



**Advisory Committee
on Public International Law**

Particular legal consequences of a peremptory norm of general international law

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Members of the Advisory Committee on Issues of Public International Law



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Introduction



On 10 April 2025, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (hereinafter: CAVV) to prepare an advisory report on the following issue:

Would it be legally expedient, under article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), for the law to develop in such a way that the commission by a state of a serious breach of a peremptory norm of general international law (*jus cogens*) could have particular legal consequences in addition to those set out in article 41, for example the lifting of the state's immunity in respect of its property? If so, under what conditions would this be legally expedient?

It appears from the Minister's letter¹ that this request was connected with the CAVV's advisory report no. 48 (20 December 2024) in which the CAVV advised on the confiscation of foreign state property. In that report, the CAVV concluded that the immunity of state property under international law is an obstacle to confiscation of a central bank's assets. It also concluded that invoking the right to take countermeasures in the general interest in order to justify confiscation may be open to legal challenge because the intention would be to pursue an object not envisaged by the International Law Commission (ILC).²

The Minister points out that the options for using the Central Bank of Russia's assets for the benefit of Ukraine are still being explored through various international initiatives.

The Minister therefore requests the CAVV to consider whether, in addition to invoking countermeasures under article 49 et seq. of the ARSIWA, the regime of particular legal consequences under article 41 of the ARSIWA can be invoked.³ The Minister requests the CAVV to advise, in particular, on whether it would be *legally expedient* for the law to develop with regard to the legal consequences not expressly mentioned in article 41 of the ARSIWA, particularly the lifting of the immunity of state property.

The CAVV would point out that there is no definition of 'legal expediency'. However, it understands the Minister's question to mean: to what extent would such a development of the law be desirable or effective in the context of the challenges posed in today's world? The CAVV is somewhat hesitant to express an opinion on the expediency of a development of future law (*lex ferenda*) since its usual remit is to advise on the law currently in force (*lex lata*). Nonetheless, the CAVV is more than willing to comply with the Minister's request for advice. It will not advise as such on the *political* desirability or feasibility of a development of the law relating to the particular consequences of breaches of peremptory norms of general international law. It will, however, advise on how such a development of the law relates to basic principles of the international legal order, particularly sovereignty and state immunity.

In this advisory report, the CAVV first outlines the concept of peremptory norms of general international law, as well as the (particular) legal consequences of committing a serious breach of a peremptory norm under current international law (part I). It then goes on to discuss the regime of state immunity and how it relates to peremptory norms of general international law, once again on the basis of current international law (part II). After briefly explaining the conditions for development of international law (part III), the CAVV then addresses the expediency of a development in regard of the lifting of state property immunity as a further particular legal consequence of a serious breach of a peremptory norm of general international law (part IV). The final part (part V) briefly discusses alternatives for compensation under the law as it stands. The report concludes with a summary of its recommendations..

– Part I

Peremptory norms of general international law and particular legal consequences of serious breaches of peremptory norms

As the CAVV indicated in advisory report no. 41, the concept of *jus cogens*, or peremptory norms of general international law, concerns rules that protect the fundamental values of the international community. These norms are hierarchically superior to other rules of international law and are universally applicable.⁴ An important characteristic of *jus cogens* is that it concerns rules accepted and recognised by all states as norms from which no derogation is permitted.⁵ This means, for example, that treaties or binding resolutions of international organisations that conflict with peremptory norms of general international law are void.⁶ However, it is not entirely clear which norms belong to the category of peremptory norms of general international law. In 2022, in the annex to the conclusions on identification and legal consequences of peremptory norms of general international law, the ILC gave the following examples: the prohibitions of aggression, genocide, crimes against humanity, racial discrimination and apartheid, slavery, and torture; the basic rules of international humanitarian law; and the right of self-determination.⁷ For the purposes of this advisory report, it is important to note that international law has attached particular legal consequences to serious breaches of peremptory norms of general international law. These legal consequences are set out in article 41, paragraphs 1 and 2 of the ARSIWA, while scope for further development of the law is left open by article 41, paragraph 3 of the ARSIWA. This section will first consider the concept of ‘serious breach’ as a condition for the occurrence of particular legal consequences under article 41 of the ARSIWA (section 1). Next, it will briefly discuss the particular legal consequences specified in article 41, paragraphs 1 and 2 of the ARSIWA (section 2), and address the development of the law envisaged in article 41, paragraph 3 of the ARSIWA (section 3), as it pertains to this advisory report.

