



**Advisory Committee
on Public International Law**

Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression

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Introduction



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In August 2022, the Minister of Foreign Affairs requested advice on the legal consequences of a serious breach of a peremptory norm of international law (*jus cogens*). This request for advice was prompted by the Russian Federation's invasion of Ukraine, which is referred to in the request as 'a serious breach of the prohibition on the use of force and of the territorial integrity and political independence of Ukraine.' The request emphasises that this constitutes a serious breach of a peremptory norm of international law and that such a breach creates obligations both for states individually and for the community of states. The purpose of the request is to obtain greater clarity about the exact content of these obligations and about the legal consequences of a serious breach of a peremptory norm for the Netherlands and other states.

The request raises two specific questions:

- What type of measures must (and may) states take, individually or collectively, to fulfil their obligations under Article 41 of the Articles on State Responsibility (ARSIWA)?
- May states take countermeasures, individually or collectively, in response to a serious breach of a peremptory norm of international law, even if they are not directly injured by the breach?

These two questions are reflected in the structure of this advisory report, consisting of two parts, preceded by a brief introduction to the concept of peremptory norms and to the focus of this report.

Part I deals with three specific obligations arising from Article 41 of the Articles on State Responsibility (ARSIWA),¹ namely (1) the obligation to cooperate in order to bring the breach to an end, (2) the obligation not to recognise as lawful a situation created by the breach, and (3) the obligation not to render aid or assistance in maintaining that situation.

Part II examines the subject of sanctions and, more specifically, whether third states may take countermeasures in the general interest, i.e. whether third states may take measures which in normal circumstances would themselves also constitute a breach of international law but are justified as a response to a serious breach of a peremptory norm of international law, in particular the prohibition of aggression.

The concept of 'peremptory norms' and the focus of the report

Peremptory norms of international law protect the fundamental values of the international community. They are hierarchically superior to other rules of international law and are universally applicable. Examples of rules generally recognised as peremptory norms of international law are the prohibition of aggression, the prohibition of genocide and the right to self-determination.

In a previous advisory report, the CAVV dealt in general terms with the special legal regime that applies to peremptory norms.² The present report specifically focuses on certain legal consequences. Moreover, it mainly examines the legal consequences of a breach of one specific peremptory norm, namely the prohibition of aggression. This focus is a consequence of the event that actually prompted the request for advice, namely the invasion of Ukraine by the Russian Federation. The CAVV uses the qualification of aggression, following in this regard the UN General Assembly. On 2 March 2022, the General Assembly voted by an overwhelming majority to classify the actions of the Russian Federation as aggression.³

The General Assembly did use the term 'aggression', but did not mention the concept of '*jus cogens*' as such. Nonetheless, the applicability of this concept automatically follows from the use of the term aggression, because the prohibition of aggression is generally recognised as a peremptory norm.

In other situations, however, the applicability of the concept of *jus cogens* may be subject to debate because there is disagreement either about whether a specific norm constitutes a peremptory norm or about whether the facts warrant the determination that a peremptory norm has been breached. Reference can also be made here to the importance of the recommended procedure in conclusion 21 of the draft conclusions of the International Law Commission (ILC) on peremptory norms of general international law.⁴ This conclusion deals specifically with the situation in which a state invokes a peremptory norm as a ground for the invalidity or termination of another rule of international law. The aim of conclusion 21 is to prevent abuse of the concept of peremptory norms through unilateral and arbitrary invocation. However, conclusion 21 is of limited scope and is as such not binding in character. Although there is, in general, a real risk of peremptory norms being unilaterally and arbitrarily invoked to override other rules of international law, this issue does not arise in the case of the invasion of Ukraine.



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Three obligations for states

Article 41 of the ARSIWA deals with the particular consequences of a serious breach of a peremptory norm. The provision contains three obligations for states, which are discussed in turn in this part.

— 1

The obligation to cooperate to bring to an end the serious breach

The obligation to cooperate is a general obligation under international law.⁵ On the basis of this fairly open-ended general obligation to cooperate, the ILC has also recognised a more specific obligation to cooperate focused on bringing to an end a serious breach of a peremptory norm.⁶ This obligation is laid down in Article 41 (1) of the ARSIWA and conclusion 19 (1) of the ILC's draft conclusions on peremptory norms.

The following aspects of this more specific obligation are considered in this section:

(i) the status of the obligation to cooperate, (ii) the question of at what level, where and how the cooperation should take place, and (iii) the content of the obligation to cooperate to bring to an end a serious breach of a peremptory norm.

(i) Is there a specific obligation to cooperate in order to bring to an end a serious breach of a peremptory norm?

The obligation to cooperate to bring to an end a serious breach of a peremptory norm was introduced by the ILC in 2001 as a measure of 'progressive development'.⁷ However, even at that stage it was indicated that such cooperation was already taking place, mainly within the framework of international organisations such as the United Nations. As stressed by the ILC at the time, cooperation to bring to an end serious breaches is 'often the only way of providing an effective remedy'.⁸

In 2022, the ILC plainly stated that the obligation to cooperate to bring to an end a serious

breach of a norm of *jus cogens* is now generally recognised under international law.⁹ There seems to be little resistance among states to the existence of this obligation to cooperate. The customary law status of this obligation was hardly disputed during the debate in the Sixth Committee of the General Assembly or in subsequent written comments and observations.¹⁰ Like Australia and Japan, the Netherlands requested the ILC to provide support for its position on the existence of the obligation by giving examples of state practice and *opinio juris*.¹¹ The examples of resolutions mentioned by the ILC could be seen as complying with this request.¹² The CAVV infers from the above that the existence of an obligation under customary international law to cooperate to bring to an end serious breaches of peremptory norms can count on sufficient support from states.

However, despite sufficient support for the existence of such an obligation, much is uncertain about the precise content of the obligation. In the sections below, the CAVV will endeavour to provide clarification by reference to the scarce legal practice in this field.

(ii) At what level, where and how should cooperation take place?

It follows from the nature of the obligation to cooperate that it is intended to be fulfilled primarily through cooperation within international organisations.¹³ Moreover, a preference for the UN may follow from the nature of the peremptory norms, as they are of concern to the international community as a whole.¹⁴ As regards the right to self-determination, the ICJ has indeed expressed a preference for the UN in two cases, the first concerning the former mandated territory of Palestine and the other the decolonisation of the Chagos archipelago.¹⁵ In these contexts, the ICJ's preference for the UN can be explained by reference to the special procedures with regard to self-determination under the UN Charter. However, such a preference may be less logical or persuasive in the case of other peremptory norms. The question



therefore arises of whether, in the case of other breaches of peremptory norms, such as breaches of the prohibition of aggression, the obligation to cooperate can also be discharged outside the UN collective system.

In the case of the prohibition of aggression, which is the peremptory norm on which this advisory report focuses, the UN Security Council has primary responsibility for maintaining international peace and security. However, as the permanent members have the power to veto resolutions, an absolute preference for cooperation within the UN Security Council could in effect abrogate the obligation to cooperate, especially where a permanent member is itself the aggressor, as in the case which has given rise to this advisory report. Japan has raised the question of whether the obligation to cooperate in order to bring to an end a breach of a peremptory norm should not also be read as meaning that the permanent members have an obligation to refrain from exercising their power of veto in situations involving a serious breach of a peremptory norm.¹⁶ Other countries have also expressed their views on the veto issue and the dysfunctional operation of the UN Security Council, in particular in the present situation.¹⁷ A conclusion that can in any event be drawn from these discussions is that in such situations it is important to look for solutions outside the UN Security Council. It is logical that the preferred forum for cooperation within the UN would then become other UN organs, especially the General Assembly and the Human Rights Council. There are countless examples of resolutions of these organs condemning breaches of peremptory norms such as the prohibition of aggression and genocide, calling for the cessation of such breaches and/or establishing accountability mechanisms.¹⁸ Moreover, on 26 April 2022 the General Assembly adopted a resolution providing for a standing mandate for a General Assembly debate when a veto is cast in the Security Council.¹⁹ Although the General Assembly cannot impose obligations on states (except in relation to internal matters such as the UN budget), a widely supported resolution calling on states to cooperate in a particular way to bring to an end a serious breach of a peremptory norm carries considerable weight. Alternative forms of cooperation *within* the framework of

the United Nations are thus possible. The CAVV therefore wishes to emphasise the general, albeit not exclusive, preference for cooperation within international organisations, with a specific preference for the United Nations. This preference for cooperation within international organisations also extends to determining that a breach of a peremptory norm has occurred, as the CAVV also indicated in a previous advisory report.²⁰ This is partly with a view to preventing abuse of the special rules applicable to peremptory norms.

