of Europe that are Contracting Parties to the European Convention would be conducive to uniformity in immunity law.

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Confiscation of foreign state assets

In the request for advice, the Minister of Foreign Affairs asks the CAVV how it views the Netherlands' accession to the UN Convention in the light of the international debate on the confiscation of Russian assets, as well as about the relationship between confiscation and state immunity. The CAVV understands this question, in a more general sense, as a question about the lawfulness, in the light of state immunity law, of confiscating foreign state property that is located in the Netherlands in cases where a foreign state has committed a serious breach of a peremptory norm of international law (for example a breach

of the prohibition of aggression). The question does not concern the potential confiscation of the property of private individuals whose assets have been frozen on the basis of sanctions legislation (for example Russian oligarchs); state immunity law is not relevant to the confiscation of such assets. The CAVV therefore does not address such confiscation in the present advisory report.

The CAVV defines confiscation as a measure, usually judicial but potentially also administrative in nature, that results in a loss of property to the state. In Dutch law, confiscation is in principle a property sanction under criminal law. It can take the form of a forfeiture order,[54] the confiscation of the proceeds of crime[55] or the confiscation of items that pose a threat to public safety.[56] In the future, moreover, the proposed Criminal Assets Confiscation Act will make it possible to confiscate assets of criminal origin in civil proceedings without being preceded by a conviction for a criminal offence.[57] Under Dutch law, confiscation is a measure that is imposed by the courts. However, it cannot be ruled out that the Netherlands will at some point allow administrative confiscation – albeit subject to judicial review – in exceptional cases, especially in the case of the property of foreign states that have committed serious breaches of peremptory norms of international law *(jus cogens)*. The Minister's question appears to envisage this scenario. At any rate, it is the scenario on which international proposals for the confiscation of Russian state assets are based.[58]

In this context, it is worth noting that confiscation goes beyond the freezing of assets. While freezing is generally temporary and the property rights remain with the original owner, confiscation amounts to a permanent transfer of ownership. Although several states and the EU have frozen Russian state assets (curtailing its right to use them), they have not yet – with the exception of Canada – adopted legislation confiscating those assets.[59] At the time of writing, the European Commission is exploring options for quasi-confiscation, for example by imposing a windfall profit tax on financial service providers that manage Russian financial assets.[60] Belgium has already levied tax on the interest generated by frozen Russian assets in Belgium. The proceeds (2.3 billion euros) are intended to benefit Ukraine.[61] Technically speaking, such measures do not amount to the confiscation of state assets but only to the taxation of the proceeds of those assets.[62]

Confiscated Russian state assets could be used to finance the reconstruction of Ukraine, or at least to compensate for the damage caused by Russia. After all, under international law, Russia must bear the consequences of the internationally wrongful acts it has committed, including the obligation to provide compensation for all damage resulting from those acts. On the basis of these considerations, the UN General Assembly recommended on 7 November 2022 that the international community establish, in cooperation with Ukraine, an international mechanism for reparation for damage, loss or injury.[63] On 17 May 2023, the Council of Europe established such a mechanism, which is known as the Register of Damage for Ukraine.[64] Since it is considered unlikely that Russia will voluntarily pay compensation for the damage it has caused, the damage could be recovered, at least in part, by confiscating Russian state assets.

The CAVV is of the opinion that the confiscation of foreign state assets is generally problematic from a legal perspective, even in cases where the state in question is guilty of breaching a peremptory norm of international law and has not met its international obligation to provide compensation for the damage it has caused. This is because confiscation is at odds with the immunity from execution that foreign states enjoy under customary international law. Pursuant to customary international law, foreign state property is in principle immune from execution. This means that forum states cannot take measures of constraint against such property.