– 1

Serious breaches of peremptory norms of general international law (article 40, paragraph 2 of the ARSIWA)

Article 41 of the ARSIWA applies only to serious

breaches of peremptory norms of general international law. This concept is defined further in article 40, paragraph 2 of the ARSIWA, which provides that a breach of a peremptory norm can be classified as serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation. According to the ILC’s commentary to article 40, a breach has to be carried out in an organised and deliberate way in order to qualify as a systematic failure.⁸ By contrast, the term ‘gross’ refers to the intensity of the breach or its effects. In other words, it refers to violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.⁹ It should be noted that the ILC’s commentary indicates that the following factors are important in determining the seriousness of a violation: the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims.¹⁰ The ILC added that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.¹¹

In the CAVV’s opinion, the prohibition of aggression has undoubtedly acquired the status of a peremptory norm of general international law, as recently determined by the ILC and confirmed in previous CAVV advisory reports. As is also apparent in its previous reports, the CAVV believes there is sufficient evidence, including resolutions of the UN General Assembly, to establish that Russia has committed aggression against Ukraine, and that Russia’s war is resulting in *serious* breaches of the prohibition of aggression.¹²

– 2

Particular legal consequences of serious breaches of peremptory norms of general international law (article 41 of the ARSIWA)

The ILC has specified the following in article 41 of the ARSIWA concerning particular legal consequences:

‘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.’

In its advisory report no. 41, the CAVV dealt at length with the particular legal consequences of serious breaches of peremptory norms of general international law. It noted that article 41, paragraphs 1 and 2 of the ARSIWA contain three obligations for states when responding to serious breaches of peremptory norms of general international law, including violations 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 the situation created by the breach, and (3) the obligation not to render aid or assistance in maintaining that situation. These particular legal consequences have been set out in article 41, paragraphs 1 and 2 of the ARSIWA and have recently been reaffirmed by the ILC in conclusion 19 of the draft conclusions on identification and legal consequences of peremptory norms of general international law. As noted in the CAVV’s advisory report no. 41, these obligations form part of customary international law and are therefore, in principle, binding on all states.¹³

The above does not preclude the possibility that other legal consequences may be attached to serious breaches of peremptory norms of general international law. The ILC explicitly left open this possibility by including a savings clause in article 41, paragraph 3. This clause states that article 41 is without prejudice to the other consequences referred to in Part Two of the ARSIWA and to such further consequences that a serious breach of a peremptory norm may entail under international law. The other consequences set out in Part Two of the ARSIWA primarily consist of obligations for the state responsible for the breach, including obligations to bring the breach to an end, to provide restitution, full compensation and satisfaction, including the punishment of the individuals responsible, and to provide appropriate assurances and guarantees of non-repetition.¹⁴

– 3

Possibility of development of the law (article 41, paragraph 3 of the ARSIWA)



As noted in section 2, when the ARSIWA were adopted in 2001, the ILC explicitly left open the possibility that the law on particular consequences could develop further. In the commentary to article 41, the ILC noted that paragraph 3 ‘reflects the conviction that the legal regime of serious breaches is itself in a state of development’ and that article 41 ‘does not intend to preclude the future development of a more elaborate regime of consequences entailed by [serious] breaches.’ When the ILC came to consider particular legal consequences again in the context of the draft conclusions it adopted in 2022 on identification and legal consequences of peremptory norms of general international law, it did not add any other legal consequences to the list than those discussed in the previous part of this section. However, it did add a savings clause to draft conclusion 19, paragraph 4 which is largely consistent with the substance of article 41, paragraph 3 of the ARSIWA.¹⁵ It is worth noting, however, that the accompanying commentary – unlike the 2001 commentary – does not provide further clarification about the clause’s application to future developments of the law. The ILC would therefore seem to be suggesting that the legal regime relating to particular legal consequences is no longer evolving to the same extent as in 2001.

Nonetheless, the ILC did add a new savings clause. Draft conclusion 22 of the draft conclusions on identification and legal consequences of peremptory norms of general international law states that the draft conclusions are without prejudice to consequences that specific peremptory norms of general international law may otherwise entail under international law. According to the accompanying commentary, the reason for this draft conclusion is the methodology used by the ILC for its study. As the draft conclusions only address *jus cogens* rules in general terms, the possibility cannot be excluded that individual peremptory norms of general international law may themselves have legal consequences that are distinct from the general legal consequences identified in the draft conclusions.¹⁶ The following section will address a legal consequence related to the lifting of immunity as discussed by the ILC in this context.