However, the obligation to cooperate may also be implemented by non-institutionalised means, i.e. outside international organisations.²¹ Notwithstanding a preference for the UN or international organisations more generally, both the determination that a serious breach of a peremptory norm has occurred and the cooperation can take place outside the UN. In its previous advisory report on peremptory norms, the CAVV welcomed the ILC's observation that states ought to enact measures to end breaches of peremptory norms even outside the framework of international institutions.²² It is important to note here that the ICJ stressed, in its advisory opinion on the wall constructed by Israel, that all states have an obligation to ensure that such breaches are brought to an end.²³ Every state must endeavour to bring the situation to an end. Especially where cooperation within the UN fails to achieve sufficient results, it is up to states to ensure that the obligation to cooperate to end the breach is discharged even outside the framework of the UN, either in coalitions or through regional organisations. Regional organisations can be a particularly good alternative when the state that has breached the peremptory norm is itself a member of that organisation. In the situation that has given rise to this advisory opinion, the Council of Europe would, until recently, have been a good alternative.²⁴

(iii) *What is the content of the obligation to cooperate?*

A crucial question concerns the content of the obligation to cooperate. What exactly is expected of states? This is not an easy question to answer because existing practice is limited and what the obligation entails depends on the peremptory norm that has been breached. Within the United



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Nations, the obligation to cooperate is often shaped through resolutions adopted by the UN General Assembly and the UN Human Rights Council condemning breaches of peremptory norms, calling for the cessation of such breaches and/or establishing accountability mechanisms. Taking collective measures of this kind is regarded as the essence of the obligation to cooperate.²⁵

This raises the question of whether states contravene the obligation to cooperate either in letter or in spirit if they vote against or abstain from voting on a condemnatory resolution. This is not an easy question to answer. Resolutions often contain a variety of considerations and provisions and may also include, for example, proposals for the way in which a breach of peremptory norms is to be brought to an end. The fact that a state votes against or abstains from voting on such a resolution does not therefore automatically mean that it refuses to condemn the breach as such. It is also necessary to distinguish between a vote against and an abstention. States may have good reasons for abstaining from voting and at the same time adopt a constructive approach to measures designed to end the breach.²⁶ Moreover, an abstention does not affect the possibility of obtaining a qualified majority in favour of the resolution because the state in question is not counted when the voting proportions are calculated.²⁷ This is not the case with a vote against the resolution. It is therefore important to ascertain the motives of a state that votes against: does it refuse to condemn the breach as such and, if so, on what grounds, or does it object to other aspects of the resolution? In specific circumstances, for example if a state does not act in good faith, it cannot be excluded that a refusal to vote in favour of a resolution condemning the breach as such could be regarded as a violation of the obligation to cooperate. Such a position could be said to follow from the view that taking collective measures, including the adoption of resolutions identifying and/or condemning violations, is the essence of the obligation to cooperate.²⁸ As yet, however, there are no examples in practice of cases in which a vote against has been regarded as amounting to a violation of the obligation to cooperate. It is therefore important for states that hold this view

to expressly articulate this position and to take steps to create relevant practice. They can do this, for example, by requesting states that vote against a condemnatory resolution to give an explanation of their vote, especially in the event of repeated negative votes. Such an explanation could clarify the circumstances of the case and thus provide a clearer picture of the motives of the state concerned for voting against the resolution. It could also pave the way for entering into a dialogue with that state.

A further question is whether the obligation to cooperate goes beyond condemning the breach, requesting that it be brought to an end and/or establishing collective accountability mechanisms. In other words, can the obligation to cooperate extend to actively taking measures? In its advisory opinion on the Chagos Archipelago, the ICJ considered that cooperating with the UN to put into effect the modalities for the decolonisation of Mauritius was part of the obligation to cooperate.²⁹ This presupposes that the obligation to cooperate can indeed also include active measures. However, the choice of which kinds of measures to take is left to states themselves and depends on the circumstances.³⁰

An important condition is that the measures taken must be consistent with international law.³¹ This condition is important regardless of whether states cooperate within or outside the framework of the UN. However, in the latter case vigilance is required as in these circumstances there will be no institutional safeguards for the lawfulness of measures. The issue of how unilateral sanctions, as a form of cooperation, relate to international law is examined in part II of this advisory report.³²

As noted earlier, the obligation to cooperate amounts to an obligation of conduct which requires states to discharge the obligation to the best of their ability. This also means that they can discharge it in different ways, depending in part on their capabilities. They must be able to demonstrate, however, that they have done everything that could reasonably be expected of them. This can be inferred from the ICJ's judgment on the crime of genocide in Bosnia, in which it held that an obligation of conduct requires states to employ all means reasonably available to them. The ICJ also held that the argument that the individual measures taken by a state would



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not have been sufficient to achieve the intended result is irrelevant. Its reasoning was that ‘the possibility remains that the combined efforts of several States, each complying with its obligation [...], might have achieved the result [...] which the efforts of only one State were insufficient to produce.’³³ On the basis of this principle, states can also hold each other accountable for an alleged lack of effort and/or ask each other for an explanation of how they have implemented the obligation to cooperate.

The emphasis on the ‘combined efforts of several States’ also means that states must not directly undermine the measures taken by other states to implement the obligation to cooperate. This may be the case, for example, where states deliberately frustrate economic sanctions imposed by other states. If a state, acting deliberately and in bad faith, undermines measures taken by other states, this could be qualified as a breach of the obligation to cooperate. It is up to those other states to explicitly qualify such actions as a breach. This could then be a basis for justified countermeasures to act against the undermining of the measures.³⁴ In such cases, it could also possibly be argued that the state concerned may be in breach of its obligation not to render aid or assistance in maintaining the situation, as discussed below.

Another question that arises is whether expressing political support for a state that breaches peremptory norms violates the obligation to cooperate. Reference can be made here to the report of the ad hoc committee on humanitarian intervention and political support for interstate use of force established by the Ministry of Foreign Affairs, which states that expressing political support for breaches of peremptory norms violates the spirit of the obligation to cooperate in bringing such breaches to an end.³⁵ The CAVV agrees with this position.

Finally, it should be noted that where states or coalitions of states take measures, especially outside the framework of the UN, they must clearly indicate that the measures are intended to implement the obligation to cooperate and that they believe they have a duty to take them under international law. In this way, these states

help to clarify what is entailed by the obligation to cooperate with a view to bringing to an end a serious breach of peremptory norms. Examples of measures that may be regarded as having been taken to implement the obligation to cooperate are: arms deliveries, the imposition of sanctions (see also part II of this advisory report) and helping to establish and operate accountability mechanisms. Moreover, measures to admit people fleeing the situation in which the serious breaches are committed can help to end other violations of international law, for example violations of international humanitarian law and the prohibition of crimes against humanity.

— 2

The obligation not to recognise as lawful the situation created by the serious breach

(i) *Is there an obligation of non-recognition?*

An obligation of non-recognition is set out in article 41 (2) of the ARSIWA and conclusion 19 (2) of the ILC draft conclusions on peremptory norms. As early as 2001, the ILC described this obligation as having the status of customary international law.³⁶ Indeed, there is a considerable body of legal practice expressing the obligation, for example in relation to the racist minority regime in Southern Rhodesia in the 1960s, Iraq’s invasion of Kuwait in the 1990s and the construction of a separation wall by Israel, partly in and partly bordering on the Palestinian territories, in the early 2000s.³⁷ At the same time, the existing practice is limited to situations arising from breaches of some specific peremptory norms, including the prohibition of aggression.³⁸ This is not illogical, because recognition can be withheld only when there is a situation that requires recognition, for example when an aggressor proclaims a new state. In view of this practice, the CAVV agrees with the ILC’s position that the obligation not to recognise the situation created by a serious breach of a peremptory norm has the status of customary international law.