The CAVV points out that the UN Convention does not regulate confiscation of a purely administrative nature as such.[65] This is because the treaty law regime relating to immunity from execution requires a prior judgment.[66] However, such confiscation may be prohibited on the basis of customary international law that exists in parallel with the UN Convention.[67] To the extent that administrative confiscation is subject to judicial review,[68] the UN Convention may apply. In such cases, state immunity from execution

precludes confiscation, although an exception is made for property that has a commercial purpose.[69] However, central bank assets – which are normally the most valuable form of state assets, particularly in the case of Russia – usually do not have a commercial purpose and are therefore not susceptible to confiscation.[70] In some countries, such as the United States and Canada, it is also possible to confiscate foreign state assets in cases where the state in question is involved in international terrorism.[71] However, this exception to state immunity is controversial at international level: a case on the issue is currently pending before the International Court of Justice.[72]

On the other hand, the CAVV points out that states may nevertheless be entitled to confiscate the property of a foreign state under certain international legal regimes. In accordance with the law of war, for example, states that are parties to an armed conflict can confiscate each other's property in cases where it is located on their territory.[73] Confiscation (or at least some form of attachment) is also possible on the basis of a binding resolution of the UN Security Council adopted under Chapter VII of the UN Charter.[74] In addition, a state that is not party to an armed conflict with another state can potentially justify its confiscation of the other state's property as a countermeasure in the general interest. Countermeasures are measures that in principle would constitute a breach of international law but whose wrongfulness is precluded by the fact that they are taken in response to a prior breach of international law by another state (such as Russia's act of aggression against Ukraine).[75] Countermeasures are normally imposed by states that have been directly injured by an internationally wrongful act. However, in advisory report no. 41 published in 2022, the CAVV noted that countermeasures in the general interest imposed by non-injured third states are or could be lawful under international law in certain circumstances.[76]

In the present advisory report, the CAVV does not take a position on the lawfulness of the confiscation of foreign state property in the light of these other international legal regimes, either in general or in relation to Russian property in particular. This is because the request for advice concerns the Netherlands' accession to the UN Convention on Jurisdictional Immunities of States and Their Property, not the possibilities offered by other regimes to carry out execution or confiscation in specific cases, despite the immunity from execution established by the UN Convention.

On the other hand, the CAVV points out that international law (including customary international law) concerning immunity from execution can obviously always evolve. A rule of customary international law could crystallise that allows for the confiscation of property of foreign states that have committed serious breaches of peremptory norms of international law. However, the Netherlands must ensure that it is aware of the consequences of such a rule. Foreign states could use (or manipulate) the rule to confiscate Dutch state property that is located in another country.[77] It is also possible that foreign states would henceforth avoid the Netherlands (and the EU) as a place to store their state assets, such as central bank assets. This could have various repercussions, including for the stability of the euro.[78]

The CAVV concludes that the debate on the confiscation of Russian assets need not affect the Netherlands' accession to the UN Convention, as the Convention does not apply to administrative confiscation. Moreover, the lawfulness of confiscating the property of foreign states that have committed serious breaches of peremptory norms of international law *(jus cogens)* is mostly governed by other legal regimes, such as the regime on countermeasures. If necessary, the CAVV would be willing to address the lawfulness of confiscating foreign state property in the light of these other regimes in a separate advisory report.

Conclusion and advice

contents

In the present advisory report, the CAVV discusses the necessity or desirability of making a reservation or declaration in respect of article 11, paragraph 2 (c) and (d) and, in respect of articles 18 and 19, as regards the interpretation of the term 'commercial purposes', of the UN Convention on Jurisdictional Immunities of States and Their Property. The report also discusses the potential impact of the international debate on the confiscation of Russian assets on the Netherlands' accession to the UN Convention.

The CAVV's advice can be summarised as follows:

1. Article 11, paragraph 2 (c) of the UN Convention provides that states can invoke immunity from jurisdiction when 'the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual'. The CAVV notes that this provision is interpreted strictly, as is borne out in practice. For instance, individuals may claim damages if it can be shown that the decision not to renew a contract, for example, was taken on unlawful grounds. The CAVV is of the opinion that this provision offers the court of the forum state sufficient scope to protect employees. In addition, it believes that the immunities granted to the foreign state under article 11, paragraph 2 (c) are required under international law. There is no evident need to adopt a reservation or interpretive declaration under these circumstances.

2. Pursuant to article 11, paragraph 2 (d) of the UN Convention, the court of the forum state is not permitted to rule in a proceeding the subject matter of which is the dismissal or termination of employment of an individual if the head of state, head of government or minister of foreign affairs of the employer state determines that such a proceeding would interfere with the security interests of the state concerned. Recent case law demonstrates that the court of the forum state is expected to assess whether invoking security interests is objectively well-founded. On the basis of this practice, the CAVV believes that the court of the forum state has sufficient scope to protect employees. A reservation or interpretative declaration in respect of article 11, paragraph 2 (d) does not seem an obvious course of action under these circumstances.