The issue of immunity was addressed in passing by the ILC in its draft conclusions on identification and legal consequences of peremptory norms of general international law, which it adopted in 2022. In its commentary, the ILC specifically referred to international crimes and their possible consequences for the immunity of state officials and the jurisdiction of national courts.¹⁷ The Special Rapporteur had initially proposed including a draft conclusion on the effects of peremptory norms of general international law on immunity, which would have provided for an exception to the immunity of state officials who have committed a crime in breach of a peremptory norm.¹⁸ This proposal was in line with a parallel study undertaken by the ILC on the immunity of state officials from foreign criminal jurisdiction, on which the CAVV published an advisory report (no. 43) in 2023.¹⁹ However, the proposal was not well received by the ILC members. This was connected with the controversy within the ILC about the aforementioned study on the immunity of state officials from foreign criminal jurisdiction. Draft article 7 of that study, which was intended to limit the functional immunity (*immunity ratione materiae*) of state officials for specific international crimes, had come in for such criticism that the draft article had to be adopted by vote.²⁰ ILC members who had voted against draft article 7 now also opposed the Special Rapporteur's proposal to include a draft conclusion that would provide for an exception to the immunity of state officials in cases of breaches of peremptory norms of general international law. This was therefore replaced by the general savings clause contained in draft conclusion 22.²¹ Also noteworthy is the fact that the possible effects of peremptory norms of general international law on state immunity were disregarded in the proposal and not even discussed in the commentary to conclusion 22. In its 2022 draft conclusions, the ILC did not therefore address the subject of particular legal consequences related to state immunity that may have developed since 2001.

Under current international law (*lex lata*), the lifting of state immunity does *not* constitute a

particular legal consequence of a serious breach of a peremptory norm of general international law. Where a breach is classified as a serious breach of a peremptory norm of general international law, this does not mean that the immunity of the state accused of committing the breach lapses.

The judgment of the International Court of Justice (ICJ) in the *Jurisdictional Immunities* case is of particular note in this case. This case was brought by Germany against Italy for the failure by the Italian courts to respect Germany's jurisdictional immunity in relation to German war crimes committed against Italian citizens during the Second World War.²² In its defence, Italy invoked, among other things, peremptory norms of general international law, arguing that the rules on state immunity conflict with peremptory norms.²³ In its 2012 judgment, the ICJ rejected this defence, holding that there was no (direct) conflict between the rules on state immunity and peremptory norms of general international law. It noted that the rules on state immunity are of a procedural nature and concern the question of whether a state's courts can exercise jurisdiction, whereas peremptory norms of general international law are of a substantive nature and raise issues of lawfulness and unlawfulness.²⁴ Moreover, the ICJ rejected the argument that, in the absence of a direct conflict, rules of international law of a lower status could not be applied if this would hinder the enforcement of peremptory norms of general international law.²⁵

As international law stands at present, the legal consequences of (serious) breaches of peremptory norms of general international law cannot be derived as such from the hierarchically superior status of *jus cogens*. Peremptory norms of general international law cannot therefore be invoked to circumvent or override rules of state immunity. There must always be a direct conflict between peremptory norms and other rules of international law if the latter category is to be rendered inoperative.²⁶

This does not mean that no further particular legal consequences are possible in the case of (serious) breaches of peremptory norms of general international law. It simply means that they are subject to the ordinary processes by





which international law develops, as explained below. Specifically, such legal consequences will occur only if states conclude a treaty on the matter or if a relevant rule of customary international law is formed.

In its advisory report no. 43 referred to above, the CAVV stated that a rule of customary international law has formed under which the functional immunity of state officials from foreign criminal jurisdiction does not apply to crimes under international law for which individual responsibility and universal jurisdiction have been accepted under customary international law.²⁷ However, such a rule has not formed in respect of breaches of peremptory norms of general international law in the context of state immunity from jurisdiction and execution.

This is also in keeping with Dutch case law.²⁸ Recent decisions by Dutch courts on requests for recognition and enforcement of Ukrainian judgments also show that violation of the prohibition of aggression does not, for the time being, constitute a ground for setting aside state immunity.²⁹ Although the Ukrainian judgments provide that the Russian state (and Gazprom as its alter ego) is not entitled to immunity on account of its aggression against Ukraine, the Dutch courts have ruled that they lack competence due to Russia's immunity, citing the ICJ's judgment in the *Jurisdictional Immunities* case. It is therefore apparent from this case law that the seriousness of the breach and the nature of the relevant rules as peremptory norms of general international law have no legal consequences for the immunity of a foreign state, even in a case of aggression.

– Part III

Development of international law

Under current international law, the lifting of state immunity does not constitute a particular legal consequence of serious breaches of peremptory norms of general international law. The question therefore arises of whether a *development of the law* is warranted, in other words whether it would be advisable, in addition to the particular legal consequences expressly referred to in article 41, paragraphs 1 and 2 of the ARSIWA, to work towards further consequences, in particular the lifting of immunity, especially immunity from execution with respect to state property. Before advising on whether such a

development of the law would be expedient, the CAVV will explain how developments of international law occur.

International legal norms develop (evolve), in principle, on the basis of treaties or customary international law, which are the most important sources of international law.