(ii) *What is expected of states?*

The obligation not to recognise as lawful the situation created by the serious breach means that states must *refrain* from any action that



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could entail recognition. It therefore constitutes a negative obligation (i.e. an obligation to refrain from doing something), in contrast with the obligation to cooperate in order to bring to an end a breach of peremptory norms, which requires positive action from states. It is also important to note that the obligation of non-recognition specifically relates to the situation created by the breach of a peremptory norm. This means, among other things, that states may not recognise a change in the territorial status quo, such as occurs when an independent state is proclaimed on parts of the territory of a state occupied as the result of aggression or when efforts are made to become part of another state.³⁹ This obligation also applies to the aggressor state itself. It may not attempt to maintain a situation created by a breach of the prohibition of aggression by recognising a new state or by annexing the conquered territory.⁴⁰

Moreover, the obligation of non-recognition applies both to formal recognition (a political statement) and to other acts that could be interpreted as amounting to recognition.⁴¹ Examples of implicit recognition of this kind include concluding a treaty with the state that has been unlawfully created (also referred to as a *de facto* state) or with the aggressor state, or entering into diplomatic, economic and consular relations with them. In addition, states may not recognise travel documents issued by a *de facto* state or aggressor state.⁴² As regards relations with the aggressor state itself, it should be noted that these rules only apply when that state acts on behalf of the territories concerned or when agreements are made that affect those territories. This follows from the observation that the obligation of non-recognition only relates to a situation created by a breach of a peremptory norm.

However, the obligation of non-recognition does not go so far as to exclude any form of cooperation with *de facto* states or annexed territories. As long ago as 1971, the ICJ formulated an exception to the obligation based on humanitarian grounds. More specifically, it considered that withholding recognition from South Africa's administration of Namibia should not result in the people of Namibia being deprived of any advantages derived

from international cooperation.⁴³ This so-called 'Namibia exception' has been followed in both UN and state practice.⁴⁴ The exception is also reflected in international occupation law, under which occupying powers are permitted to administer public property in occupied territory in so far as they act in the interests of the local population. It follows that occupying powers must also be able to enter into international (trade) relations when this is in the interests of the local population, which constitutes an exception to the general rule that entering into economic relations with an aggressor breaches the obligation of non-recognition, as set out above. States must therefore determine on a case-by-case basis whether there are humanitarian reasons that justify minimal relations with a *de facto* state or occupying power. Minimal relations of this kind do not infringe the obligation not to recognise the situation created by the breach of a peremptory norm.

A final question concerns the nature of the obligation of non-recognition: is taking a decision not to recognise a specific situation the responsibility of states individually or is a collective decision required? In the commentary to the articles on state responsibility, the ILC specifically refers to an obligation of collective non-recognition.⁴⁵ The ICJ's advisory opinion on Namibia is also sometimes interpreted as evidence that a formal decision must be made by the UN's political organs. The CAVV does not support this position. It is apparent from several authoritative statements by the UN General Assembly, including the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, that states are bound by the obligation of non-recognition whether or not a collective decision is taken.⁴⁶ However, a collective decision can carry weight and clarify the content of the obligation of non-recognition in a specific case.

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The obligation not to render aid or assistance in maintaining the situation

(i) *Is there an obligation not to render aid or assistance?*



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The obligation not to render aid or assistance in maintaining the situation created by a breach of a peremptory norm is contained in Article 41 (2) of the ARSIWA and in conclusion 19 (2) of the ILC's draft conclusions on peremptory norms. In 2001, this obligation too was classified by the ILC as being of a customary law nature.⁴⁷ As indicated in its earlier advisory report, the CAVV supports the position taken by the ILC in this regard.⁴⁸

(ii) What is expected of states?

Like the obligation of non-recognition, the obligation not to render aid or assistance in maintaining the situation created by a breach of a peremptory norm is of a negative nature: in other words, states must refrain from any actions that help to maintain the situation. Once again, this is explicitly about rendering aid and assistance in maintaining the situation created by the breach and not about maintaining the breach itself. This does not imply that states evade responsibility if they provide aid and assistance in maintaining the breach itself. However, this responsibility is based on Article 16 of the ARSIWA, which provides that a state which aids or assists another state in the commission of an internationally wrongful act is itself responsible if it does so with knowledge of the circumstances of the internationally wrongful act and the act would also be internationally wrongful if committed by that state itself. For example, a state that knowingly makes its territory available to an aggressor state so that the latter can carry out attacks from that territory is complicit in the aggression itself.⁴⁹

Article 41 (2) of the ARSIWA relates to the provision of aid and assistance in maintaining the situation that has been created by the breach, regardless of whether or not the breach itself still continues.⁵⁰ According to the ILC, this provision should be read in connection with Article 16 of the ARSIWA on complicity in an internationally wrongful act.⁵¹ It follows from this connection that there must be a causal relationship between the aid rendered and the maintenance of the situation caused by the breach of a peremptory norm.⁵² Arms deliveries to the aggressor state are a typical example of rendering aid and assistance, either in the commission of the breach itself (when the arms are used to conquer territory)

or in maintaining the situation (when the arms are used to maintain military superiority).⁵³ The undermining of measures (including sanctions) taken by other states with the aim of bringing to an end the situation caused by the breach may, in certain circumstances, also amount to aid or assistance within the meaning of Article 41 (2) of the ARSIWA. This is especially the case when the state undermining the measures is aware that these actions help to maintain the situation.

Finally, it should be noted that it is not always easy in practice to draw a clear distinction between acts that violate the obligation of non-recognition on the one hand and acts that are tantamount to the rendering of aid or assistance on the other. For example, should maintaining diplomatic relations with an aggressor state in relation to the occupied territories be regarded as a breach of the obligation of non-recognition or as the rendering of aid and assistance or as both? It may be asserted that the obligation not to render aid or assistance relates to concrete measures that have a direct impact on the wrongful situation that must be brought to an end, whereas non-recognition relates to the more general, political forms of aid and assistance.⁵⁴ However, the two obligations are complementary and the possibility of some overlap cannot therefore be excluded.



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The lawfulness of countermeasures taken in the general interest



The request for advice also raises the question of whether states may take countermeasures, individually or collectively, in the general interest in response to a serious breach of a peremptory norm, even if they themselves are not directly injured by the breach in question. The following aspects of this question are dealt with below: (i) terminology, (ii) the lawfulness of countermeasures taken in the general interest, (iii) objections to unilateral measures, and (iv) points for consideration.

— 1

Terminology

Countermeasures are measures taken by states that would, in normal circumstances, constitute a breach of international law, but whose wrongfulness is precluded by the fact that they are a justified response to an earlier breach by another state. Countermeasures taken in the general interest by states that are not themselves directly injured by the previous breach are referred to variously as ‘third party countermeasures’, ‘third State countermeasures’, ‘collective countermeasures’, ‘countermeasures in the name of community interests’, etc. The term mainly employed in this advisory opinion is ‘countermeasures in the general interest’.

In common parlance, measures are often called ‘sanctions’, especially in connection with measures announced by an international organisation (or one of its organs), such as the UN Security Council or the Council of the European Union. However, as the word ‘sanctions’ does not appear as such in the founding treaties of these organisations,⁵⁵ this advisory report refers more generally to ‘measures’, which is also the term customarily employed in the international law on state responsibility.

From a legal perspective, a distinction should

also be made between acts of retorsion and countermeasures. An act of retorsion is a measure taken in response to a prior breach of international law, but needs no justification as it does not in itself constitute in any way a breach of an obligation of the state or organisation. It follows that acts of retorsion are, by definition, lawful measures and can therefore always be taken in response to a breach of international law. Whether a measure should be qualified as a countermeasure or an act of retorsion will depend on the obligations by which a state or organisation is bound under international law, which may differ from one situation to another and from one state or organisation to another. Typical acts of retorsion are the expulsion of diplomats and the severance of diplomatic relations, as well as the imposition of entry bans and import and export bans that do not constitute a breach of international obligations.

