Shifting goalposts in the enforcement against sovereigns

Immunity from execution – the unsustainability of the Dutch Supreme Court's application and interpretation of Article 19(c) of the United Nations Convention on Jurisdictional Immunities of States and their Property

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Abstract'

This article discusses the Dutch Supreme Court's application and interpretation of the so-called 'commercial use' criterion of Article 19(c) of the United Nations Convention on Jurisdictional Immunities of States and their Property ('UN Convention') concerning measures of constraint against a foreign State's property and compares it with the substantially different approach in contemporary judgments rendered by the highest courts of several other European jurisdictions. The Dutch approach seems neither to be in accordance with the drafting history of the UN Convention nor sustainable in the light of customary international law which continues to govern a foreign State's entitlement to State immunity when there is no applicable treaty in force and/or where treaty provisions need interpretation. Moreover, where the Dutch application of State immunity from execution goes beyond what customary international law requires, Article 6 European Convention on Human Rights, laying down the right of access to a court, is violated.

1. Introduction

The United Nations Convention on Jurisdictional Immunities of States and Their Property ('UN Convention') was received with much acclaim after its adoption by the UN General Assembly on 2 December 2004. Although the UN Convention has not yet entered into force,[1] national and international courts make frequent reference to its provisions. Many commentators see its reflection of the restrictive theory of State immunity as its most important achievement.[2] State

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Note: State immunity is by its nature a subject at the intersection of international and domestic law requiring reference to international treaties and case law and other foreign language sources, hence the choice of the author to write this article in English. Moreover, this makes the article more accessible to foreign-based creditors seeking to seize a foreign State's assets in the Netherlands who will need to know the status of Dutch case law on the subject and, consequently, how to present their case.

1 At the date of the finalization of this article, the UN Convention has 28 signatories of which 23 have ratified it. Since 30 deposits of ratification are required, the UN Convention is still not in force.

2 See *inter alia* 'State Immunity and the New UN Convention', Chatham House, Conference Transcript, 5 October 2005, Session 3, Professor Christopher Greenwood (London School of Economics): 'What I think is the real achievement of this Convention is that it does crown or enshrine in international law the restrictive theory of immunity', *inter alia* pp. 21 and 74, to be found at https://www.chathamhouse.org/

immunity is a principle of customary international law, following from the truism that all States are sovereign and equal and have no sovereignty over each other: '*par in parem non habet imperium*'. State immunity from execution concerns the extent to which measures of constraint can be taken against a State's property by the courts of another State ('forum State'). The immunity from execution assessment is generally linked to the question of whether a foreign State's property is used or intended for a public or a non-public ('commercial') purpose.[3] Although during a certain period several States have applied (almost) absolute State immunity from execution,[4] it is nowadays not considered absolute, hence the term 'restrictive' theory or 'restrictive' approach. Despite the reflection of the restrictive theory in the UN Convention it seems that, since its introduction, the Dutch Supreme Court (*Hoge Raad*) appears to be increasingly inclined to rule in favour of the position of the foreign State, which is particularly apparent when it concerns a State's financial assets.[5] Have the goalposts in the Netherlands shifted to the detriment of the private creditor's recovery position and could that have to do with the UN Convention?

2. The problem with the Dutch Supreme Court's case law

Article 19 UN Convention states that no post-judgment measures of constraint may be taken by the forum State against a State's property unless and except to the extent of (a) the State's express consent or (b) if the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding or (c) (intended) commercial use, which is formulated as follows under Article 19(c):

> 'it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided 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.'[6]

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sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf (last accessed 3 September 2024) and J. Foakes, L. McGregor & A. Tzanakopoulos, 'State Immunity: The UN Convention and Current Practice', Chatham House, 11 December 2013, p. 3, available at https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/111213StateImmunity.pdf (last accessed 3 September 2024).

3 On a jurisdictional level State immunity concerns the question to what extent a foreign State is immune from the jurisdiction of the courts of another State. The restrictive theory entails in this context that a foreign State is only immune where it concerns *acta jure imperii* (activities in the State's exercise of sovereign power) as opposed to *acta jure gestionis* (State activities of a private law nature, akin to those of a private commercial party).

4 Particularly in the first half of the 20th century although it should be noted that there is disagreement about whether absolute immunity was ever an established rule under customary international law, see *inter alia* C.A. Whytock, 'Foreign State Immunity and the Right to Court Access', *Boston University Law Review* (93/6) 2013, pp. 2033-2093, available at https://www.bu.edu/bulawreview/files/2014/01/WHYTOCK.pdf (last accessed 3 September 2024).

5 Such as deposits in bank accounts, monetary claims and shares in, or returns on, investments of a Sovereign Wealth Fund.

6 Note that Art. 21 UN Convention sets out a list of categories of State property that, according to the article, shall not be considered as property specifically in use or intended for use by the State for other than govern-

In the so-called 'Autumn judgments' rendered in the autumn of 2016[7] the Dutch Supreme Court interpreted Article 19(c) UN Convention as reflecting customary international law, taking as a starting point that the property of foreign States is not susceptible to seizure and execution unless the creditor can state and prove that such property has a purpose that is not incompatible therewith.[8] The Dutch Supreme Court further considered that it is consistent with the foregoing that the obligation to state and prove the susceptibility to seizure and execution lies upon the creditor who has to provide information as to the (intended) use of the asset for other than public purposes.[9] After the Autumn judgments, the lower Dutch courts started to apply an 'immediate purpose' approach which entails that it should suffice for the creditor to make a plausible case not that the ultimate destination is non-public but that the immediate

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ment non-commercial purposes under Art. 19(c). Art. 21 mentions bank accounts used or intended for use for the State's diplomatic missions and other special missions, military equipment, central bank property and property forming part of the cultural heritage of a State and the exhibition of objects of scientific, cultural, or historic interest. It is disputed whether all those categories can be considered to reflect customary international law.

7 Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236, *NIPR* 2016-425, *NJ* 2017/190 (*Morning Star v. Gabon and State*); Dutch Supreme Court 14 October 2016, ECLI:NL:HR:2016:2354, *NIPR* 2016-427, *NJ* 2017/191 (*State v. Servaas*); Dutch Supreme Court 14 October 2016, ECLI:NL:HR:2016:2371, *NIPR* 2016-426, *NJ* 2017/192 (*N.N. v. State*).

8 Dutch Supreme Court *Morning Star v. Gabon*, para. 3.5.2, *Servaas v. Staat*, para. 3.4.2 and *N.N. v. State*, para. 3.4.2: '*Het is in overeenstemming met de – op het respecteren van de soevereiniteit van vreemde staten gerichte – strekking van de immuniteit van executie om tot uitgangspunt te nemen dat eigendommen van vreemde staten niet vatbaar zijn voor beslag en executie tenzij en voor zover is vastgesteld dat deze een bestemming hebben die daarmee niet onverenigbaar is. Dit strookt met art. 19 onderdeel c VN-Verdrag dat, zoals hiervoor in 3.4.6 is overwogen, op dit punt valt aan te merken als een regel van internationaal gewoonterecht. Het past voorts bij de vermelde strekking van de immuniteit van executie dat vreemde staten niet gehouden zijn om gegevens aan te dragen waaruit volgt dat hun eigendommen een bestemming hebben die zich tegen beslag en executie verzet*.' (Unofficial translation by the author: 'It is in accordance with the purport of immunity from execution – aimed at respecting the sovereignty of foreign States – to take as a starting point that the property of foreign States is not susceptible to seizure and execution unless and to the extent that it has been established that it has a purpose that is not incompatible therewith. This is in line with Art. 19, section c, of the UN Convention which, as considered above in 3.4.6, can be regarded on this point as a rule of customary international law. It is also in line with the stated purport of immunity from execution that foreign States are not obliged to provide information from which it follows that their property has a purpose that is resistant to seizure and execution.').

9 Dutch Supreme Court *Morning Star v. Gabon*, para. 3.5.3, *Servaas v. State*, para. 3.4.2. and *N.N. v. State*, para. 3.4.2: '*Met het vorenstaande strookt dat de stelplicht en bewijslast met betrekking tot de vatbaarheid voor beslag en executie rusten op de schuldeiser die beslag legt of wil leggen op goederen van de vreemde staat en dat, ook indien de vreemde staat in rechte verstek laat gaan, steeds vastgesteld moet worden dat de desbetreffende goederen vatbaar zijn voor beslag. De schuldeiser zal derhalve steeds gegevens moeten aandragen aan de hand waarvan kan worden vastgesteld dat de goederen door de vreemde staat worden gebruikt of zijn bestemd voor, kort gezegd, andere dan publieke doeleinden*.' (Unofficial translation by the author: 'It is in accordance with the above that the obligation to state and prove the susceptibility concerning seizure and execution rests on the creditor who seizes or wishes to seize goods of the foreign State, and that, even if the foreign State does not appear in the proceedings, it must always be established that the goods in question are susceptible to seizure. The creditor will therefore always have to provide information on the basis of which it can be established that the goods are used by the foreign State or are intended for, in short, purposes other than public purposes.').