3. Article 19 of the UN Convention provides that no post-judgment measures of constraint may be taken unless and except to the extent that it has been established that the property in question 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 forum state. The Supreme Court of the Netherlands has declared that this rule also applies to pre-judgment attachment, as addressed in article 18 of the Convention, in which connection the CAVV in 2006 suggested making a reservation to this article. Although it notes that the international and foreign case law on the practical application of the 'commercial purpose' criterion is not uniform, the CAVV does not necessarily regard this as problematic and sees no obvious need to provide a more detailed definition of this criterion. Ultimately, the question of whether or not state property has a commercial purpose is largely a question of fact that can be left to the appraisal of the court, based on all of the circumstances of the case and the available evidence. The CAVV therefore does not consider a reservation or declaration in respect of articles 18 and 19 regarding the interpretation of the term 'commercial purpose' to be necessary.[79]

4. As regards the impact of the international debate concerning the confiscation of Russian assets on the Netherlands' accession to the UN Convention, the CAVV notes that the confiscation of foreign state assets is generally problematic from a legal perspective. This is because confiscation is at odds with the immunity from execution that foreign states enjoy under customary international law. The CAVV points out that the UN Convention does not regulate confiscation of a purely administrative nature as such. It concludes that, of itself, the debate on the confiscation of Russian assets ultimately need not affect

the Netherlands' accession to the Convention. Whereas the UN Convention contains general rules on immunity in respect of measures of constraint and execution, the lawfulness of confiscating the property of foreign states that have committed serious breaches of peremptory norms of international law *(jus cogens)* is mostly governed by other legal regimes, such as the regime on countermeasures. If necessary, the CAVV would be willing to address the lawfulness of confiscating foreign state property in the light of those other regimes in a separate advisory report.

Endnotes

contents

1 United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, Dutch Treaty Series 2010, 272 (hereinafter: the UN Convention). At the time of writing, the UN Convention has been ratified by 23 states, including 11 EU member states. In order to enter into force, it needs to be ratified by 30 states. For more information on the status of the UN Convention, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

2 CAVV, *Advisory report on the United Nations Convention on Jurisdictional Immunities of States and Their Property*, Advisory report no. 17, 19 May 2006 (in Dutch).

3 Request for advice on the UN Convention on State Immunity, 29 June 2023, p. 2 (in Dutch), https://www.adviescommissievolkenrecht.nl/publicaties/adviesaanvragen/2023/07/04/vn-verdrag-staatsimmuniteit

4 Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, Dutch Treaty Series 1972, 51.

5 For an example of an interpretative declaration, see https://treaties.un.org/doc/Publication/CN/2014/CN.222.2014-Eng.pdf. See also 'Guide to Practice on Reservations to Treaties,' *Yearbook of the International Law Commission, 2011*, vol. II, Part Two, UN Doc. A/CN.4/SER.A/2011/Add.1 (Part 2), p. 26.

6 See also C.J. Tams, 'Part VI Final Clauses, Article 27', in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), p. 379 et seq.

7 See UN Doc. A/RES/59/38 (2004) and https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en

8 United Nations, *Treaty Handbook*, 2013, p.18, https://treaties.un.org/doc/source/publications/THB/English.pdf . On the interpretation of treaties, see also articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, Dutch Treaty Series 1972, 51.

9 See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

10 United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, Annex to the Convention, Dutch Treaty Series 2010, 272.

11 E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed. (Oxford: Oxford University Press, 2016), pp. 340-341; C. Oelfke et al., *Vienna Convention on Diplomatic Relations of 18 April 1961*: *Commentaries on Practical Application* (Berlin: Berliner Wissenschafts-Verlag, 2018), pp. 301-303.

12 ECtHR, 29 June 2011, ECLI:CE:ECHR:2011:0629JUD003486905, *Sabeh El Leil v. France*, Application no. 34869/05, para. 66.