In accordance with the request for advice, this report focuses on measures that breach international obligations and should therefore be classified as countermeasures (taken in the general interest). Countermeasures may, above all, restrict political, economic, financial, cultural and other activities. Countermeasures cannot involve the use of military or armed force.⁵⁶ Typical examples of countermeasures are the severance of economic relations and the freezing of official bank balances contrary to international obligations.

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Lawfulness of countermeasures taken in the general interest

Countermeasures may be taken by states or international organisations in response to a previous breach of international law that directly affects them.⁵⁷ The characteristic feature of countermeasures is that they would normally

constitute a breach of obligation(s) by the state or organisation taking them, but their wrongfulness is precluded by the existence of the earlier breach of an obligation: the measures are deemed justified.⁵⁸

The question which the CAVV must consider is whether states that are *not* directly affected may also take countermeasures in the general interest if the prior breach by the other state constitutes a serious breach of a peremptory norm. The ILC indicated in 2001 that states that are not directly affected may invoke the responsibility of the wrongdoing state and demand cessation of the serious breach. States not directly affected may also require assurances and guarantees of non-repetition, and may claim fulfilment of the duty of reparation, compensation or redress for the benefit of an injured state or organisation or for the beneficiaries of the obligation. However, the idea that non-affected states may also take countermeasures encountered resistance.⁵⁹

It was for this reason that the ILC decided to include Article 54 in the ARSIWA, a provision which left unanswered the question of the lawfulness of countermeasures taken in the general interest.⁶⁰ Nor has this question been addressed in the ILC's recent work on peremptory norms, despite urging from the Dutch government.⁶¹ The CAVV regrets this omission and considers it at odds with the state of international law on this point, especially in view of recent state practice. Before discussing this more recent practice, it may be noted that the practice of countermeasures taken by non-affected states or international organisations was already much more widespread before 2001 than the ILC's commentary to Article 54 of the ARSIWA suggests.⁶² Moreover, the states involved in this (early) practice were by no means only Western states, but in fact states from other parts of the world as well.⁶³ Even more so, well into the second half of the 1990s the ILC was still taking the position that in the event of a breach of collective obligations and obligations towards the international community, every state (or every state bound by the norm in question) ought to be considered an 'injured State'.⁶⁴ Indeed, at that time the provisions on countermeasures were otherwise fully applicable in cases involving breaches of collective obligations and obligations towards the international community.⁶⁵

This practice of taking measures in the general interest has continued since 2001. Such measures have been taken against Sudan, Myanmar, Zimbabwe, Belarus, Libya, Syria and Russia, with non-Western states also being involved in some of these cases.⁶⁶ Since the military coup and the overthrow of Myanmar's civilian government, the EU and others have announced new restrictive measures.⁶⁷ Naturally, the last and most recent example are the very far-reaching restrictive measures taken against Russia, mainly but not exclusively by Western states.⁶⁸ Mention should also be made here of measures taken against states that are directly involved in the Russian aggression, such as Belarus and Iran.⁶⁹ Moreover, non-Western states are also imposing sanctions more frequently. It is not always clear whether these are acts of retorsion or countermeasures, but this practice does show that legal views on what is permissible and lawful, and practice itself, are evolving. For example, reference may be made here to various measures taken against Qatar by Saudi Arabia, the United Arab Emirates, Bahrain and Egypt between 2017 and 2021.⁷⁰ The practice of states such as China, Russia and India is also evolving.⁷¹

This growing and evolving body of practice may allow for the inference of an *opinio juris* that measures of this kind can be lawful.⁷² It should also be noted here that many of the measures taken did not result in protests from other states and sometimes even had their backing,⁷³ although there were, of course, protests from the target states, occasionally supported by other states.⁷⁴ Although this *opinio juris* is implicit, states have also expressed themselves more explicitly from time to time.⁷⁵ For example, the EU has indicated that unilateral economic measures are permissible in certain circumstances, in particular in order to combat terrorism and the proliferation of weapons of mass destruction and to guarantee respect for human rights, democracy, the rule of law and good governance.⁷⁶ The CAVV advises the government, repeatedly and at appropriate opportunities, to state its views explicitly on the lawfulness of countermeasures taken in the general interest.



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A large group of states reject unilateral measures as inconsistent with the principles of international law contained in the UN Charter, with basic principles of the multilateral trading system (freedom of trade and investment and fair competition), with the sovereignty of developing countries (sovereign equality), with the duty of non-intervention in internal affairs, with principles of peaceful relations among states, with the duty to cooperate or with human rights.⁷⁷ On the basis of considerations of this kind, General Assembly resolutions use the term ‘unilateral coercive measures’, which refers mainly to political and economic coercion against developing countries and does not clearly distinguish between countermeasures and acts of retorsion.⁷⁸ This section discusses two major objections. First, that only the UN Security Council may impose coercive measures and, second, that measures in the general interest violate the principle of non-intervention.

The UN Security Council has the power to impose coercive measures under Chapter VII of the UN Charter.⁷⁹ Such coercive measures may be imposed by the Security Council in the event of threats to the peace, breaches of the peace and acts of aggression.⁸⁰ However, these measures do not constitute a *lex specialis* that would override the general rules on countermeasures.⁸¹ The UN Security Council does not have an all-inclusive mandate to enforce international law. The view that the law on coercive measures is laid down exclusively and exhaustively in the UN Charter and thus precludes unilateral measures by member states is incorrect.⁸² As such, member states therefore retain the freedom, within the limits of international law, to take measures to enforce that law.⁸³

The question arises of whether coercive measures can be qualified as contrary to the principle of non-intervention, which prohibits states from intervening in the internal and external affairs of other states. According to the ICJ in the Nicaragua case, an intervention is ‘prohibited’ if it relates to matters in which each state is permitted, by the principle of state sovereignty, to decide freely. As examples of

such matters, the ICJ cites the choice of a state’s political, economic, social and cultural system and the formulation of its foreign policy. According to the ICJ, intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.⁸⁴

Although unilateral restrictive measures are, in principle, of a coercive nature,⁸⁵ countermeasures in the general interest cannot be considered as a ‘prohibited’ or ‘wrongful’ intervention in the internal or external affairs of the target state. This is because they are a response to violations of international law and are intended to induce the wrongdoing state to cease its wrongful act, offer assurances or guarantees of non-repetition and provide reparation, compensation or redress for the benefit of the directly injured state or beneficiaries. Under the rules on state responsibility, the target state cannot decide freely on such matters since it has violated international law and is obliged to undo and make good its violation(s).⁸⁶

The objections should be taken seriously in so far as they concern the undesirable effects of countermeasures and of sanctions in a more general sense. But this does not mean that countermeasures in the general interest are necessarily wrongful. General Assembly resolutions criticising coercive measures are passed on the basis of a variety of different considerations, which may partly explain why the vote is split between around 130 developing countries voting for and some 50 developed countries voting against or abstaining.⁸⁷

The CAVV considers that countermeasures taken in the general interest are an important means of addressing the most serious violations of international law. Their importance is even greater in situations in which the wrongdoing state is a permanent member of the UN Security Council. In view of these considerations and also, in particular, the manner in which practice is growing and evolving as discussed in the previous section, the CAVV considers that it is defensible to argue that countermeasures in the general interest may be lawful in certain circumstances. Indeed, the CAVV even considers the application of these measures to be desirable in certain circumstances in response to the serious violations of international law discussed



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in this advisory report.

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Points for consideration

While the objections discussed in the previous section do not warrant the conclusion that countermeasures in the general interest are necessarily unlawful, they do show that there are legitimate concerns about abuses or excessive measures.⁸⁸ The CAVV recognises these concerns and therefore considers that further regulation would be desirable in order to clarify the conditions for taking countermeasures in the general interest. This would be particularly desirable because the ARSIWA rules tend to concentrate on regular (i.e. bilateral) countermeasures.