destination of the asset or the immediate use of the proceeds of those assets is non-public. This, to ensure that the protection that the restrictive immunity approach offers to the creditor is not illusory.[10] However, in its judgment of 18 December 2020 in the case of *Stati/Ascom v. Samruk/Kazakhstan* ('*Stati* case'),[11] the Dutch Supreme Court rejected this approach and quashed the judgment of the Amsterdam Court of Appeal that had applied the immediate purpose approach. The case concerned an attachment on shares held by Samruk-Kazyna JSC ('Samruk'), a Kazakhstan Sovereign Wealth Fund ('SWF'), in a Dutch company, KMG Kashagan B.V. ('KMGK'). The attachment was levied to collect on an arbitral award of USD 500 million plus interest and costs rendered in 2013 by the Stockholm Chamber of Commerce in favour of the Moldova-based creditors Stati and Ascom. In paragraph 3.2.3 of the judgment the Dutch Supreme Court summarized its line of jurisprudence from the Autumn judgments and considered in paragraph 3.2.4 that the immediate purpose approach applied by the Amsterdam Court of Appeal was an incorrect legal interpretation (in Dutch: '*onjuiste rechtsopvatting*'):

> 'The requirement applied by the Court of Appeal that it is decisive whether the immediate destination of the seized goods is other than a public destination does not correspond to the rules set out above in 3.2.3 and therefore demonstrates an incorrect legal interpretation. Those rules boil down to the fact that, under international law, assets of a foreign State are subject to a presumption of immunity from execution, which only gives way if it is established that the assets in question are used by the foreign State or are intended for purposes other than public purposes, and that it is for the party invoking an exception to immunity from execution to provide information on the basis of which this can be established. It follows from these rules that immunity from execution is not limited to property whose immediate destination is a public one.'[12]

In its judgment of 27 January 2021 in *Hydro v. State*, the preliminary relief judge in The Hague (*voorzieningenrechter Rechtbank Den Haag*) promptly applied the Dutch Supreme Court's reasoning in a case concerning an attachment on claims based on oil extraction contracts held by an Albanian government agency ('AKBN') against several group companies belonging to the

10 First proposed in the legal literature by C.M.J. Ryngaert, 'Staatsimmuniteit van executie: beslagmogelijkheden voor crediteuren na de herfstarresten van de Hoge Raad (2016)' [State Immunity from execution: attachment options for creditors after the Autumn judgments of the Supreme Court (2016)], *Tijdschrift voor Civiele Rechtspleging* (*TCR*) 2017, issue 3, pp. 111-118, to be found at https://www.bjutijdschriften.nl/tijdschrift/civielerechtspleging/2017/3/TCR_0929-8649_2017_025_003_003.pdf.

11 Dutch Supreme Court 18 December 2020, ECLI:NL:HR:2020:2103, *NIPR* 2021-95 (*Stati/Ascom v. Samruk/Kazakhstan*).

12 Unofficial translation by the author from Dutch Supreme Court 18 December 2020 (*Stati/Ascom v. Samruk/Kazakhstan*), para. 3.2.4: '*De door het hof gehanteerde eis dat bepalend is of de onmiddellijke bestemming van de beslagen goederen een andere dan een publieke bestemming is, stemt niet overeen met de hiervoor in 3.2.3 weergegeven regels en geeft derhalve blijk van een onjuiste rechtsopvatting. Die regels komen erop neer dat op grond van het volkenrecht voor goederen van een vreemde staat een presumptie van immuniteit van executie geldt, die alleen wijkt indien is vastgesteld dat de desbetreffende goederen door de vreemde staat worden gebruikt of zijn beoogd voor andere dan publieke doeleinden, en dat het op de weg ligt van de partij die zich beroept op een uitzondering op de immuniteit van executie, om gegevens aan te dragen aan de hand waarvan dat kan worden vastgesteld. Uit deze regels volgt dat immuniteit van executie niet is beperkt tot goederen waarvan de onmiddellijke bestemming een publieke is.*'

Dutch oil company Royal Dutch Shell N.V.[13] The preliminary relief judge considered that it is not certain that the income of AKBN cannot and will not have a specific sovereign destination in the future. The judge repeated the consideration of the Dutch Supreme Court that 'immunity from execution is not limited to goods whose immediate destination is public'.[14] The seized assets were considered largely immune. This approach entails that if the creditor cannot prove that the financial asset in question is in use and/or intended to be used for commercial purposes both in the short *and* in the long term, including possible revenues derived from it, the asset should be considered as being immune. The reasoning behind this is that such assets may serve a sovereign purpose in the future and/or may generate new income or revenues that could benefit the sovereign purposes of the foreign State. This approach boils down to a presumption, not only covering the foreign State's (intended) use of the asset for a public purpose but also covering the foreign State's possible future intention to use the asset and/or its possible revenues for public purposes. This results in an impossible burden on the creditor to prove the contrary.

3. Article 19(c) UN Convention – presumption of immunity, burden of proof, starting point of immunity analysis?

The terminology of Article 19(c), often abbreviated as the 'commercial use' or 'commercial purpose' criterion, is not clarified or defined in the UN Convention. In most jurisdictions similar criteria are applied in State immunity legislation or case law and in that sense the commercial purpose criterion of Article 19(c) can be regarded as a codification of customary international law.[15] It is the application and interpretation of this criterion which continues to create a wealth of domestic case law, often with reference to its formulation in Article 19(c) UN Convention. In this context it is important to point out that during the whole drafting process of the UN Convention, the articles concerning measures of constraint and the kinds of State property that should or should not be eligible for immunity were amongst the most debated and controversial topics, in particular the text of what is now Article 19(c).[16] The Draft Articles with commentaries, produced by the UN International Law Commission ('ILC') in 1991 (the '1991 ILC Commentary'),[17] contain nothing on a presumption or burden of proof in establishing (in-

13 Preliminary relief judge in The Hague 27 January 2021, ECLI:NL:RBDHA:2021:534 (*Hydro v. State*), except for a minor detail confirmed on appeal (not published).

14 Preliminary relief judge in The Hague 27 January 2021, para 4.8 (unofficial translation by the author). See sect. 3 below.

15 See *inter alia* C. Brown & R. O'Keefe, 'Article 19', in: R. O'Keefe, C.J. Tams & A. Tzanakopoulos (eds.), *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary*, Oxford: Oxford University Press 2013, p. 323.

16 The wording of Art. 19(c) was amended on several occasions both during the preparatory work (on the requirement of a connecting link between the property and the object of the request) and in the General Assembly, see in particular the *Report of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property*, 24-28 February 2003, GA Official Records Fifty-eighth Session, Supplement No. 22 (A/58/22).

17 Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries 1991, https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf (last accessed 3 September 2024). The Draft Articles with commentaries are considered an authoritative source in the UN Convention's drafting history.

tended) use whether for a public or a commercial purpose.[18] The 1991 ILC Commentary does state on Draft Article 18 (the draft predecessor of what is now Article 19(c)) that 'the principle of nonexecution against the property of a state … is clearly set out followed by the exceptions to that principle…'. A little further below it is stated that 'the principle of immunity is subject to three conditions…'. This indicates that the drafters of the UN Convention did not take a position on whether (absolute) immunity is the starting point of the immunity analysis subject to exceptions or rather that immunity only applies under certain conditions.[19]

Since neither Article 19(c) of the UN Convention nor customary international law contain anything on the burden of proof, its allocation is subject to the laws of the forum State and is dependent on how that law requires the claimant to present and prove the legal requirements necessary for its claim to succeed. According to Article 150 Dutch Code of Civil Procedure the basic rule is that the party that relies on the legal consequences of facts or rights asserted by it bears the burden of proving those facts or rights, unless a different allocation of the burden of proof arises from any special rule or from the requirements of reasonableness and fairness. The burden of proof is directly connected to the question of how the immunity analysis should be conducted: is immunity the rule subject to exceptions – and what precisely do such exceptions require in order to apply – or is the grant of immunity from execution conditional upon the fulfilment of the requirements of the applicable rule of customary international law?[20] Is a presumption of immunity applicable as to the asset's purpose? The text of Article 19(c) UN Convention does not answer these questions although the Dutch Supreme Court applies and interprets Article 19(c) as though the article requires that immunity is the starting point of the immunity analysis which only gives way if the creditor establishes the (intended) use of the asset for purposes other than public purposes both in the immediate, short term as well as for future purposes, in the long term.

Where the provisions of the UN Convention need interpretation, customary international law needs to come to its aid.[21] Does customary international law hold a presumption of im-

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18 H. Fox, *The Law of State Immunity*, Oxford: Oxford University Press 2002, p. 413.

19 The same applies to Art. 5 UN Convention, holding that '[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State, subject to the provisions of the present Convention'. The text of this article is a compromise formula as well. The 1991 ILC Commentary on Art. 5 states *inter alia*: '…it was considered that any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice. … Article 5 is to be regarded as the statement of the principle of State immunity and does not prejudice the question of the extent to which the articles, including article 5, should be regarded as codifying the rules of existing international law.' See also the UK Supreme Court 18 October 2017 [2017] UKSC 62 (*Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs*), to be found at https://www.supremecourt.uk/cases/docs/uksc-2015-0063-judgment.pdf (last accessed 3 September 2024), para. 39 concerning Art. 5 UN Convention: '…it is important … to distinguish between a drafting technique and a principle of law. The travaux préparatoires of the United Nations Convention show that the technique of stating a general rule of immunity subject to exceptions, was highly contentious.'