13 See ILC, 'Summary record of the 2191st meeting', *Yearbook of the International Law Commission*, 1990, vol. 1, UN Doc A/CN.4/SR.2191, p. 314, para. 72; and J. Foakes and R. O'Keefe, 'Part III Proceedings in Which State Immunity Cannot Be Invoked, Article 11', in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), p. 193.

14 See J. Foakes and R. O'Keefe, 'Part III Proceedings in Which State Immunity Cannot Be Invoked, Article 11', in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), pp. 192-193; and U. Köhler, 'State Immunity Regarding Employment Contracts', in G. Hafner, M. Kohen and S. Breau (eds.), *State Practice Regarding State Immunities* (Leiden: Martinus Nijhoff, 2006), p. 74.

15 On the other hand, the employee can challenge these decisions before the court of the employer state.

16 J. Foakes and R. O'Keefe, 'Part III Proceedings in Which State Immunity Cannot Be Invoked, Article 11', in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), p. 197.

[17] See ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries', *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 43, para. 10. This approach was adopted by the working group that further elaborated the UN Convention. See UN General Assembly Sixth Committee, Convention on Jurisdictional Immunities of States and Their Property, Report of the Working Group, 11 November 1993, UN Doc A/C.6/48/L.4, p. 13, para. 64. See further H. Fox and P. Webb, *The Law of State Immunity*, 3rd ed. (Oxford: Oxford University Press, 2015), pp. 451-452.

[18] See also J. Foakes and R. O'Keefe, 'Part III Proceedings in which State Immunity cannot be Invoked, Article 11', in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), p. 197.

[19] ECtHR, 8 November 2016, ECLI:CE:ECHR:2016:1108JUD002612607, *Naku v. Lithuania and Sweden*, para. 92 (in which the Court distinguished between reinstatement, which is subject to immunity, and damages, for which immunity cannot be invoked); ECtHR, 25 October 2016, ECLI:CE:ECHR:2016:1025JUD004519713, *Radunović and Others v. Montenegro*, para. 76. See also Italian case law, including Supreme Court of Cassation, 17 June 2014, *Académie de France à Rome v. Galamini di Recanati*, Preliminary order on jurisdiction, no. 19674/2014, ILDC 2437 (IT 2014). Italy ratified the UN Convention in 2013. For a discussion of this practice, see P. Rossi, *International Law Immunities and Employment Claims: A Critical Appraisal* (London: Bloomsbury Publishing, 2021), pp. 128-129.

[20] The ECtHR regards article 11 in its entirety as a reflection of customary international law. ECtHR, 23 March 2010, ECLI:CE:ECHR:2010:0323JUD001586902, *Cudak v. Lithuania*, paras. 66-67; ECtHR, 29 June 2011, ECLI:CE:ECHR:2011:0629JUD003486905, *Sabeh El Leil v. France*, para. 54; ECtHR, 17 July 2012, ECLI:CE:ECHR:2012:0717JUD000015604, *Wallishauser v. Austria*, paras. 30-32. See also UK Supreme Court, 18 October 2017, *Benkharbouche (Respondent) v. Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v. Janah (Respondent)*, [2017] UKSC 62, para. 70, in which the Court distinguished between decisions relating to the recruitment, renewal of employment or reinstatement of an individual, on the one hand, and the awarding of damages, on the other. The Supreme Court of the Netherlands has confirmed the customary law status of the general rule enshrined in article 11, paragraph 1 and of the exceptions listed in article 11, paragraph 2 (a) and (e), but there is no relevant case law concerning subparagraph (c). See Supreme Court of the Netherlands, 5 February 2010, ECLI:NL:HR:2010:BK6673, *Kingdom of Morocco v. Defendant*, para. 3.3.2; and Supreme Court of the Netherlands, 15 July 2022, ECLI:NL:HR:2022:1084, *Employee v. United States of America*, para. 3.2.4.

[21] J. Foakes en R. O'Keefe, 'Proceedings in which State Immunity cannot be Invoked, Article 11', in R. O'Keefe and C.J. Tams (red.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press, 2013, p. 204.

[22] Supreme Court of the Netherlands, 22 December 1989, ECLI:NL:PHR:1989:AD0998, *Van der Hulst v. United States of America*, para. 3.5.