Clarification would be welcome on the following aspects:

- *Nature of the obligations and seriousness of the breaches:* First, the CAVV considers that there should be greater clarity about when countermeasures may be taken in the general interest, in other words in response to what breaches exactly? It may be assumed that not all collective obligations are accorded equal weight,⁸⁹ even if it is often stated that all human rights are 'inalienable and indivisible'. Likewise, it can be argued that not every obligation to protect the environment in areas outside national jurisdiction should be capable of leading to countermeasures by other states in the event of a breach. A choice could be made to limit the admissibility of countermeasures in the general interest to serious breaches of peremptory norms and for certain collective obligations only.⁹⁰

- *Determination of breach(es):* In view of the horizontal nature of relations between states, based on the principle of their sovereign equality, the starting position under international law is that each state establishes for itself when an obligation has been violated.⁹¹ As collective obligations and obligations to the international community primarily serve the general interest of states, the CAVV considers that that any action should be taken as far as possible in a multilateral context, especially through the

procedures of the UN,⁹² and that countermeasures in the general interest should *preferably* be taken once the occurrence of the serious breaches has been determined in a multilateral context and hence not solely on the basis of a unilateral determination.

- *Dispute settlement:* Given the horizontal nature of relations between states, one state cannot make decisions that are binding on another state. When a state, group of states or international organisation takes countermeasures in the general interest, this does not amount to a conclusive or even convincing determination that another state has committed a breach of international law. It follows that countermeasures may result in disputes with the target state as to whether a breach has actually been committed, whether countermeasures are justified or whether the conditions for taking them have been fulfilled. Disputes may, of course, be submitted to international tribunals or courts, but in such a case international law requires that the states involved have consented to their jurisdiction. In view of the importance of countermeasures taken in the general interest and the support that is also requested from other states for such measures, the CAVV believes that, in principle, there should be a willingness to cooperate in settling disputes about countermeasures. However, a prerequisite is that an international tribunal or court can also rule on possible breaches by the target state.⁹³ It should be noted here that the Kingdom of the Netherlands has broadly recognised the jurisdiction of the International Court of Justice (ICJ), without many restrictive conditions, by means of a declaration as referred to in Article 36, paragraph 2 of the ICJ Statute, and that disputes about countermeasures can therefore potentially be brought before the ICJ.⁹⁴

- *Proportionality:* If countermeasures are taken in parallel by a (large) number of states, this may raise questions about the proportionality of those measures when viewed together in relation to the earlier breach or breaches, given the seriousness and effects of the breach(es) and the object of the measures.⁹⁵ The question is whether Article 51 of the ARSIWA takes sufficient account of the situation that arises when countermeasures are taken in parallel. It should be pointed out, however, that countermeasures



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taken in response to a flagrant breach of the prohibition of aggression, such as the measures taken in response to the current invasion of Ukraine by Russia, which has also involved systematic violation of core rules of international humanitarian law, could be regarded as disproportionate only in the most exceptional cases.

- *Unintended consequences*: Countermeasures taken by states collectively could potentially have serious unintended consequences for states other than the target states.⁹⁶ In such a case, the states taking countermeasures should be prepared, by analogy with Article 50 of the UN Charter,⁹⁷ to enter into consultations with affected states in order to find a solution to any special economic problems that may result from the measures.

- *Fundamental human rights*: The minimum threshold for the lawfulness of countermeasures is that they must not violate fundamental human rights.⁹⁸ In General Comment 8, the Committee on Economic, Social and Cultural Rights also indicated that it is essential to distinguish between political and economic pressure on the governing elite of a country to persuade them to conform to international law and potential collateral damage to the most vulnerable groups within the targeted state. Examples of fundamental human rights that are important in this context are the prohibition of starvation of civilians as a method of warfare in the context of an international armed conflict and Article 1, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights, which states that '[i]n no case may a people be deprived of its own means of subsistence.'⁹⁹ Although it is important to have a minimum threshold for the lawfulness of countermeasures, it should be noted that primary responsibility for respecting and safeguarding human rights lies with the government of the state against which the measures are directed. It should also be noted that not only may human rights be derogated from in certain circumstances, but they may also be restricted in many cases for legitimate purposes such as national security. Nonetheless, it is important for sanctions regimes involving countermeasures and acts of retorsion to include clear provisions on humanitarian exemptions from sanctions, for example for agricultural

produce, pharmaceuticals and medical supplies. Greater procedural clarity is also desirable with regard to the restrictions that states or international organisations, especially the EU, impose on persons within their jurisdiction who are subject to targeted sanctions.

The CAVV is of the opinion that the government can take the above points and suggestions into consideration when formulating its own policy and providing input for the EU's policy on taking countermeasures in the general interest.



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Conclusion and advice



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This advisory report concerns the international rights and obligations of states (including third states) in the event of serious breaches of peremptory norms of general international law, in particular the prohibition of aggression. This final section summarises the key elements of the report point by point.

1. Peremptory norms of international law protect the fundamental values of the international community. They are hierarchically superior to other rules of international law and are universally applicable. Although there is, in general, a real risk of peremptory norms being unilaterally and arbitrarily invoked to override other rules of international law, this does not arise in the case of the invasion of Ukraine.
2. Article 41 of the Articles on State Responsibility (ARSIWA) sets out the following three specific obligations requiring states to take action in order to bring to an end serious breaches of peremptory norms, including a breach of the prohibition of aggression, namely: (1) the obligation to cooperate in order to bring the breach to an end, (2) the obligation not to recognise as lawful a situation created by the breach, and (3) the obligation not to render aid or assistance in maintaining that situation.
3. The obligation to cooperate in order to bring to an end a serious breach of a peremptory norm has the status of customary international law. The obligation should preferably be effectuated within international organisations, and more specifically within the UN. If cooperation within the UN fails to achieve sufficient results, it is up to states to ensure that the obligation to cooperate to end the breach is discharged even outside the framework of the UN, either in coalitions or through regional organisations. As yet there is no definitive answer to what exactly the obligation to cooperate entails. It is therefore important, especially when states or coalitions of states take measures outside the framework
- of the UN, to clearly indicate that the measures are intended to implement the obligation to cooperate and that the states concerned believe they have a duty to take them under international law. If a state, acting deliberately and in bad faith, undermines measures taken by other states, this could be qualified as a breach of the obligation to cooperate.
4. The obligation not to recognise the situation that has arisen as a result of the serious breach has the status of customary international law and applies to both formal and implicit recognition. In addition, states must not recognise travel documents issued by a de facto state or aggressor state. Minimal relations with a de facto state or an occupying power may be justified on humanitarian grounds. It is up to each individual state to fulfil the obligation of non-recognition; no collective decision is required.
5. The obligation not to render aid or assistance in maintaining the situation has the status of customary international law. Arms deliveries to the aggressor state are a typical example of rendering aid and assistance in maintaining the situation, for example where the arms are used to maintain military superiority. The undermining of measures (including sanctions) taken by other states with the aim of bringing to an end the situation caused by the breach may, in certain circumstances, also amount to aid or assistance in maintaining the situation. This is especially the case when the state undermining the measures is aware that these actions help to maintain the situation.
6. Third states, i.e. states that are not directly injured themselves, can also respond to serious breaches of peremptory norms of general international law by imposing sanctions. Sanctions regimes may consist of measures that do not violate international law (acts of retorsion) and measures that do violate international law but are justified by the earlier serious breach of peremptory norms to which they are a response



(countermeasures in the general interest). In view of the existing and substantial body of practice involving countermeasures taken in the general interest, including those taken by non-Western states, the CAVV concludes that countermeasures in the general interest are, in certain circumstances, lawful under international law. The CAVV advises the government, repeatedly and at appropriate opportunities, to explicitly state its views on the lawfulness of countermeasures taken in the general interest.

7. Although the objections raised to countermeasures taken in the general interest do not necessarily mean that such measures are unlawful, they do show that there are legitimate concerns about abuses or excessive measures. The CAVV recognises these concerns and therefore considers that further regulation would be desirable, particularly because the ARSIWA rules tend to focus on regular (i.e. bilateral) countermeasures. Further regulation of the following points would be especially desirable:

- Nature of the obligations and seriousness of the breaches;
- Determination of breach(es);
- Dispute settlement;
- Proportionality;
- Unintended consequences;
- Fundamental human rights.