20 Compare UK Supreme Court 18 October 2017 (*Benkharbouche)*, para. 33.

21 The fifth recital of the UN Convention's Preamble affirms that the rules of customary international law continue to govern matters not regulated by the provisions of the UN Convention. In relation thereto Tams notes: 'What is more, it does not specify (nor could it be expected to) what matters are regulated by the Convention; this is to be determined by interpreting the treaty and its provisions. Yet to affirm that where

munity from execution to be rebutted by the creditor? If the starting point of the analysis is immunity, the burden of proof may, also depending on the circumstances, be more complicated than only the rebuttal of the presumption of the non-commercial use of the asset. The judge in the *Hydro* matter held:

> 'However Hydro et al. fail to recognise that immunity from execution is the starting point and that, in order to admit an exception to this, it must be established that the goods are not used or intended for public purposes. Even with the information contained in the ETI report it is not certain that AKBN's revenues cannot and will not have a specific sovereign destination in the future. After all, immunity from execution is not limited to goods the immediate destination of which is a public one.'[22]

Taking immunity as a starting point subject to internationally recognized exceptions considerably broadens the scope of immunity in customary international law because the immunity umbrella then covers any group of cases concerning which there is a diversity of State practice.[23] The question is what customary international law holds.

In his discussion of the Autumn judgments Van Leyenhorst concludes that, apart from specific customary international law rules for certain categories of State property, the general rule following from an analysis of judgments from various countries is that a foreign State is entitled to immunity from execution in relation to property destined for sovereign purposes as in 'official' State functions and that a presumption of immunity cannot be deduced from international State practice and *opinio juris*.[24] Dalmasso, with reference to the judgment of the International Court of Justice ('ICJ') in *Jurisdictional Immunities of the State*,[25] comments that, by excluding from the benefit of immunity property not assigned to an activity linked to the sovereignty of the State, Article 19(c) enshrines the functional nature of immunity.[26] There are

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the treaty does not apply customary law continues to apply is important as it implies that the Convention's substantive scope is limited'. See C.J. Tams, 'Preamble', in: O'Keefe, Tams & Tzanakopoulos 2013, p. 32 (*supra* note 15)

22 Unofficial translation by the author from Preliminary relief judge in The Hague 27 January 2021, para. 4.12 ('*Daarmee miskennen Hydro cs echter dat immuniteit van executie het uitgangspunt is en dat voor het maken van een uitzondering daarop moet worden vastgesteld dat de goederen niet worden gebruikt of zijn beoogd voor publieke doeleinden. Ook met de informatie uit het EITI-rapport staat niet vast dat de inkomsten van AKBN in de toekomst geen specifieke soevereine bestemming kunnen en zullen hebben. Immuniteit van executie is immers niet beperkt tot goederen waarvan de onmiddellijke bestemming een publieke is.*').

23 See UK Supreme Court 18 October 2017 (*Benkharbouche)*, para. 37. This case concerned immunity from jurisdiction.

24 M.C. van Leyenhorst, 'Immuniteit van executie: tijd voor een koerswijziging' [Immunity from execution: time for a change of course], in: S.J.W. van der Putten & M.R. van Zanten (eds.), *Compendium Beslag- en executierecht* [Compendium of the Law on Execution and Seizure], The Hague: Sdu Uitgevers 2018, pp. 788-790.

25 ICJ 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening*), *ICJ Reports* 2012, p. 99.

26 J. Dalmasso, 'Les incertitudes persistantes relatives aux conditions de saisie des biens des Etats et de leurs émanations affectés à une activité relevant du droit privé', *Revue de droit international d'Assas* 2018, issue 1, p. 266, para. 5: '*La France a ratifié la Convention. Si cette dernière n'est toujours pas entrée en vigueur et si le caractère coutumier de chacune de ses dispositions est sujet à d'intenses débats, il faut souligner que la Cour Interna-*

numerous examples of this functional analysis. This seems to have become the predominant approach in domestic and international court practice[27] although this practice is not uniform.[28] Such a functional analysis (also referred to as 'qualified purpose' analysis (see *inter alia* the Swedish judgments discussed in sect. 3.3)) does not necessarily entail that the burden of proof as to the asset's purpose is transferred to the State. Dependent on the practice in the forum State, the creditor may still be required to rebut a presumption of the public use of the asset by proving commercial use, but it may also be the case that under certain circumstances the burden of proof is reversed. The Swiss Supreme Court, for example, while considering that there is a presumption that the property of a State is used *iure imperii*, applies a reversed burden of proof in the case of a foreign State's funds held in bank accounts.

It follows from the above that there seem to be at least three questions of interpretation concerning Article 19(c) that are relevant to the discussion in this article which may partially overlap or influence each other:

1. what is the starting point of the immunity analysis,
2. does Article 19(c) entail a presumption of a public (governmental, sovereign) purpose or destination concerning State property, and
3. how are the words 'intended use' to be interpreted.[29]

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tionale de Justice a pu se prononcer a minima en faveur du caractère coutumier de l'article 19(c) de la Convention des Nations Unies qui, en excluant du bénéfice de l'immunité les biens non affectés à une activité liée à la souveraineté de l'Etat, consacre le caractère fonctionnel de l'immunité.' (Unofficial English translation by the author: 'France has ratified the Convention. Although the latter has still not entered into force and the customary nature of each of its provisions is the subject of intense debate, it should be noted that the International Court of Justice was able to rule at least in favour of the customary nature of Article 19(c) of the United Nations Convention which, by excluding from the benefit of immunity property not assigned to an activity linked to the sovereignty of the State, enshrines the functional nature of immunity.').

27 The Advocate General stated in her opinion for the French *Cour de Cassation* 3 November 2021 (*Citibank v. Rasheed*), p. 15: '*Ainsi que nous l'avons exposé précédemment (v. supra), le droit des immunités d'exécution des Etats étrangers, initialement absolu, a vu son périmètre se réduire progressivement pour permettre aux créanciers d'un Etat étranger de saisir ceux des biens qui ne sont pas utilisés pour accomplir une mission de souveraineté. Mission de souveraineté qui se rattache nécessairement aux prérogatives régaliennes de l'Etat et ne peut donc viser qu'un nombre limité d'hypothèses. La rédaction de l'article 21 de la Convention de 2004 en témoigne.*' (Unofficial English translation by the author: 'As we have already explained (see above), the law of immunity from execution of foreign States, which was initially absolute, has been progressively reduced in scope to allow for the creditors of a foreign State seizing those assets which are not used to carry out a sovereignty mission. This mission of sovereignty is necessarily linked to the sovereign prerogatives of the State and can therefore only cover a limited number of cases. The wording of Article 21 of the 2004 Convention bears witness to this.').

28 See for example the judgment of the High Court of Justice of England and Wales 20 October 2005 [2005] EWHC 2239 (*AIG v. Kazakhstan*) with a similar approach as the Dutch Supreme Court in its 18 December 2020 judgment in the *Stati* case.

29 There are more questions and discussions concerning the interpretation of Art. 19(c), for example with regard to the word 'specifically', concerning the territorial stipulation and the 'connection with the entity against which the proceeding was directed', see *inter alia* Brown & O'Keefe 2013, pp. 321 et seq. (*supra* note 15).

3.1 No need to establish the intention of the State

Starting with the third question, two things are important to note from the drafting history of the UN Convention. The first is that the central requirement of Article 19(c) that the property be specifically in use or intended for use by the State for other than government commercial purposes is to be determined by reference to the time the proceedings for arrest, attachment, execution or other measures of constraint are instituted.[30] Second, that its *travaux préparatoires* indicate that the first five words of Article 19(c): 'It has been established that' were inserted at the beginning of the sentence 'to introduce an objective element that would do away with the need to establish the intention of the State to use the property'.[31] The latter now is what the Dutch Supreme Court does seem to require the creditor to establish. How this approach influences the outcome is well illustrated by contemporary judgments of the Brussels Court of Appeal, the Swedish Supreme Court, the French *Cour de Cassation* and the Swiss *Bundesgerichtshof* which, contrary to the approach of the Dutch Supreme Court, indicate that, when the actual, concrete, current use or purpose for other than government non-commercial purposes is established, the creditor does *not* (in the absence of indications as to a concrete and clear long-term sovereign purpose) need to also establish the *intention* of the State to allocate the seized property to a commercial purpose in the long term.

3.2 Brussels Court of Appeal 29 June 2021 – Stati v. Kazakhstan[32]

In its judgment of 29 June 2021, also concerning the enforcement of the award in the *Stati v. Kazakhstan* dispute, the Brussels Court of Appeal had to rule on an attachment by Stati/

30 ILC Draft Articles, Art. 18, para. 11: 'The use of the word "is" in paragraph 1(c) indicates that the property should be specifically in use or intended for use by the State for other than government non-commercial purposes at the time the proceeding for attachment or execution is instituted. To specify an earlier time could unduly fetter States' freedom to dispose of their property. It is the Commission's understanding that States would not encourage and permit abuses of this provision, for example by changing the status of their property in order to avoid attachment or execution.' See also Brown & O'Keefe 2013, p. 323 (*supra* note 15).

31 2000 Report by the Chairman of the Sixth Committee Working Group, UN Doc. A/C.6/55/L.12 (10 November 2000), para. 78: 'As regards subparagraph (c) of alternatives I and II, the suggestion was made to introduce an objective element into the text that would take away the need to establish the intention of the State to the use of the property by adding at the beginning of the sentence "It is established that" or by deleting the reference to "intention". Several delegations supported this suggestion. The view was also expressed that a linkage should be made between the property of the State and the claim.' See also Brown & O'Keefe 2013, pp. 314 and 322 (*supra* note 15).

32 To be found at https://jusmundi.com/fr/document/decision/nl-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-arrest-van-hof-van-beroep-te-brussel-tuesday-29th-june-2021 (last accessed 3 September 2024) in the original Dutch text. The English translation is available there as well, but the last part of para. 266 is unfortunately not correctly translated. The words '*aldus een ander dan niet-commercieel doel*' are to be translated as 'thus other than a non-commercial purpose' instead of 'thus a non-commercial purpose' as the English translation now reads, see https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-judgment-of-the-brussels-court-of-appeal-tuesday-29th-june-2021 (last accessed 3 September 2024).