[23] CAVV, *Advisory report on de United Nations Convention on Jurisdictional Immunities of States and their Property*, Advisory report no. 17, 19 May 2006, pp. 22-23 (in Dutch).

[24] ECtHR, 23 March 2010, ECLI:CE:ECHR:2010:0323JUD001586902, *Cudak v. Lithuania*, para. 72; ECtHR, 29 June 2011, ECLI:CE:ECHR:2011:0629JUD003486905, *Sabeh El Leil v. France*, para. 61.

[25] ECtHR, 25 October 2016, ECLI:CE:ECHR:2016:1025JUD004519713, *Radunović and Others v. Montenegro*, para. 77.

[26] Cour de Cassation, 27 November 2019, no. 18-13.790, ECLI:FR:CCASS:2019:SO01629, *B. c. République du Ghana*, para. 5. See also P. Rossi, *International Law Immunities and Employment Claims*: A Critical Appraisal (London: Bloomsbury Publishing, 2021), p. 132.

[27] Cour de Cassation, 27 November 2019, no. 18-13.790, ECLI:FR:CCASS:2019:SO01629, *B. c. République du Ghana*, para. 5.

[28] CAVV, *Advisory report on de United Nations Convention on Jurisdictional Immunities of States and*

their Property, Advisory report no. 17, 19 May 2006, p. 27 (in Dutch).

29 Ibid., at p. 28 ('The CAVV deems it advisable to consider making a reservation at least in respect of article 18.')

30 Supreme Court of the Netherlands, 30 September 2016, ECLI:NL:HR:2016:2236, *Gabonese Republic v. the State of the Netherlands*.

31 See the discussion of section 2 of the bill for a Kingdom Act and the Explanatory Memorandum on the approval the United Nations Convention on Jurisdictional Immunities of States and Their Property, done at New York on 2 December 2004, (Dutch Treaty Series 2010, 272), Parliamentary Papers, House of Representatives 2021/2022, 36 027 (R2160), nos. 2 and 3.

32 Supreme Court of the Netherlands, 30 September 2016, ECLI:NL:HR:2016:2236, *Gabonese Republic v. the State of the Netherlands*, para. 3.5.2.

33 Ibid.

34 Ibid.

35 Ibid., at para. 3.5.3.

36 Ibid., at para. 3.5.4.

37 The Hague District Court, 18 October 2017, ECLI:NL:RBDHA:2017:11906; United States Court of Appeals, Third Circuit, 3 January 2018, *Crystallex International Corp. v. Petróleos de Venezuela S.A.*, para. 5.36; Court of First Instance of Curaçao, 18 May 2018, ECLI:NL:OGEAC:2018:92, para. 4.12; Amsterdam Court of Appeal, 31 July 2018, ECLI:NL:GHAMS:2018:2736, *Instrubel v. Irak*, para. 3.9; Joint Court of Justice of Aruba, Curaçao, St Maarten and of Bonaire, St Eustatius and Saba, 19 March 2019, ECLI:NL:OGHACMB:2019:86, para. 2.12; Amsterdam Court of Appeal, 7 May 2019, ECLI:NL:GHAMS:2019:1566, *Samruk/Kazachstan*, para. 3.7.

38 Supreme Court of the Netherlands, 18 December 2020, ECLI:NL:HR:2020:2103, *Republiek Kazachstan/ Samruk-Kazyna JSC*, para. 3.2.4 ('The requirement applied by the Court of Appeal, according to which the decisive factor is whether the immediate purpose of the attached goods is other than a public one, is not consistent with the rules set out above in at 3.2.3 and is therefore indicative of an incorrect interpretation of the law … It follows from these rules that immunity from execution is not limited to goods whose immediate purpose is a public one'). However, Advocate-General Vlas considered this a 'useful criterion' in his advisory opinion in this case. See Advisory Opinion of Advocate General Vlas of 26 June 2020, ECLI:NL:PHR:2020:649, para. 3.2.3.

39 In the literature it is suggested that 'intended use' is a difficult concept to apply given that intended use changes constantly. See Ji L., *A Study on Commercial Transaction Proceedings in Which State Immunity Cannot Be Invoked* (Dissertation, Tohoku University, 2017), p. 189.