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Notes



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- ¹ Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) deals with the particular consequences of a serious breach of peremptory norms and reads as follows: ‘1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40; 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation; 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.’ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)’, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 26.
- ² CAVV, *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Report no. 37, 27 July 2020.
- ³ Resolution of the General Assembly, 2 March 2022, UN Doc. A/RES/ES-11/1 (votes for: 141; votes against: 5; abstentions: 35; non-voting: 12).
- ⁴ Peremptory norms of general international law (*jus cogens*) in: ILC, *Report of the seventy-third session*, UN Doc. A/77/10 10 (2022), p. 11.
- ⁵ For example, see ‘The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970)’, General Assembly resolution of 24 October 1970, UN Doc. A/RES/2625(XXV), Annex, paragraph 1 (‘States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences’).
- ⁶ ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (2), p. 71. See also commentary at (9), pp. 73-74.
- ⁷ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)’, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 41, commentary at (3), p. 114.
- ⁸ Ibid.
- ⁹ ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (2), p. 71. See commentary at (9), pp. 73-74.
- ¹⁰ See the deliberations of the Sixth Committee in the 74th session. See also Comments by Governments, 73rd session of the International Law Commission (2021), UN Doc. A/CN.4/748. Only Israel, the United Kingdom and the United States question the customary law status of the obligation.
- ¹¹ The Dutch request was in keeping with the CAVV’s recommendation in *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Report no. 37, 27 July 2020.
- ¹² ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)’ in: *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 114, Article 41, commentary at (3).
- ¹³ Ibid. This can also be inferred from the examples of resolutions that the ILC has included in the commentary to conclusion 19.
- ¹⁴ This preference is emphasised by the ICJ in the cases considered below. The preference for the UN is also stated explicitly in conventions in which peremptory norms are central, such as Article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 December 1948, United Nations, *Treaty Series*, vol. 78, p. 277, and Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1969. United Nations, *Treaty Series*, vol. 660, p. 195.
- ¹⁵ ICJ, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, p.



- 136, paragraphs 159-160; and ICJ, 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, paragraphs 178-180. In these cases, the ICJ refers to obligations erga omnes and not to peremptory norms. In general, all peremptory norms can be said to give rise to rights and obligations erga omnes, in other words these norms entail rights and obligations for all states because the entire international community is deemed to have an interest in protecting such norms. See also conclusion 17 of the ILC draft conclusions on peremptory norms, ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 17.
- ¹⁶ UN Doc. A/CN.4/748, p. 87.
- ¹⁷ See, for example, the explanations of vote given by states when voting for the resolution adopted by the UN General Assembly on a ‘Standing mandate for a General Assembly debate when a veto is cast in the Security Council’, UN Doc. A/RES/76/262, 26 April 2022, discussed below. For the explanations of vote, see UN Doc. A/76/PV.69.
- ¹⁸ As regards Ukraine, see General Assembly resolution UN Doc. A/RES/ES-11/1 of 2 March 2022, paragraphs 2, 5 and 11; and UN Human Rights Council resolution, 4 March 2022, UN Doc. A/HRC/RES/49/1 paragraph 11. For other examples, see ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (9), pp. 73-74.
- ¹⁹ Resolution of the UN General Assembly on a Standing mandate for a General Assembly debate when a veto is cast in the Security Council, A/RES/76/262, 26 April 2022. This resolution builds on the original basis for this, namely General Assembly resolution, UN Doc. A/RES/377 (V), *Uniting for Peace*.
- ²⁰ The CAVV/EVA’s *Advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians* contains the following passage: ‘Given the Netherlands’ commitment to advancing the international legal order, the preferred course of action is for the government and parliament to support the determinations made by the relevant UN bodies. A distinction can be made between (i) determinations by the UN Security Council or the General Assembly, in which the underlying facts are not stated in detail, (ii) determinations by UN commissions of inquiry, in which facts are ascertained and characterised in a more detailed and meticulous fashion, and (iii) determinations made by international courts and criminal tribunals.’
- ²¹ ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (10), p. 75. See also CAVV, *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Report no. 37, 27 July 2020, p. 16.
- ²² CAVV, *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Report no. 37, 27 July 2020.
- ²³ ICJ, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, paragraph 159.
- ²⁴ This option is now less obvious following Russia’s recent exclusion from the Council of Europe. See the following Council of Europe resolutions: Resolution CM/RES(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, 16 March 2022 and Resolution CM/Del/Dec(2022)1428ter/2.3 on the consequences of the aggression of the Russian Federation against Ukraine, 16 March 2022.
- ²⁵ ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (7), p. 72, where the ILC describes collective measures as ‘the essence of “cooperation”’.
- ²⁶ See, for example, the following statements by Ambassador Georges Nzongola-Ntalaja, the Permanent Representative of the Democratic Republic of Congo to the United Nations, who in fact voted in favour of the resolution concerned despite the following objections: ‘We deplore the politics of the double standards of the powerful of this world when it comes to Africa, [...] We support Ukraine. We want to see the war ended [...] But we would like to see the international community take similar action against other situations in the world where countries are being invaded and occupied.’ See <https://www.reuters.com/world/united-nations-condemns-russias-move-annex-parts-ukraine-2022-10-12/> and <https://press.un.org/en/2022/ga12458.doc.htm>.



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- ²⁷ See the Rules of Procedure of the UN General Assembly, rule 86, , <https://www.un.org/en/ga/about/ropga/plenary.shtml>.
- ²⁸ See R. J. Barber, ‘Cooperating through the General Assembly to End Serious Breaches of Peremptory Norms’, *International and Comparative Law Quarterly*, Vol. 71(1), 2022, pp. 23-25; and ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (11), pp. 75-76.
- ²⁹ ICJ, 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 95, paragraph 180.
- ³⁰ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)’ in: *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 41, commentary at (3), p. 114: ‘Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation.’
- ³¹ Ibid, Article 41, text and commentary at (3), p. 114, and ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), text of conclusion 19 and commentary at (7) and, specifically in relation to unilateral measures, (10), pp. 72-75. See also ICJ, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, paragraph 159, where the ICJ notes that ‘It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end’ [emphasis added].
- ³² The question whether regional organisations may adopt measures (sanctions) against states outside their organisation is also addressed in part II of this advisory report. The ILC notes on this point that ‘Other international organizations may also adopt measures, consistent with international law, to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) if their mandates permit them to do so’ [emphasis added]. ILC, *Report of the seventy-third session*, UN Doc. A/77/10 (2022), conclusion 19, commentary at (8), p. 73.
- ³³ ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, paragraph 430.
- ³⁴ See also part II.
- ³⁵ Report of the Expert Group established by the Minister of Foreign Affairs of the Netherlands, *Humanitarian Intervention and Political Support for Interstate Use of Force*, December 2019, paragraph 14.
- ³⁶ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)’ in: *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, article 41, commentary at (6), p. 114.
- ³⁷ For these and other examples, see *ibid*, article 41 commentary at (6), (7) and (8), pp. 114-115; ILC, *Report of the Seventy-third session*, UN Doc. A/77/10 (2022), pp. 76-78. See also ‘International Law Association Committee on Recognition/Non-recognition in International Law’, *Conference Report Sydney 2018*, at: https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-6, p.15.
- ³⁸ Martin Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’, in James Crawford *et al.*, *The Law of International Responsibility* (Oxford University Press 2010), pp. 678-679.
- ³⁹ Resolution of the General Assembly, 12 October 2022, UN Doc. A/RES/ES-11/4, paragraph 4 (votes for: 143; votes against: 5; abstentions: 35, non-voting: 10).
- ⁴⁰ Ibid, paragraph 5; ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)’ in: *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, article 41, commentary at (9), p. 115.
- ⁴¹ Ibid., p. 114.
- ⁴² These examples are based on the practice of the UN Security Council and the General Assembly. See, for example, UN Security Council resolution on Southern Rhodesia, UN Doc. S/RES/253, (1968), UN Security Council resolution on Namibia, UN Doc. S/RES/283, (1970), UN Security Council resolution on South Africa, UN Doc. A/RES/32/105N (1977), in particular paragraph 5. See also Martin Dawidowicz,