Ascom on assets of another Kazakhstan SWF than the one that had been the focus of the proceedings before the Dutch courts, namely the National Fund of the Republic of Kazakhstan (the 'National Fund' or 'NFRK) held by The Bank of New York Mellon ('BNYM') with its seat in Belgium. Relying on Article 19(c) UN Convention, Kazakhstan claimed that Stati had failed to prove the (intended) use of the seized assets for other than non-commercial purposes. The Brussels Court of Appeal first considered that, given the fact that Article 19(c) of the UN Convention has not yet entered into force and that this provision corresponds in content to Article 1412quinquies, §2, 3° of the Belgian Judicial Code,[33] the latter provision would be taken as the basis for the further assessment of the dispute.[34] The Court started with the consideration that the principle of immunity from execution enjoyed by a foreign power in Belgium is not absolute. The Court then considered that the current tendency is that the immunity principle is being interpreted less absolutely, taking the fundamental right of Article 6 of the ECHR into account in which the right to enforcement is contained.[35] On this basis, the Court considered that Belgian case law, in particular the judgments of the Belgian *Cour de Cassation*, has ruled 'that the question of proportionality requires that in each individual case "in the light of the particular circumstances of the case" the principle of immunity must be tested against the fundamental right of Article 6 ECHR'.[36] After having considered that the destination of the goods is central to the analysis, the Brussels Court stated that goods of foreign powers that are 'privately affected'[37] are not excluded from attachment and also found that this is to be assessed on the basis of all the concrete circumstances of the case. The Court found that the starting point for the assessment is the 'concrete, actual, current purpose of the funds'.[38] The Court considered that in this context this is 'the most reasonable and practically workable criterion to distinguish goods with a public, "sovereign" or "other than non-commercial purposes" for this condition to be meaningfully understood and applied'.[39] The Court also stated: 'After all, in the long run, a State will always pursue sovereign purposes of public utility.'[40] The Brussels Court

33 As a matter of fact, the relevant provision of the Belgian Judicial Code corresponds exactly in content with Art. 19(c) UN Convention.

34 Brussels Court of Appeal 29 June 2021, para. 247.

35 Brussels Court of Appeal 29 June 2021, para. 251.

36 Brussels Court of Appeal 29 June 2021, para. 251.

37 Brussels Court of Appeal 29 June 2021, para. 253 where the term '*privaatrechtelijk geaffecteerd*' appears and whose meaning can probably be best understood as 'intended or reserved for a private law use'.

38 Brussels Court of Appeal 29 June 2021, para. 260.

39 Brussels Court of Appeal 29 June 2021, para. 260.

40 Brussels Court of Appeal 29 June 2021, para. 261. The Brussels Court of Appeal also explained that, by understanding and applying this condition in this way, there is no question of adding an 'additional criterion' as Kazakhstan suggested, but of applying the destination criterion in concrete terms, taking into account the context, which the Court found to be completely different from other cases of application as cited by Kazakhstan (para. 262). The cases which Kazakhstan had made reference to concerned other case law in the *Stati v. Kazakhstan* matter, i.e. the case law in the Netherlands, more specifically the judgment of the Amsterdam Court of Appeal of 7 May 2019, quashed by the Dutch Supreme Court in its judgment of 18 December 2020. The Brussels Court of Appeal found that, 'in view of the fact that the judgment of 7 May 2019 was severed and that the judgment of 18 December 2020 does not impose itself on this Court in a binding manner', no useful contribution to the settlement of this dispute could be derived from it (para. 263).

of Appeal, quoting from the Stati submissions and with reference to the Presidential Decree submitted by Stati, held that the purpose of the NFRK Savings Fund on which the contested attachment was made – as distinguished from the 'Stabilisation Portfolio' component of the NFRK – is 'to increase the long-term profitability of the assets', 'or in other words: to earn money by making investments", thus "other than a non-commercial purpose'.[41] The assets of the Savings Fund were, according to the Brussels Court, invested solely with a view to maximising long-term returns. The Court concluded: 'Pure investments do not fall under the protection of State immunity. This is a commercial purpose which meets the condition of (intended) use for other than non-commercial purposes."[42,43]

3.3 Swedish Supreme Court 18 November 2021 – Stati v. Kazakhstan[44]

In their recovery efforts resulting from the 2013 Stockholm Chamber of Commerce award, the award creditors had also attached securities of the Kazakhstan National Fund in accounts held in the Swedish bank SEB, claims for dividends on those securities as well as funds deposited in a cash account. The assets were managed by the National Bank of Kazakhstan based on an agreement with the State. Kazakhstan and the National Bank of Kazakhstan opposed the attachment. In the immunity from execution analysis the Swedish Supreme Court considered that Sweden has ratified the UN Convention and incorporated it into Swedish law but neither the UN Convention nor the Swedish law on State Immunity had yet entered into force.[45] The Swedish Supreme Court considered that '[i]n the preparatory works for the [Swedish Law] it was stated that there was no common State practice regarding restrictions on the principle of immunity from enforcement, but that the countries of the Western world had developed an approach according to which enforcement would be permitted in property used or intended for to be used for commercial purposes' and that 'Article 19 can be viewed as expression of this approach'.[46] The Swedish Supreme Court referred to its judgment of 2011[47] where it held that the UN Convention 'expresses the principle, now recognized by many states, that enforcement

41 Brussels Court of Appeal 29 June 2021, para. 266. See also note 32 concerning para. 266.

42 Brussels Court of Appeal 29 June 2021, paras. 270 and 271.

43 This case never reached the Belgian Supreme Court since the exequatur on the award was refused by the Brussels Court of Appeal on 16 November 2021, Case No. 2020/AR/252 (*Republic of Kazakhstan v. Stati consorts, Ascom Group SA and Terra Raf Trans Traiding Ltd*), therefore the collection on the award could not be further pursued in Belgium.

44 Swedish Supreme Court 18 November 2021, Case No. Ö 3828-20 (*Stati v. Kazakhstan*). In this article reference is made to the English translation which is available at https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattningar/o-3828-20-eng.pdf and at https://jusmundi.com/fr/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-i-decision-of-the-supreme-court-of-sweden-thursday-18th-november-2021#decision_18310 (both last accessed 3 September 2024).

45 Swedish Supreme Court 18 November 2021, para. 16.

46 Swedish Supreme Court 18 November 2021, para. 18.

47 Swedish Supreme Court 1 July 2011, Case No. Ö 170-10 (*Russian Federation v. Sedelmayer*), English translation available at https://jusmundi.com/en/document/decision/en-mr-franz-sedelmayer-v-the-russian-federation-decision-of-the-swedish-supreme-court-friday-1st-july-2011#decision_1343 (last accessed 3 September 2024).

can take place at least in property used for other than state non-commercial purposes', and considered that 'the Supreme Court thereby qualified the principle by distinguishing it from cases in which enforcement cannot take place'.[48] The State's purpose in holding the property was to be found in being of a *qualified nature* when the property is used for the exercise of the State's sovereign power and similar functions of an official character in which context the 2011 judgment also referred to the specific categories of property mentioned in Article 21 UN Convention.[49] Concerning real estate and movable property the Swedish Supreme Court considered that its purpose is as a rule apparent from the actual use of the property but concerning the holdings of financial assets there is often an absence of actual use which could otherwise form the basis for assessing the purpose behind the holding of the assets.[50] Therefore, according to the Court, the assessment may therefore be made in a different way.[51] The Swedish Supreme Court considered that there may be several purposes behind a State's investment of funds on the international capital market and that 'as a rule this involves funds which are not immediately needed to serve government purposes'.[52] According to the Swedish Supreme Court, the chosen investment strategy as to the risk level and return requirements can reflect its purpose.[53] The Court considered the chosen investment strategy of the attached financial assets in the savings portfolio to be the same as that of other equity investors, namely better value development and higher returns than an investment that only aims to secure the real value of the assets.[54] The Swedish Supreme Court considered: 'If the State's motive for the investment is not more developed than that, it cannot generally be regarded as an outflow of the State's sovereign actions.'[55] Above motives of a commercial nature, it was required, according to the Swedish Supreme Court, that there were qualified purposes of a sovereign nature that are 'expressed concretely and clearly in the State's regulation of how the property is to be used': 'The mere fact that the State will be able to use the value of the property for government activities in the future or that the savings are intended for future generations cannot be considered to be enough.'[56] The Swedish Supreme Court considered that a State's saving in financial assets on the international capital market may serve a general macroeconomic function but for this to be the case a more concrete link between the form of saving and the State's monetary policy or other acts of a

48 Swedish Supreme Court 18 November 2021, para. 19.

49 Swedish Supreme Court 18 November 2021, para. 19.

50 Swedish Supreme Court 18 November 2021, para. 25.

51 Swedish Supreme Court 18 November 2021, para. 25.

52 Swedish Supreme Court 18 November 2021, para. 26.

53 Swedish Supreme Court 18 November 2021, para. 27.

54 Swedish Supreme Court, 18 November 2021, para. 28. The Swedish Supreme Court distinguished the SWF holdings into a savings portfolio and a stabilization portfolio and considered in para. 32: 'Typically, a stabilisation portfolio is designed to provide a quick injection of assets into the government budget in order to stabilise the domestic economy, if necessary. In contrast, a savings portfolio usually has as its primary function to provide high returns over the long term for an as yet unspecified use, with liquidity requirements usually being set lower. The two types of portfolios thus normally differ, *inter alia*, in terms of risk tolerance (cf. p. 27). However, the two types of portfolios may be functionally linked in that funds from the savings portfolio may be planned to be transferred to the stabilisation portfolio for use in accordance with policy decisions.'