40 For example, Supreme Court of Canada, 21 October 2010, *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, para. 35; UK Supreme Court, 17 August 2012, *SerVaas Inc v. Rafidain Bank*, [2012] UKSC 40; Högsta Domstolen (Supreme Court of Sweden), 1 July 2011, Ö 170-10, paras. 20 and 23: Cour de Cassation, Chambre civile 1, 25 January 2005, no. 03-18.176. At the same time, there is also case law in those countries that favours a different approach. In the United Kingdom, see, for example, Court of Appeal of England and Wales (Civil Division), 2 November 2011, *SerVaas v. Rafidain Bank and Others*, [2011] EWCA Civ 1256 (which granted immunity to Iraqi assets because their *future use* was intended for the 'sovereign' UN Development Fund of Iraq). For literature on this matter, see K. Reece Thomas, 'Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used "Context" When Applying the "Commercial Purposes" Test', *Journal of International and Comparative Law* 2(1) (2015), pp. 1-31; C.M.J. Ryngaert, 'Staatsimmuniteit van executie: beslagmogelijkheden voor crediteuren na de herfstarresten van de Hoge Raad (2016)' [State immunity from execution: possibilities for attachment for creditors following the autumn judgments of the Supreme Court (2016)], *Tijdschrift voor Civiele Rechtspleging* (2017), pp. 111-118; F. Boschma, 'Shifting Goalposts in the Enforcement Against Sovereigns', 8 November 2023, available at https://ssrn.com/abstract=4648650.

41 However, some case law appears to use the nature of the underlying transaction that gave rise to the dispute as a criterion. See, for example, High Court of Delhi, 18 June 2021, *KLA Const Technologies Pvt. Ltd v. Embassy of the Islamic Republic of Afghanistan*, OMP (ENF) (COMM) 82/2019 & I.A. no. 7023/2019.

This case law appears to contradict article 19 of the UN Convention, which regards *purpose – not nature* – as decisive.

42 See also M. Brenninkmeijer and F. Gélinas, 'The Problem of Execution Immunities and the ICSID Convention', *The Journal of World Investment & Trade* 22(3) (2021), pp. 429-458, at p. 440 ('The problem with execution based on this restrictive approach is that it relies on a distinction that seems impossible of definition and – given the varying approaches of domestic courts and the inconsistencies in their decisions – of application.'). Incidentally, in common law countries, immunities are primarily governed by domestic law. Definitions developed by courts in those countries are therefore not necessarily relevant to international law.

43 In this sense, see also Cour de Cassation, 3 November 2021, no. 19-25.404, ECLI:FR:CCASS:2021:C100656. Moreover, it will not always be straightforward for the court to discern a commercial purpose from a non-commercial one. See Y. Dautaj, 'Enforcing Arbitral Awards Against States and the Defense of Sovereign Immunity from Execution: A U.S. Perspective', 11 *Penn State Journal of Law & International Affairs* 97 (2023), p. 122. In the case of the Netherlands, for example, compare the decision of the North Netherlands District Court, 24 December 2019, ECLI:NL:RBNHO:2019:10644, with the judgment of the Supreme Court of the Netherlands in the same case, 6 July 2021, ECLI:NL:HR:2021:1042. This case concerned the attachment under criminal law of money transfers processed by Centrale Bank van Suriname. While the District Court considered that Centrale Bank van Suriname processed the transfers in the exercise of its statutory duties as a central bank (and therefore enjoyed immunity), the Supreme Court was of the opinion that in this matter Centrale Bank van Suriname played only a facilitatory role in the exchange of the attached monies, to which monies commercial banks remained entitled (and consequently immunity did not apply).

44 C. Brown and R. O'Keefe, 'Part IV State Immunity from Measures of Constraint in Connection with Proceedings Before a Court, Article 19', in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), p. 324.

45 Parliamentary Papers, House of Representatives 2021/2022, 36 027 (R2160), no. 3, p. 16.

46 ICJ, 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, paras. 117, 118.

47 Supreme Court of the Netherlands, 30 September 2016, ECLI:NL:HR:2016:2236, para. 3.4.6. Dutch courts occasionally apply this requirement but, following the example of the Supreme Court of the Netherlands, they express doubt concerning its status as a rule of customary international law. See, for example, The Hague Court of Appeal, 28 June 2022, ECLI:NL:GHDHA:2022:1159, para. 5.34 ('*To the extent that* the requirement under article 19 of the UN Convention that post-judgment measures of constraint must be targeted at property "that has a connection with the entity against which the proceeding was directed" amounts to a rule of customary international law…' [emphasis added]).