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- 'The Obligation of Non-Recognition of an Unlawful Situation'*, in James Crawford et al., *The Law of International Responsibility* (Oxford University Press 2010), pp. 679-683.
- ⁴³ ICJ, 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, paragraph 125.
- ⁴⁴ A. Cullen and S. Wheatley, 'The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights' (2013), 14 (4) *Human Rights Law Review*, p. 691; T. de Waal, *Uncertain Ground: Engaging with Europe's De Facto States and Breakaway Territories* (Carnegie Endowment for International Peace 2018), pp. 31-33.
- ⁴⁵ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, article 41, commentary at (5), p. 114.
- ⁴⁶ See also S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?,' in C. Tomuschat and J-M. Thouvenin, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill 2006), pp. 112-113.
- ⁴⁷ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 41, commentary at (6), p. 114.
- ⁴⁸ CAVV, *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Report 37, 27 July 2020, p. 16.
- ⁴⁹ M. Jackson, *Complicity in International Law* (Oxford University Press 2015), pp. 137-144; Resolution of the General Assembly, 14 December 1974, UN Doc. A/RES/3314 (XXIX), Annex, Definition of Aggression, Article 3(f).
- ⁵⁰ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 41, commentary at (11), p. 115.
- ⁵¹ *Ibid*, Article 41, commentary at (11), p. 115.
- ⁵² See H. Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011), p. 336.
- ⁵³ M. Jackson, *Complicity in International Law* (Oxford University Press 2015), p. 146.
- ⁵⁴ H. Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011), p. 337.
- ⁵⁵ Article 41 of the UN Charter and Article 215 of the Treaty on the Functioning of the European Union. See also ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 22, commentary at (3), p. 75.
- ⁵⁶ This follows from the prohibition of the threat or use of force as laid down in Article 2 (4) of the UN Charter and in customary international law, and has also been specifically confirmed in the ARSIWA and in the ILC's 'Draft Articles on the Responsibility of International Organizations with Commentaries Thereto', in: *Yearbook of the International Law Commission* 2011, vol. II, Part Two, p. 46 (DARIO) as regards countermeasures (Articles 50 (1)(a) and 53 (1)(a)) respectively. See also the commentary to Article 22 (1) DARIO, commentary to countermeasures Article 22 (3) DARIO, commentary to Article 50 (4-5) DARIO, commentary to Article 54 (3-4) DARIO. It should be noted that this does not affect measures that may be permissible on the basis of the inherent right of individual or collective self-defence in response to an act of aggression (Article 51 of the UN Charter).
- ⁵⁷ Articles 22 and 49-53 ARSIWA; Articles 22 and 51-56 ILC's 'Draft Articles on the Responsibility of International Organizations with Commentaries Thereto', in: *Yearbook of the International Law Commission* 2011, vol. II, Part Two, p. 46 (DARIO).



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- ⁵⁸ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 'Circumstances precluding wrongfulness', commentary at (2-4) and (7-8), pp. 71-72; and *ibid*, Article 22, commentary at (1-2) and (4), p. 75.
- ⁵⁹ See, for example, 'Comments and observations received from Governments' in UN Doc. A/CN.4/515, p. 90 (Argentina); p. 79 (China), which rejected collective countermeasures and argued that they should be scrapped altogether; p. 91, paras. 2, 5-16 (Mexico); pp. 93 and 93-94, paras. 1-3, (Japan); p. 94 (Republic of Korea); p. 94 (United Kingdom). As regards unilateral coercive measures, see the most recent resolutions of the General Assembly, UN Doc. A/RES/76/161, *Human rights and unilateral coercive measures*, 16 December 2021 (votes for: 131; votes against: 54; abstentions: 0, non-voting: 8), UN Doc. A/RES/76/191, *Unilateral economic measures as a means of political and economic coercion against developing countries*, 17 December 2021 (votes for: 126; votes against: 6; abstentions: 46, non-voting: 15). It is noteworthy that the General Assembly itself has in the past actually called for unilateral measures to be taken, for example against Portugal, Rhodesia, South Africa and Israel.
- ⁶⁰ Article 54 ARSIWA: 'This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.'
- ⁶¹ Following proposals to this effect by the CAVV in its *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Report no. 37, 27 July 2020.
- ⁶² E. Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2009), p. 110; M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) p. 111: 'The true extent of State practice on third-party countermeasures has not always been fully appreciated. Already in 2001, at the time of the adoption of the savings clause in Article 54 ARSIWA, relevant instances of practice on third-party countermeasures greatly exceeded the rather limited examples identified by the ILC.'
- ⁶³ E. Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2009), pp. 114-116 (Organization of American States (OAS) against the Dominican Republic), pp. 122-126 (Arab states against Israel), p. 126 (Organization of African Unity (OAU) against Portugal), p. 135 (Economic Community of West African States (ECOWAS) against Liberia), pp. 166-169 (India and African states against South Africa), pp. 189-190 (Commonwealth member states against Nigeria), 190 (African states against Burundi); M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017), discusses the same examples in chapter 4 and, after evaluating their consistency, concludes that this practice is 'virtually uniform', pp. 245-250.
- ⁶⁴ See the provisions of Articles 40(2)(e)(iii), 40(2)(f) and 40(3) [ARSIWA] in ILC, Text of the draft articles provisionally adopted by the Commission on first reading, *Yearbook of the International Law Commission* 1996, vol. II, Part Two, p. 58.
- ⁶⁵ *Ibid*, articles 47-50.
- ⁶⁶ M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017), pp. 176-181 (Sudan), pp. 193-203 (Myanmar; new measures were introduced after the military coup d'état in 2021, see: <https://www.sanctionsmap.eu/#/main/details/8/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D>, p. 203-211 (Zimbabwe), pp. 211-216 (Belarus), pp. 216-220 (Libya), pp. 220-231 (Syria), pp. 231-238 (Russia).
- ⁶⁷ See: <https://www.consilium.europa.eu/en/press/press-releases/2021/06/21/myanmar-burma-third-round-of-eu-sanctions-over-the-military-coup-and-subsequent-repression> and <https://www.consilium.europa.eu/en/press/press-releases/2022/02/21/myanmar-burma-eu-imposes-restrictive-measures-on-22-individuals-and-4-entities-in-fourth-round-of-sanctions>.
- ⁶⁸ See Reuters Graphics, Tracking sanctions against Russia, updated 7 July 2022, at <https://graphics.reuters.com/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>. For EU measures, see: <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine>.
- ⁶⁹ For the EU sanctions against Belarus and Iran, see <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus> and <https://www.consilium.europa.eu/en/policies/sanctions/iran> respectively.