55 Swedish Supreme Court 18 November 2021, para. 28.

56 Swedish Supreme Court 18 November 2021, para. 28.

sovereign nature must be required.[57] The Swedish Supreme Court found the fact that certain securities are part of a SWF is not in itself decisive for the assessment of whether the securities should be subject to immunity from enforcement.[58] In this context the Supreme Court engaged in a review of the particularities of a SWF and the Kazakh National Fund in question and considered whether the attached property had such a concrete and clear connection to a qualified purpose of a sovereign nature that, despite the commercial ingredient, it is subject to immunity from enforcement. The Swedish Supreme Court considered that the attached property was part of the savings portfolio at the time of the attachment. The Swedish Supreme Court found that what Kazakhstan and the National Bank had stated regarding future State purposes

> 'was framed in very general terms and the presented regulation of the National Fund did not specify what those purposes are. Nor had it otherwise come to light that, prior to attachment, it had been decided that the attached property should be used for any specified State purpose. A clear connection between the attached property and a qualified purpose of a sovereign nature is therefore lacking. In this context it should be noted that long-term savings for future – as-of-yet specified – needs cannot be regarded as being of a sovereign nature.'

The fact that the underlying idea seemed to be that the long-term savings in the savings portfolio should create the conditions for taking budgetary stabilizing and similar measures even in the future perspective was considered by the Swedish Supreme Court as weak. The Court concluded that the purpose was such that immunity does not apply.[59]

In line with its prior judgment of 2011 in the *Sedelmayer* case, the Swedish Supreme Court thus applied a functional immunity analysis, by determining how, according to the principles expressed in Article 19(c) UN Convention, the nature of the property should be qualified. Compared to the Brussels Court of Appeal's judgment of 29 June 2021 the Swedish Supreme Court went a step further in the purpose analysis. The Swedish Supreme Court had established that the attached shares and related receivables were included in the savings portfolio at the time of attachment. The management of this portfolio, according to the analysis of the Swedish Supreme Court, did not differ from other active and long-term management of shares on the international capital market and thus was found to have a commercial motive. The Swedish Supreme Court addressed whether this property nevertheless had a concrete and clear connection to a qualified purpose of a sovereign nature *in the long term*. The purpose of preserving and increasing Kazakhstan's assets for future use was not found by the Swedish Supreme Court as sufficiently qualified to be regarded as an expression of Kazakhstan's sovereign acts or similar acts of an official character.[60] In this analysis the Swedish Supreme Court pointed to what

57 Swedish Supreme Court 18 November 2021, para. 29.

58 Swedish Supreme Court 18 November 2021, para. 33.

59 The Swedish Supreme Court had also established that, since the management of the savings portfolio appeared to be normal management of an equity portfolio rather than an instrument for the exercise of the National Bank's exchange and monetary policy function, the immunity analysis was not performed on the basis of Art. 21(1)(c) of the UN Convention but on the basis of Art. 19(c) UN Convention. Swedish Supreme Court 18 November 2021, paras. 38-43.

60 The Court of Appeal of The Hague reasoned otherwise in the referral proceedings in the *Stati v. Samruk/Kazakhstan* case. The Court, referring to the presumption of immunity applied by the Dutch Supreme Court

Kazakhstan and the National Bank had themselves stated regarding future State purposes and did not require the creditor to prove any possible future commercial use. The purpose of the property was thus such that immunity did not apply.

3.4 French Cour de Cassation 3 November 2021 – Citibank v. Rasheed Bank [61]

The French *Cour de Cassation* (Supreme Court) in its judgment of 3 November 2021, concerning an attachment on funds of a State's emanation, also rejected the argument that the creditor needs to establish the State's intention to use the seized property for a commercial operation and that by affirming the contrary, on the hypothetical ground that such proof would have been impossible, the Court of Appeal had violated customary international law. The *Cour de Cassation* stated that, according to customary international law, 'as reflected' in the UN Convention, in the absence of a waiver or allocation of the seized property for the satisfaction of the claim the property of a foreign State may not be the subject of a measure of execution, unless it is established that such property is specifically used or intended to be used otherwise than for

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in its judgment of 18 December 2020, found that, despite the creditors Stati/Ascom having alleged that the proceeds from the shares in KMGK benefited Samruk and were used by it to realize a commercial activity, the creditors had provided insufficient information to establish that the shares held by Samruk in KMGK were intended for other than public purposes. The Court based this upon the established facts that the participations held by Samruk, including the shares in KMGK, were managed by Samruk with the purpose of increasing the national welfare of the Republic of Kazakhstan and that Samruk could not transfer these shares without the permission of Kazakhstan. Moreover, according to the Court, Samruk's purpose ('to increase the national welfare of the Republic of Kazakhstan') did not only relate to the proceeds from the shares in KMGK that could ultimately benefit Kazakhstan as a shareholder of Samruk. According to the Court, Samruk's purpose was undeniably broader: 'as Kazakhstan has argued and insufficiently disputed by Ascom, the aim of Samruk is to contribute to the economic development of Kazakhstan and increase national prosperity through optimal management of the State holdings it holds'. This further confirmed, according to the Court, that the destination of these State holdings, including the seized KMKG shares, was a public one. The Court concluded that the seized shares enjoyed immunity from execution. The Hague Court of Appeal 14 June 2022, ECLI:NL:GHDHA:2022:977, *NIPR* 2022-423, para. 3.13 (unofficial translation by the author). The Stati parties again appealed to the Dutch Supreme Court. In a two-paragraph assessment of the cassation complaints, the Supreme Court only contemplated that the complaints assumed that The Hague Court of Appeal considered Samruk's statutory purpose to be decisive and ignored the actual organization of its activities. According to the Supreme Court the cassation complaints had no factual basis. The Supreme Court considered that The Hague Court had taken the starting point – which was, according to the Supreme Court, rightly not disputed in cassation – that it was up to the plaintiffs to demonstrate that the seized shares had a purpose other than a public destination and to provide sufficient information to this end. The Supreme Court considered that the Court of Appeal's judgment demonstrated that it had not ignored Ascom's statements about Samruk's activities, but that it considered these statements insufficient to rule that the shares had a purpose other than a public destination. Dutch Supreme Court 22 September 2023, ECLI:NL:HR:2023:1281, *NIPR* 2023-672, para. 3.2. This seems to imply that The Hague Court could have made a different assessment of the facts with a different outcome although, on the other hand, that would be difficult while applying the Dutch Supreme Court's approach.

61 *Cour de Cassation*, Civ. 1ère , 3 November 2021, no. 19-25.404, ECLI:FR:CCASS:2021:C100656 (*Citibank v. Rasheed Bank*).

non-commercial public service purposes.[62] The *Cour de Cassation* found that, from its findings and assessments, the Court of Appeal was able to deduce, 'without reversing the burden of proof, that the seized assets, an instrument of bank guarantee constituted in connection with commercial transactions, were by their very nature intended to be used for purposes other than non-commercial public service'.[63] The *Cour de Cassation* explicitly rejected the debtor's contention that the creditor needed to establish the foreign State's intention to use the seized property for a commercial operation. The *Cour de Cassation* considered that this contention by the debtor went further than the law by requiring the demonstration of an intentional element and was therefore unfounded.[64] The Paris Court of Appeal had characterized such proof as impossible since the State or its emanations are always at liberty to allocate a good which is by nature commercial, to a non-commercial operation and thus avoid recovery. The Advocate General had noted in her advice that neither customary law as reflected by the 2004 Convention, nor the provisions of Article L. 111-1-2 of the French Civil Enforcement Procedural Code, require the seizing creditor to provide proof of the State's will, and therefore of an immaterial element and that, through its sovereign assessment of the indices produced by the creditor, the Court of Appeal had pointed out the Iraqi State's intention to allow the commercial allocation of the seized funds to continue, and thus to use them for purposes other than non-commercial public service.[65]

3.5 Swiss Federal Supreme Court 11 December 2023[66] – anonymized, concerning a seizure of royalties collected by The International Air Transport Association ('IATA') on behalf of the Republic of U[…] or any of its departments

In its judgment of 11 December 2023, the Swiss Federal Supreme Court contemplated that, pursuant to Article 92(1) no. 11 of the Swiss Federal Debt Collection and Bankruptcy Act, assets belonging to a foreign State or a central bank which are assigned to tasks which are part

62 *Cour de Cassation* 3 November 2021 (*Citibank v Rasheed Bank*), para. 9.

63 *Cour de Cassation* 3 November 2021 (*Citibank v Rasheed Bank*), para. 11 (unofficial translation by the author).