48 European Convention on State Immunity and its Additional Protocol, Basel, 16 May 1972, Dutch Treaty Series 1973, 43.

49 Ibid., article 23: 'No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.'

50 Parliamentary Papers, House of Representatives 2021/2022, 36 027 (R2160), no. 3.

51 CAVV, *Advisory report on the United Nations Convention on Jurisdictional Immunities of States and their Property*, Advisory report no. 17, 19 May 2006, p. 8 (in Dutch).

52 CAHDI, Interim Report of the Second Informal Meeting of the Parties to the European Convention on State Immunity, Athens, 13 September 2006, https://www.coe.int/t/dlapil/cahdi/Source/News/Outcome_EN.pdf. See also J. d'Aspremont 'Part VI Final Clauses, Article 26,' in R. O'Keefe and C.J. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), p. 372 et seq. Article 40 of the European Convention on State Immunity enables Contracting States to denounce the Convention.

[53] CAHDI, 'Meeting Report: 50th Meeting, Strasbourg, 24-25 September 2015', CAHDI (2015) 23, in particular pp. 19-20, paras. 80-85, https://rm.coe.int/09000016805a6c86.

[54] Article 33a, paragraph 1 of the Dutch Criminal Code.

[55] Article 36e, paragraphs 2 and 3 of the Dutch Criminal Code.

[56] Article 36b et seq. of the Dutch Criminal Code. For a detailed comparative legal analysis, see S.S. Buisman et al., *Inbeslagneming en confiscatie van crimineel vermogen: een rechtsvergelijkend onderzoek naar de samenwerking inzake beslag en confiscatie in Duitsland, Engeland, Ierland en Italië* [Attachment and confiscation of criminal assets: a comparative legal analysis of cooperation on attachment and confiscation in Germany, England, Ireland and Italy] (The Hague: Boom Juridisch, 2018).

[57] Bill for an Act containing rules regarding the confiscation of assets of criminal origin (Criminal Assets Confiscation Act), draft explanatory report, 15 December 2022.

[58] See, for example, A. Moseienko, International Lawyers Project and Spotlight on Corruption, 'Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options' (Research Paper, World Refugee & Migration Council, 2022), p. 25 (referring to 'non-judicial (executive) confiscation of Russian state-owned assets').

[59] Pursuant to new Canadian legislation (2022), the property of a foreign state may be confiscated if 'a grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis' or 'gross and systematic human rights violations have been committed in a foreign state'. See sections 4(1.1)(b) and (c) of the Special Economic Measures Act, S.C. 1992, c. 17, as amended on 23 June 2022.

[60] P. Tamma, 'Ballsy EU Commission Moves to Make Russia Pay for Ukraine', *Politico*, 21 June 2023; 'EU Working on Proposal for Frozen Russian Assets – von der Leyen', *Reuters*, 27 October 2023.

[61] 'België geeft belasting op Russische tegoeden aan Oekraïne' [Belgium to give tax on Russian assets to Ukraine], *Financieel Dagblad*, 11 October 2023.

[62] The question may arise of the extent to which such a measure is compatible with international double taxation treaties. The CAVV does not address this issue in the present report.

[63] UN General Assembly resolution ES-11/5, 15 November 2022, UN Doc. A/RES/ES-11/5, paras. 3 ('recognizes also the need for the establishment … of an international mechanism') and 4 ('recommends the creation … of an international register of damage').

[64] Council of Europe, CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, adopted by the Committee of Ministers on 12 May 2023.

[65] See also T. Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at non-UN Targeted Sanctions', in T. Ruys, N. Angelet and L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019), pp. 670-710. M.T. Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?', *Netherlands International Law Review* 70 (2023), pp. 5-6.

[66] See article 19 of the UN Convention ('No *post-judgment* measures of constraint, such as attachment, arrest or execution, against property of a State may be taken' [emphasis added]).