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- ⁷⁰ See A. Hofer, 'Sanctioning Qatar: the Finale?', *EJIL:Talk!*, 16 June 2021, <https://www.ejiltalk.org/sanctioning-qatar-the-finale>.
- ⁷¹ For an analysis of this practice, see Rishika Chauhan, 'From pessimism to accommodation: India's stand and practice on unilateral sanctions', Congyan Cai, 'China's position and practice concerning unilateral sanctions', Ivan N. Timofeev, 'Unilateral and extraterritorial sanctions policy: the Russian dimension', in Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*, Elgar, 2021, chapters 4, 5 and 6.
- ⁷² E. Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2009), pp. 287; M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) pp. 250-255. The method used by these authors to decide whether certain measures can be treated as countermeasures and thus as relevant state practice is as follows. First, they assess whether measures from state practice could conflict with an international obligation of the state or should actually be classed as acts of retorsion. In the former case, they then examine the measures to see whether they could reasonably be permissible under the applicable legal regime (as a legitimate limitation of an obligation or as an exception to, derogation from or suspension or termination of a treaty). If the applicable legal regime does not provide an adequate explanation for the breach of an obligation, the authors conclude that the measure can only be justified as a countermeasure. See E. Katselli Proukaki, *ibid.*, pp. 7-8 and 90-93, and M. Dawidowicz, *ibid.*, pp. 14-15, 29-30 and 111-112.
- ⁷³ E. Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2009), p. 207; M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017), p. 126 (footnote 83): p. 143 (footnote 203): pp. 145, 165-166, 175-176, 181, 184, 192, 201-202, 210, 237, 243, 243-245, 249-250 and 283 ('the relative absence of diplomatic protests against third-party countermeasures is also noteworthy').
- ⁷⁴ M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017), p. 126 (footnote 83): p. 143 (footnote 203): p. 145 (east European states protested against measures targeting Argentina on the grounds that they constituted a violation of Chapter VII of the UN Charter) and pp. 146-147, 163, 165, 174-175, 180 and 181 (member states of the Organisation of Islamic Cooperation (OIC) called for the cessation of the US's unilateral coercive measures on account of their harmful effects), 184, 202 and 210 (the Non-Aligned Movement (NAM) called for the lifting of the measures against Zimbabwe), 215 (the NAM protested against measures taken against Zimbabwe on the grounds that they contravened the principle of non-intervention and General Assembly resolutions on measures against developing countries and had not been authorised by the General Assembly and Security Council), 216, 225, 231, 237-238 and 243.
- ⁷⁵ This is important since it supplements the *opinio juris* derived solely from state practice. See also F. Paddeu, book review 'Martin Dawidowicz, *Third-Party Countermeasures in International Law* [Cambridge University Press 2017]', *The Cambridge Law Journal*, vol. 77-2 (2018), pp. 427-429.
- ⁷⁶ See 'Unilateral economic measures as a means of political and economic coercion against developing countries', *Report of the Secretary-General*, 30 August 2021, UN Doc. A/76/310 (2021), Annex, p. 17 (EU).
- ⁷⁷ 'Unilateral economic measures as a means of political and economic coercion against developing countries', *Report of the Secretary-General*, 30 August 2021, UN Doc. A/76/310, Annex, pp. 5 and 7 (Cuba), 10 (Iran), 12 (Iraq), 13 (Russian Federation), 14 (South Africa) and 15 (Syria).
- ⁷⁸ General Assembly resolutions, UN Doc. A/RES/76/161, Human rights and unilateral coercive measures, 16 December 2021 (votes for: 131, votes against: 54; abstentions: 0; non-voting: 8), UN Doc. A/RES/76/191, Unilateral economic measures as a means of political and economic coercion against developing countries, 17 December 2021 (votes for: 126; votes against: 6; abstentions: 46; non-voting: 5).
- ⁷⁹ Article 41 UN Charter.
- ⁸⁰ Article 39 UN Charter.
- ⁸¹ In the same sense, see previously: 'Measures against South Africa and the Non-intervention Duty, Advisory Committee on Questions of International Law', quoted in full in the section 'Netherlands State Practice' in *Netherlands Yearbook of International Law*, Vol. 14 (1983), pp. 246 and 248. See also M. Dawidowicz, *Third-Party Countermeasures in International Law*



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(Cambridge University Press 2017), pp. 255-262. In a similar sense, Azaria notes that GATT Article XXI on 'Security Exceptions' does not constitute *lex specialis* as regards countermeasures. See D. Azaria, 'Trade Countermeasures for Breaches of International Law Outside the WTO', *International and Comparative Law Quarterly*, vol. 71-2 (2022), pp. 389-423.

⁸² See also Jean-Marc Thouvenin, 'Articulating UN sanctions with unilateral restrictive measures', in Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*, Elgar, 2021, p. 163.

⁸³ In this connection, see ICJ, 20 July 1962, 'Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)', Advisory Opinion, I.C.J. Reports 1962, p. 151, at p. 168: 'These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action.' See also Permanent Court of International Justice, 7 September 1927, *The Case of the S.S. "Lotus"*, P.C.I.J., Series A, No. 10, p. 18: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.'

⁸⁴ ICJ, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 108, paragraph 205. See discussion in A. Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', *Chinese Journal of International Law*, vol. 16 (2017), pp. 178-185.

⁸⁵ Strangely, the EU states that its sanctions are not coercive in nature: 'Unilateral economic measures as a means of political and economic coercion against developing countries', *Report of the Secretary-General*, 30 August 2021, UN Doc. A/76/310 (2021), Annex, p. 18 (EU): 'European Union sanctions are not punitive, retaliatory or coercive in nature, but are

designed to bring about a change in policy or activity by the target country, entities or individuals.'

⁸⁶ Articles 28-37 of ILC's 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 26. See also R. Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Coercive Measures', *International and Comparative Law Quarterly*, Vol. 70 (2021), pp. 350-355 and 361-364, but see also pp. 369-370.

⁸⁷ A. Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', *Chinese Journal of International Law*, Vol. 16 (2017), pp. 187-188. See also R. Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Coercive Measures', *International and Comparative Law Quarterly*, Vol. 70 (2021), pp. 357-358.

⁸⁸ See, for example, 'Comments and observations received from Governments' in UN Doc. A/CN.4/488 (1998), p. 167, para. 2 (Czech Republic); and comments and observations of governments on Article 54 ARSIWA, which at that time still provided that collective countermeasures were permissible at the request of the injured state or in the interest of beneficiaries of the obligation breached, in UN Doc. A/CN.4/515 (2001), p. 90 (Argentina); p. 79 (China), which rejected collective countermeasures and argued that they should be scrapped altogether; p. 91, para. 2 and paras. 5-16 (Mexico); p. 93 and pp. 93-94, paras. 1-3 (Japan); p. 94 (Republic of Korea); p. 94 (United Kingdom). See also M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017), pp. 271-276, 284 and 285-382 (safeguards against abuse).

⁸⁹ T. Meron, 'On a Hierarchy of International Human Rights', *American Journal of International Law*, Vol. 80, 1986, pp. 1-23.

⁹⁰ Cf. Article 40, paragraph 2 of ILC's 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 26, which refers to a 'gross or systematic failure' to fulfil an obligation arising under a peremptory norm of general international law. See also M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017), pp. 268-270



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and 347-348; E. Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2009), p. 91, footnote 362, where reference is made to Dawidowicz; I. Bogdanova, 'Unilateral Sanctions in International Law and the Enforcement of Human Rights' (Brill 2022), p. 315, which indicates that, to justify countermeasures, human rights violations should not only be systematic and threaten international peace and security but also be sufficiently serious.

⁹¹ UN Reports of International Arbitral Awards, *Air Service Agreement of 27 March 1946 between the United States of America and France*, 9 December 1978, volume XVIII, p. 417, at p. 443, paragraph 81.

⁹² The CAVV/EVA's *Advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians*, Advisory Report 28, March 2017.

⁹³ The provisions of Article 52, paragraphs 3 and 4 of the ARSIWA, whose customary law status is uncertain, will often not apply in the event of a serious breach of a peremptory norm or widespread or systematic violations of collective obligations.

⁹⁴ For declaration, see: <https://www.icj-cij.org/en/declarations/nl>.

⁹⁵ See comments and observations received from governments in UN Doc. A/CN.4/488, p. 154, para. 1 (UK); p. 159 (Czech Republic); p. 159, para. 2 (Ireland); UN Doc. A/CN.4/515, p. 94, para. 1, [concerning para. 3 of Article 54] (Austria).

⁹⁶ Countermeasures may not be taken against third states, i.e. states that have not committed a breach. This is apparent from the wording of Article 49 ARSIWA, which refers only to countermeasures against a state which is responsible for an internationally wrongful act.

⁹⁷ Article 50 of the UN Charter reads: 'If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.'

⁹⁸ Examples of provisions imposing this restriction are Article 50, paragraph 1 (b) ARSIWA and Article 53, paragraph 1 (b) DARIO.

⁹⁹ Commentary to Article 50 ARSIWA, p. 132, paras. 6-7. *Dutch Treaty Series* 1969, no. 100.



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List of abbreviations



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ARSIWA

Articles on Responsibility of States for Internationally Wrongful Acts

CAVV

Advisory Committee on Issues of Public International Law

DARIO

Draft Articles on the Responsibility of International Organizations, with Commentaries Thereto

ICJ

International Court of Justice

ILC

International Law Commission

UN

United Nations