64 *Cour de Cassation* 3 November 2021 (*Citibank v. Rasheed Bank*), paras. 11 and 12: '*11. De ces constatations et appréciations, la cour d'appel a pu déduire, sans inverser la charge de la preuve, que l'actif saisi, instrument de garantie bancaire constitué à l'occasion d'opérations commerciales, était, par nature, destiné à être utilisé autrement qu'à des fins de service public non commerciales. 12. Le moyen, qui ajoute à la loi en exigeant la démonstration d'un élément intentionnel, n'est donc pas fondé.*'

65 Opinion of the Advocate General for the French *Cour de Cassation* 3 November 2021 (*Citibank v. Rasheed*), p. 20: '*Il sera de surcroît relevé que ni le droit coutumier tel que reflété par la Convention de 2004, ni les dispositions de l'article L. 111-1-2 du code des procédures civiles d'exécution, n'imposent au créancier saisissant de rapporter la preuve d'une volonté de l'Etat, et donc d'un élément immatériel. Et qu'en tout état de cause, par une appréciation souveraine des indices produits par la société créancière, a fait ressortir la volonté de l'Etat irakien de laisser perdurer l'affectation commerciale des fonds saisis, et donc de les destiner à une utilisation autre qu'à des fins de service public non commerciales.*'

66 Swiss Federal Supreme Court 11 December 2023, no. 5A550/2023, (https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=5A_550%2F2023&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F11-12-2023-5A_550-2023&number_of_ranks=70, last accessed 3 September 2024). See para. 6.1.

of their duty as public authorities cannot be seized. The Swiss Federal Supreme Court also stated that the activities of a foreign State are deemed to fall within its acts *jure imperii*. From this presumption arises the presumption of the *jure imperii* use of that foreign State's property.[67] The burden of proving commercial use lies therefore on the creditor[68] but 'liquid assets' like bank accounts can only be exempted from seizure if clearly allocated by the State to specific public purposes.[69] In the absence of an allocation to a concrete and identifiable sovereign task, a State's bank deposits are presumed to be used for commercial purposes.[70] The purpose of this case law is, as the Swiss Supreme Court stated, to prevent a foreign State from practically creating unlimited immunity from execution by depositing assets abroad in the name of its central bank as it sees fit.[71] The separation or allocation of assets for specific sovereign purposes can be proven when the assets concerned appear in the bank accounts in such a way that it can be understood that they are exclusively available for sovereign purposes.[72] Proof of the use of assets for sovereign purposes must meet high standards when the entity is also active in commercial activities.[73]

3.6 Evaluation

It follows from the above analysis that the Dutch Supreme Court's requirement that the creditor establishes the intention of the foreign State concerning possible future (long-term) non-public use of the asset, which may even extend to the possible proceeds of the asset, does not follow from Article 19(c) UN Convention. Contemporary judgments of the Brussels Court of Appeal, the Swedish Supreme Court, the French *Cour de Cassation* and the Swiss Supreme Court are in accordance with the UN Convention's *travaux préparatoires* in that the intended use of the property is to be sovereignly determined by the court assessing the facts and evidence concerning the State's intended use of the property at the moment the proceedings for arrest or attachment are instituted. The will or intention of the State is an unverifiable element which cannot be established. These judgments show a functional immunity analysis in distinguishing property with a public, 'sovereign' purpose from property with a commercial purpose. Where a clear connection with a qualified purpose of a sovereign nature at the time the proceeding for attachment or execution has been instituted is lacking, the property is not considered to be immune.[74] Concerning financial assets connected to respectively commercial transactions or

67 Swiss Federal Supreme Court 11 December 2023, para 6.1.

68 Swiss Federal Supreme Court 11 December 2023, para 6.1.

69 Swiss Federal Supreme Court 11 December 2023, para 6.1.

70 Swiss Federal Supreme Court 11 December 2023, para 6.1.

71 Swiss Federal Supreme Court 11 December 2023, para 6.1.

72 Swiss Federal Supreme Court 11 December 2023, para 6.1.

73 Swiss Federal Supreme Court 11 December 2023, para 6.1.

74 See also similar (earlier) German case law concerning the assessment at the time of the enforcement measures:

– German *Bundesgerichtshof* (Supreme Court) 4 July 2013, VII ZB 63/12, para. 10: '*Die Vollstreckungsimmunität ist eine Ausprägung des Grundsatzes der Staatenimmunität, der aus dem Grundsatz der souveränen Gleichheit der Staaten folgt. Nach heutigem Völkerrecht sind staatliche Vermögenswerte vor Vollstreckungsmaßnahmen anderer Staaten immun, soweit sie hoheitlichen Zwecken dienen (BVerfG, IPRax 2011, 389, juris Rn. 17; BGH, Beschluss vom 1. Oktober 2009 – VII ZB 37/08, NJW 2010, 769, jeweils m.w.N.).* (Unofficial translation by the

pure investments, the French, Swedish and Brussels Courts found that these assets were by their nature intended to be used for other than government non-commercial purposes. In their analysis these courts deduced the intended purpose from the available evidence presented by the creditor. The Swiss Supreme Court, although applying a presumption that the property of a State is used for purposes *jure imperii*, applies a reversed burden of proof as to the purpose criterion when this concerns funds in bank accounts: in the absence of earmarking such funds for a concrete and identifiable sovereign task, a foreign State's assets in a bank account are presumed, according to Swiss jurisprudence, to be used or intended for a commercial purpose. This contemporary case law of the Belgian, French, Swedish and Swiss Courts is in line with numerous examples in earlier case law and the landmark judgment of the ICJ in the *Jurisdictional Immunities* case of 2012 referring to a range of such earlier judgments,[75] in which a functional immunity analysis was applied, taking as a point of departure or starting point not the immunity of a State's assets but a restrictive immunity approach, assessing the nature of the asset in concreto. Only property allocated for sovereign purposes is considered immune.

4. Margin of appreciation and Article 6 ECHR

The Dutch Supreme Court's approach, deviating from that of its esteemed foreign colleagues on both the starting point of the immunity analysis and the approach as to 'intended use', is not only detrimental to the private creditor's enforcement possibilities in the Netherlands but it also unjustifiably violates the creditor's rights. It is true that the degree of State immunity may

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author: 'According to current international law, state assets are immune from enforcement measures by other States as long as they serve sovereign purposes…). And para. 11: '*Es besteht mithin eine allgemeine Regel des Völkerrechts im Sinne des Art. 25 GG, wonach die Zwangsvollstreckung durch den Gerichtsstaat aus einem Vollstreckungstitel gegen einen fremden Staat, der über ein nicht hoheitliches Verhalten (acta iure gestionis) dieses Staates ergangen ist, in Gegenstände dieses Staates ohne dessen Zustimmung unzulässig ist, soweit diese Gegenstände im Zeitpunkt des Beginns der Vollstreckungsmaßnahme hoheitlichen Zwecken des fremden Staates dienen (BVerfG, NJW 2012, 293, 295; BGH, Beschluss vom 1. Oktober 2009 – VII ZB 37/08, aaO, jeweils m.w.N.)*'. (Unofficial translation by the author: 'There is therefore a general rule of international law within the meaning of Art. 25 of the Basic Law, according to which the enforcement by the forum State of an enforcement order against a foreign State which has been issued regarding non-sovereign behaviour (*acta iure gestionis*) of that State, against property of such foreign State is inadmissible without its consent insofar as these objects at the time the enforcement measure begins serve the sovereign purposes of the foreign State (BVerfG, NJW 2012, 293, 295; BGH, decision of October 1, 2009 – VII ZB 37/08, ibid., each with m.w.N.)'.

– German *Bundesgerichtshof* 12 April 1983, BvR 683/81 found that the qualification of the purpose of an asset located or situated in the forum State is not an exclusive matter for the foreign State (para. 142). According to this judgment, credit balances, under German law, are part of the foreign State's financial assets and not public property since they are subject to private law. The Court held that the law of State immunity does not prevent the forum State from ordering enforcement measures in relation to claims arising from credit balances held in accounts with banks in the forum State which are intended to be transferred to an account that a foreign State maintains with its Central Bank to cover its State budget. These credit balances may be qualified by the forum State as assets which, at the time of the commencement of the enforcement measure, do not serve sovereign purposes of the foreign State. So, the only fact that such funds are intended to be transferred to the State budget at a later point in time is not sufficient to consider such funds as immune.

75 ICJ 3 February 2012 (*Jurisdictional Immunities of the State*), para. 118 (*supra* note 25).

vary from jurisdiction to jurisdiction. States are free to adopt their own State immunity laws and regulations. In observing that the international law of State immunity generally requires that States provide each other with certain protections from national court proceedings, Gaukrodger notes that it does not preclude them from offering extended immunities:

> 'In other words, the law creates a floor of minimum protection, but does not create a ceiling. As a matter of the law of State immunity, States are free to adopt laws, treaties or policies that extend immunities, as a matter of discretion, beyond those required by international law.'

The level of protection may be influenced by political and economic considerations.[76] However, additional immunity protection beyond the requirements of international law should not mistakenly be considered or applied as (customary) international law.[77] In its Draft Conclusions on identification of customary international law with commentaries,[78] the ILC sets forth that a rule of customary international law is established by ascertaining general State practice accepted as law. General State practice must be accompanied by *opinio juris*, the so-called 'two-element approach'.[79] In her dissertation '*Rechter over Grenzen*' [Judge over Borders] Kuiper-Slendebroek describes:

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76 D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/02, OECD Publishing, p. 14: 'It is that the economic interests of States may affect their interpretation of state immunity principles'. An eminent professor offered a version of this thesis in his conclusions to a 2004 international conference on State immunity: '*les considérations propres aux Etats interfèrent largement avec l'interprétation prétendue du droit international dans l'élaboration de leur propre droit national des immunités. … Ce sont largement les intérêts des Etats et de leurs entreprises qui commandent les réglementations nationales des immunités des Etats étrangers.*' (Unofficial English translation by the author: 'Considerations specific to States significantly influence the supposed interpretation of international law in the development of their own national law of immunity. … To a substantial degree it is the interests of States and businesses in those States that determine the national rules applicable to the immunity of foreign States.'). P. Lagarde, 'Conclusions générales', in: I. Pingel (ed.), *Droit des immunités et exigences du procès équitable*, Paris: Pedone 2004, p. 152 (citing note by L. Collins on the UK State Immunity Act in *Revue critique de droit international privé*, p. 171 (1980)).