[67] The existence of customary international law is confirmed in the preamble of the UN Convention ('*Affirming* that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention' [emphasis added]). See also D. Franchini, 'Ukraine Symposium –Seizure of Russian State Assets: State Immunity and Countermeasures', *Articles of War* (Lieber Institute, West Point), 8 March 2023. It could be argued that, on the basis of customary international law, immunity from execution applies to all measures of constraint, regardless of whether they have been ordered by the judicial, executive or legislative branch. See J. Thouvenin and V. Grandaubert, 'The Material Scope of State Immunity from Execution', in T. Ruys, N. Angelet and L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019), pp. 245-265. In this context, it is worth

noting that measures of constraint in respect of diplomatic property are *always* prohibited, see article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, Dutch Treaty Series 1962, 101 and 159.

68 See, for example, the above-mentioned Canadian legislation, pursuant to which a judge may order confiscation at the request of the Canadian Minister of Foreign Affairs. Section 5.4 of the Special Economic Measures Act, S.C. 1992, c. 17, as amended on 23 June 2022.

69 Article 19 of the UN Convention. The ICJ has regarded the essence of this article as having the nature of customary international law. ICJ, 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, ICJ Reports 2012, p. 99, para. 118.

70 Article 21, paragraph 1 (c) of the UN Convention. The Supreme Court of the Netherlands has ruled that it cannot be assumed that article 21, paragraph 1(c) of the UN Convention can be regarded as a codification of customary international law, since – at least according to the Supreme Court – the legislation and case law of many other states starts from the premise that central banks have less far-reaching immunity. Supreme Court of the Netherlands, 6 July 2021, ECLI:NL:HR:2021:1042, para. 6.2.3. However, according to the Supreme Court, it can be assumed that 'the rule that central banks are entitled to immunity from attachment and execution in respect of central bank "property" that is in use or intended for use in the performance of their tasks in the areas of monetary and currency policy can be regarded as a widely accepted, unwritten rule of customary international law'. Ibid., at para. 6.2.4.

71 28 U.S. Code § 1605A; section 12, subsection 1 (d) of the Canadian State Immunity Act.

72 ICJ, 27 June 2023, *Alleged Violations of State Immunities (Islamic Republic of Iran v. Canada)*, Application instituting proceedings.

73 See, inter alia, A. Moseienko, International Lawyers Project and Spotlight on Corruption, 'Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options' (Research Paper, World Refugee & Migration Council, 2022), p. 25.

74 See, for example, the United Nations Compensation Commission (UNCC), which was established in 1991 as a subsidiary organ of the UN Security Council, pursuant to UN Security Council resolution 687 (1991). The UNCC was authorised to pay compensation for damage resulting from Iraq's unlawful invasion and occupation of Kuwait in 1990-1991. Its financial resources were generated through a levy on the export of Iraqi oil and oil products, under the supervision of the UN Security Council. See www.uncc.ch.

75 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001)', *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, pp. 129-139, articles 49-54.

76 CAVV, *Legal Consequences of a Serious Breach of a Peremptory Norm: The International Rights and Duties of States in Relation to a Breach of the Prohibition of Aggression*, Advisory report no. 41, 17 November 2022, pp. 17-18.

77 See, for example, 'Moscow Will Confiscate EU Assets If Brussels 'Steals' Frozen Russian Funds, Putin Ally Says', *Reuters*, 29 October 2023.

78 This is the European Central Bank's argument against the European Commission's plans regarding Russian state assets. See W. Shaw, S. Bodoni and A. Nardelli, 'EU Sees Hurdles to Seizing €200 Billion in Russian Assets', *Bloomberg*, 21 June 2023.

79 For the record, the CAVV notes that, in line with the government's explanatory memorandum, the Netherlands does intend to make a reservation to article 18 of the UN Convention concerning measures of constraint.

List of abbreviations

CAHDI
Committee of Legal Advisers on Public International Law (Council of Europe)

CAVV
Advisory Committee on Issues of Public International Law

Convention/UN Convention
United Nations Convention on Jurisdictional Immunities of States and Their Property

ECtHR
European Court of Human Rights

ECHR
Convention for the Protection of Human Rights and Fundamental Freedoms

ICJ
International Court of Justice

ILC
International Law Commission

UN
United Nations

VCLT
Vienna Convention on the Law of Treaties