77 If there is no applicable treaty in force, reference is usually specifically made to international *customary* law governing the State immunity rules instead of international law in general. In its judgment in the case *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece intervening*), the ICJ stated that both Germany and Italy agreed that immunity is governed by international law and is not a matter of comity. The ICJ also considered that as between Germany and Italy, any entitlement to immunity could be derived only from customary international law, rather than a treaty, since – as the ICJ expressly considered – neither State was party to the UN Convention which, as the ICJ considered, was not yet in force in any event.

78 ILC Draft Conclusions on identification of customary international law, with commentaries, 2018, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (last accessed 3 September 2024).

79 Ibid., Conclusion 2: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)' and the Commentary on pp. 124 et seq. In its Commentary the ILC *inter alia* states: 'In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way.' And: 'Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist.'

> 'The rule of State immunity consists of a core, which is determined by the law of nations ("*volkenrecht*"), which is composed of State practice and *opinio juris*. The margins of this rule are supplemented in national law. The core of the law of nations is that jurisdiction over and enforcement measures against a foreign State must not impede it in the performance of its governmental duties.' (translation from the original Dutch text by the author).[80]

In 2012, in its judgment in the case *Jurisdictional Immunities of the State*, the ICJ considered:

> 'While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.'[81]

In its judgment, the ICJ also stated that both Germany and Italy agreed that immunity is governed by international law and is not a matter of comity.[82] The ICJ considered that the existence of a rule of customary international law had to be established through identifying a settled *State practice* together with *opinio juris*.[83]

As mentioned above, the Brussels Court of Appeal in its judgment of 29 June 2021 included Article 6 ECHR in its immunity analysis because of the current tendency that the immunity principle is being interpreted less absolutely.[84] As the Brussels Court noted and as has been established by the European Court of Human Rights ('ECtHR'), Article 6 ECHR encompasses the right of execution of a judgment.[85] Pursuant to the line of case law of the

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80 B.A. Kuiper-Slendebroek, *Rechter over Grenzen, De toepassing en interpretatie van internationaal recht in het Nederlands privaatrecht*, 2017 (a dissertation on the topic 'Judge Over Borders', the application and interpretation of international law in Dutch private law), p. 164 : '*De regel van staatsimmuniteit bestaat uit een kern die bepaald wordt door het volkenrecht, samengesteld uit statenpraktijk en opinio juris. De marges van deze regel worden in het nationale recht aangevuld. De volkenrechtelijke kern van staatsimmuniteit is dat jurisdictie over en executiemaatregelen tegen een vreemde staat hem niet mogen belemmeren in het uitoefenen van zijn overheidstaak*.' '*Volkenrecht*' is translated by the author of this article as 'the law of nations'.

81 ICJ 3 February 2012 (*Jurisdictional Immunities of the State*), paras. 53-55.

82 ICJ 3 February 2012 (*Jurisdictional Immunities of the State*), para. 53.

83 ICJ 3 February 2012 (*Jurisdictional Immunities of the State*), paras. 53-55. State practice is to be found in judgments of national courts, the legislation of States which have enacted immunity statutes, claims to immunity advanced by States before foreign courts and statements made by States, according to the ICJ. The ICJ finds '*Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.'

84 Brussels Court of Appeal 29 June 2021, para. 251.

85 ECtHR 19 March 1997, Appl. No. 1835791 (*Hornsby v. Greece*), para. 40: 'The Court reiterates that, according to its established case-law, Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect… However, that right would be illusory if a Contracting State's domestic

ECtHR, the right of access to a court secured by Article 6(1) ECHR is not absolute but may be subject to limitations. The granting of State immunity is considered to pursue the legitimate aim of complying with international law to promote comity and good relations between States through respect for another State's sovereignty. Immunity measures taken by a State which reflect generally recognised rules of public international law are considered within a State's '*margin of appreciation*' and will not be regarded as disproportionate. It is important to note that, as was explained by the UK Supreme Court in *Benkharbouche*, a court can act on a view of international law 'which, although not the possible only one, [is] within "currently accepted international standards"'. However, this only applies 'if there is no relevant and identifiable rule of international law. If there is such rule the court must identify it and determine whether it justifies the application of State immunity.'[86]

This case law of the ECtHR, covering a range of cases mainly in respect of employment claims in the context of immunity from jurisdiction, is also relevant and employed by domestic courts when it concerns immunity from execution. The French *Cour de Cassation* in 2013 recalled that it follows from the case law of the ECtHR that the right of access to a court guaranteed by Article 6(1) of the ECHR, and of which the enforcement of a court decision is the necessary extension, does not preclude a limitation on this right of access arising from the immunity of foreign States, as long as this limitation is enshrined in international law and does not go beyond the rules of international law generally recognised in relation to State immunities.[87] As the UK Supreme Court made clear in 2017 in *Benkharbouche*: if there is a relevant and applicable immunity rule of customary international law the court is obliged to give effect to such immunity.[88] On the other hand, a more extensive immunity than that which international law *requires* is necessarily disproportionate.[89]

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legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. … Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (art. 6)'.

86 UK Supreme Court 18 October 2017 (*Benkharbouche*), para. 36.

87 *Cour de Cassation*, Civ. 1ère, 28 March 2013, no. 11-13.323 p. 2: '*…qu'il résulte de la jurisprudence de la Cour européenne des droits de l'homme (CEDH, Grande chambre, 21 novembre 2001, Al-Adsani/Royaume-Uni, requête n° 35763/97, Forgaty/Royaume-Uni, req. n° 37112/97, Mc Elhinney/Irlande, req. n° 31253/96; 12 décembre 2002, Kalogeropoulou e.a./Grèce et Allemagne, req. n° 59021/00; Grande chambre, 23 mars 2010, Cudak/Lituanie, req. n° 15869/02, 29 juin 2011, Sabeh El Leil/France, req. n° 34869/05), qu'il convient d'interpréter la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales de manière à la concilier le plus possible avec les autres règles du droit international, dont cette dernière fait partie intégrante, telles que celles relatives à l'immunité des Etats étrangers, de sorte que le droit d'accès à un tribunal, tel que garanti par l'article 6 de cette Convention, et dont l'exécution d'une décision de justice constitue le prolongement nécessaire, ne s'oppose pas à une limitation à ce droit d'accès, découlant de l'immunité des Etats étrangers, dès lors que cette limitation est consacrée par le droit international et ne va pas au-delà des règles de droit international généralement reconnues en matière d'immunité des Etats.*'

88 UK Supreme Court 18 October 2017 (*Benkharbouche)*, para. 34.

89 UK Supreme Court 18 October 2017 (*Benkharbouche*), para. 34: 'The relevant rule is that if the foreign State is immune then, as the International Court of Justice has confirmed in Jurisdictional Immunities of the State, the forum State is not just entitled but bound to give effect to that immunity. If the foreign State is not immune, there is no relevant rule of international law at all. What justifies the denial of access to a court is the international law obligation of the forum State to give effect to a justified assertion of immunity. A

This may entail that domestic State immunity legislation should be 'read down', meaning that it is read and interpreted in a way which is compatible with customary international law principles. This was recently raised before the courts in the UK in the case *UK P&I Club v. Republica Bolivariana de Venezuela* where claimants, with reference to the UK Supreme Court's judgment in *Benkharbouche*, argued that Section 13(2)(a) (providing that 'relief shall not be given against a State by way of injunction') of the UK State Immunity Act ('SIA') should be read narrowly in order to allow anti-suit injunctions against Venezuela. However, the UK High Court in its 2022 judgment[90] disagreed, finding *inter alia* that *Benkharbouche* 'relates to bars on the adjudicative jurisdiction of the court but is not determinative in the separate area of enforcement immunity under section 13(2)a UK State Immunity Act'. The UK Court of Appeal agreed with the lower court that there is no rule of customary international law to the effect that states are not immune to injunctions and was of the opinion that section 13(2)(a) SIA fell within the range of possible rules consistent with international practices.[91] The *UK P&I Club* judgment was *inter alia* criticized as being contrary to established case law that an injunction can be granted against a foreign State under the SIA as long as the State is not immune from suit.[92] The UK court could also have considered that there is no rule of customary international law *prohibiting* an injunction against a foreign State. Interestingly the Dutch Supreme Court recently followed such reasoning where it considered in a judgment of 17 May 2024: 'No rule of customary international law exists which states that a penalty may not be imposed on a foreign state. National legal systems hold different views on this point. Article 19 of the UN Convention also does not contain such a rule.'[93] In this recent case the Dutch Supreme Court did *not* take immunity as a point of departure, while acknowledging the variety of State practice.

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mere liberty to treat the foreign State as immune could not have that effect, because in that case the denial of access would be a discretionary choice on the part of the forum State: see Al Jedda v. United Kingdom (2011) 53 EHRR 23; Nada v. Switzerland (2012) 56 EHRR 593, paras 180, 195; Perincek v. Switzerland (2016) 63 EHRR 6, paras 258- 259. To put the same point another way, if the legitimate purpose said to justify denying access to a court is compliance with international law, anything that goes further in that direction than international law requires is necessarily disproportionate.'

90 UK Supreme Court 28 June 2022 [2022] EWHC 1655 (Comm.) (*UK P&I Club v. Republica Bolivariana de Venezuela*), https://www.quadrantchambers.com/sites/default/files/2022-07/uk_p_i_club_v_venezuela_judgment_28-06-22.pdf (last accessed 3 September 2024), para. 106.

91 UK Court of Appeal 20 December 2023 [2023] EWCA Civ 1497 (*UK P&I Club & Anor v. Republica Bolivariana de Venezuela*), https://www.bailii.org/ew/cases/EWCA/Civ/2023/1497.html (last accessed 3 September 2024), paras. 47 and 48.

92 See T. Innes et al., 'Three Part Series: UK Freezing Orders Against a Foreign State, Part Two', *Steptoe*, 4 April 2023 for applying UK Supreme Court 18 October 2017 (*Benkharbouche)* in the injunction context and discussing *UK P&I Club*: https://www.steptoe.com/en/news-publications/three-part-series-uk-freezing-orders-against-a-foreign-state-part-two.html (last accessed 3 September 2024) in which article it is also observed that *UK P&I Club*'s effect may be limited to prohibiting anti-suit injunctions alone in relation to the fact that such injunctions are generally eschewed by continental jurisdictions.

93 Unofficial translation by the author of para 3.2.2 of Dutch Supreme Court 17 May 2024, ECLI: NL:HR:2024:727, *NIPR* 2024-522: '*Er bestaat geen regel van internationaal gewoonterecht die inhoudt dat aan een vreemde staat geen dwangsom mag worden opgelegd. In nationale rechtsstelsels worden op dit punt uiteenlopende opvattingen gehuldigd. Ook art. 19 VN-Verdrag bevat niet een dergelijke regel.*'

The remaining question to be answered is whether the Dutch Supreme Court goes beyond the requirements of customary international law where it does take immunity as the starting point of its immunity analysis. This approach enables the Dutch Supreme Court to cover under the immunity umbrella the (unknown) intention of the State concerning the (possible) future use of the asset for public purposes. This article takes the position that the Dutch Supreme Court does go beyond the requirements of customary international law since there is a relevant and identifiable rule of customary international law which holds that a State's property is immune only if, at the time of attachment, the asset is allocated in a concrete and identifiable manner for public (as in sovereign, *jure imperii*) use. Where the granting of immunity by the Dutch Supreme Court goes further than customary international law requires, there is a conflict with Article 6 ECHR. Even if there was no substantial State practice and *opinio juris* concerning such qualified, functional rule of State immunity from execution, State practice does not show that the Dutch Supreme Court needs to take the approach as formulated in the Autumn judgments and its judgment in the *Stati* case. Contrary to what the Dutch Supreme Court seems to assume, the rules of immunity from execution that it embraces in these judgments are not with substantial uniformity found in customary international law, but are Dutch rules of State immunity.[94] The Dutch Supreme Court may not be obliged to follow the approach of its European counterparts, but the question now strongly arises as to why it feels called upon to grant a wider immunity from execution scope than these other Western European courts do. The *Stati* case shows very well how various national courts can render very different judgments based on the same or similar facts but applying a different immunity approach. Perhaps a forthcoming judgment of the Supreme Court could provide an opportunity to compare its current approach with international practice and to modify the line of the Autumn and *Stati* judgments.

5. Conclusion

To answer the question posed at the beginning: yes, the scope of immunity from execution has, since the adoption of the UN Convention, expanded in the case law of the Dutch Supreme Court to the detriment of private creditors' enforcement possibilities and even to the extent that this is infringing their rights of access to a court. This case law seems to be aimed, or at least has the effect, not only at respecting but also at overly protecting the foreign State's property. The problem is not the reference to Article 19(c) UN Convention though, but its application and interpretation which leads to immunity protection beyond the requirements of customary international law. The Dutch Supreme Court's analysis is based on State immunity from execution as the starting point of the immunity analysis subject to exceptions. The exception applied by the Dutch Supreme Court which includes the determination of the State's intention concerning the future use of the property even if actual, current use for a commercial purpose has been established, is not in conformity with the *travaux préparatoires* of the UN Convention and is not required by customary international law either.[95] Carefully worded contemporary judgments of the highest courts of several other European jurisdictions indicate that the creditor does not need to establish the (unknown and unpredictable) intent of the foreign State and these judg-

94 Compare Kuiper-Slendebroek 2017, pp. 174-178, 185-186, 192 (*supra* note 80).

95 See the ILC in its 2018 Draft Conclusions on the identification of customary international law, Commentary on Conclusion 2, p. 125: 'The test must always be: is there a general practice that is accepted as law?'.

ments assess the foreign State's intended use for the asset from the facts presented concerning the situation at the time of attachment which is in conformity with the UN Convention's *travaux préparatoires* concerning Article 19(c). These judgments take as a point of departure not immunity subject to exceptions but how the purpose of the asset should be qualified. Only property with a sovereign use or purpose is shielded by immunity which is an established customary international law rule. This fits within the restrictive immunity trend, clearly persisting in international case law and literature to counter an overly generous grant of immunity from execution which had already set in before the adoption of the UN Convention.[96] In this context, the right of access to a court – that some find could be seen emerging as a rule of customary international law itself[97] – plays an inherently crucial role in the restrictive interpretation of the State immunity principle. If anything, and as applied in ECtHR case law, the UN Convention in fact embodies the restrictive immunity approach. The *raison d'être* of the State immunity regime is to avoid interference with the functions of government.

As a last observation it should be noted that, as follows from the above, 'outsourcing'[98] of the determination of the applicable customary international law rule by just referring to the UN Convention or the ILC Draft Articles with Commentary is not sufficient and certainly not since it is a given that the international case law concerning the interpretation of the commercial purpose criterion of Article 19(c) is not uniform. The Dutch Advisory Committee on Public International Law (CAVV) can be quoted with approval where in its advice of 22 December 2023 to the Dutch government it does not necessarily regard this non-uniformity as problematic and finds no obvious need to provide a more detailed definition of the UN Convention term 'commercial purpose'. As the CAVV advises, ultimately, the question of whether a property of a State has a commercial purpose is largely a question of fact that can be left to the appraisal of

96 It is interesting to note that absolute immunity was likely never an established rule under international law, see *inter alia* Whytock 2013, p. 2041 and fn. 51 (*supra* note 4) as well as the UK Supreme Court in *Benkharbouche* (*supra* note 19), para. 41: 'The Exchange was a decision on the immunity of the property of a foreign state, a context in which the immunities recognised by international law have generally been wider than those available in actions for breach of duty. But it will be seen even in that context, at its origins the immunity was not conceived to be absolute. It was assumed to extend only to property employed for public or governmental purposes' and para. 52.

97 Whytock 2013 (*supra* note 4).

98 Expression used by R. Pavoni in 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End justify the Means?', 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2787679 (last accessed 3 September 2024).
See also Van Alebeek on the identification of customary international law by the ECtHR in her commentary on the *Oleynikov* case: 'the casualness with which the Court identifies custom is striking. Custom is generally considered to follow from a consistent State practice accompanied by a sense of legal obligation, *opinio juris*. Where the ICJ in *Germany v. Italy* (3 February 2012) engaged in a comprehensive analysis of all available (national court) practice, the ECtHR relies completely on the ILC Commentary. More problematic even is the fact that this Commentary provides very little proof of the traditional constitutive elements of customary international law: an "emerging trend in the practice of a growing number of states" is a far cry from "consistent state practice"'. R. van Alebeek, 'Oleynikov Judgment on State Immunity', ECHR Blog, 22 March 2013, https://www.echrblog.com/2013/03/oleynikov-judgment-on-state-immunity.html (last accessed 3 September 2024).

the court, based on all of the circumstances and the available evidence.[99] Of course it is essential that in such appraisal the correct immunity approach is applied.

99 On 3 February 2022 the Dutch government submitted a legislative proposal to Parliament for a bill approving the UN Convention and a proposal to amend the Dutch Code of Civil Procedure in that regard ('*wetsvoorstel Goedkeuring van het op 2 december 2004 te New York tot stand gekomen Verdrag van de Verenigde Naties inzake de immuniteit van rechtsmacht van staten en hun eigendommen (Trb. 2010, 272) (36027-(R2160) en wetsvoorstel tot Wijziging van het Wetboek van Burgerlijke Rechtsvordering en het Wetboek van Burgerlijke Rechtsvordering BES in verband met het op 2 december 2004 te New York tot stand gekomen Verdrag van de Verenigde Naties inzake de immuniteit van rechtsmacht van staten en hun eigendommen (Uitvoeringswet VN-Verdrag staatsimmuniteit) (36028)*'). Upon the request of the Minister of Foreign Affairs the CAVV published on 22 December 2023 an advisory report *inter alia* covering the question of the Minister on the risks arising from differences in interpretation between courts in States Parties to the UN Convention, in particular regarding the term 'commercial purposes' in Arts. 18 and 19 of the UN Convention, and whether the Netherlands should make a declaration or reservation in respect of these articles as a result of these risks. The CAVV does not consider a reservation or declaration in respect of Arts. 18 and 19 concerning the interpretation of the term 'commercial purpose' to be necessary (see CAVV Advisory Report on the accession of the Netherlands to the UN Convention on Jurisdictional Immunities of States and Their Property, Advisory report no 44, 22 December 2023, p. 10). In its response by letter dated 10 April 2024 to the CAVV, the Dutch government has indicated its agreement with this CAVV advice, https://www.adviescommissievolkenrecht.nl/publicaties/kabinetsreacties/2024/04/11/kabinetsreactie-vn-verdrag-staatsimmuniteit (last accessed 3 September 2024).