States can conclude a treaty with each other stipulating that the confiscation of foreign state property is permissible in the event of breaches of peremptory norms of general international law. However, such a treaty applies only between the parties and does not create any obligations for states that have not ratified it.³⁰ It follows, for example, that the property of a foreign state that has not become a party to the treaty cannot be confiscated. Given the prevailing 'treaty fatigue',³¹ it is also questionable whether there is actually any desire to conclude a treaty on this subject.

Any development of the law regarding the particular consequences of serious breaches of peremptory norms of general international law could occur through customary international law – but only if the formal conditions for the development of customary law are met. In accordance with the prevailing doctrine on identification of customary international law, as set out in the ILC's 'Draft conclusions on identification of customary international law' (2018),³² a (new) rule of customary international law comes into existence only if there is general state practice that is accepted as law.³³ State practice is considered general if it is sufficiently widespread, representative and consistent.³⁴ It is not necessary for *all* states to have participated in the practice in question.³⁵ However, the practice of 'specially affected states' should be taken into account. These are states 'whose interests are specially affected' and 'are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule'.³⁶ The CAVV would also note the role of the 'persistent objector' state, which can oppose a rule of customary international law while that rule is in the process of formation (*in statu nascendi*); such a rule is not opposable to the state concerned.³⁷ It follows that even if a rule of customary international law permitting confiscation is formed on the basis of the practice of other states, a state can still oppose – and is therefore not bound by – that rule. A rule of customary



international law permitting confiscation could also develop at regional level, for example in Europe, but would only be binding on the states that endorse it.³⁸ Such a rule would not then be opposable to third states.

In certain cases, new customary international law can emerge quickly, despite the relatively strict rules governing its formation. The ICJ held in the *North Sea Continental Shelf* cases that ‘the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law’.³⁹ This is most likely to be the case at critical junctures in world politics, when a discrepancy arises between existing rules and new political or moral ideas.⁴⁰ In this respect a tipping point may be reached, where existing rules of customary international law quickly disappear as a consequence of changing state practice and new rules are formed.⁴¹ The question of whether the Russian aggression against Ukraine can be regarded as such a critical juncture or tipping point need not be answered. But even if that question were to be answered in the affirmative, in the case of ‘instant custom’ sufficiently widespread state practice, based on a belief that the practice is legally obligatory (*opinio juris*), is still required in order to generate the formation of a new rule. If Russia were to oppose such a development of the law, the new rule could not be invoked against it.

– Part IV

Expediency of a development of the law relating to further particular legal consequences of serious breaches of peremptory norms of general international law

Having explained the law as it stands (*lex lata*) and the modalities for its development, the CAVV will now examine whether such development of the law (*lex ferenda*) on further particular legal consequences of serious breaches of peremptory norms of general international law would be expedient or desirable, in particular the lifting of immunity from execution with respect to state property.

The CAVV recognises that reasons may conceivably exist for attaching new particular legal consequences, such as the lifting of immunity, to serious breaches of a limited category of peremptory norms of general

international law. A legal consequence of this kind could, in particular, contribute to the realisation of international law. Peremptory norms of general international law are aimed at protecting fundamental values.⁴² It follows that in the event of a breach of obligations arising from these norms, all states are deemed to have a legal interest in ensuring compliance and are entitled to invoke the responsibility of the state committing the breach.⁴³ The ILC has indicated in this connection that states other than the injured state may submit a claim for reparation to the responsible state.⁴⁴ A development of the law that also allows for the immunity of states and their property to be set aside could enhance the effectiveness of international law, particularly if the proceeds of any confiscation could be used to compensate an injured state and/or individual victims. Moreover, setting aside state immunity could have a stronger preventive and deterrent effect: the potential loss of state property might possibly induce a foreign state to refrain from committing an intended breach of a peremptory norm of general international law.

Although the CAVV can understand the arguments in favour of a development of the law that amounts to setting aside state immunity from execution in the event of breaches of peremptory norms of general international law, it considers that such a development would not be desirable or plausible for various reasons:

(a) State immunity is intrinsically linked to the principle of the sovereign equality and independence of states. The exercise of foreign jurisdiction over sovereign acts or over property used or intended for public purposes is incompatible with this undisputed pillar of the international legal order. Even greater importance is attached to immunity from execution than to immunity from jurisdiction. Fox and Webb observe in this connection that ‘[e]nforcement against State property constitutes a greater interference with a State’s freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of a judgment or order by a national court of another State’.⁴⁵ Setting aside state immunity from execution would not only infringe the sovereignty and independence of a foreign state, but also jeopardise the exercise of essential government tasks and could thus undermine the functioning of a state. The CAVV believes that it would not be



the obvious choice to focus specifically on this rule when considering the possible development of new law aimed at giving states more opportunities to take action against serious breaches of peremptory norms of general international law.

(b) Further particular consequences, such as the lifting of immunity of state property, do not take effect automatically but instead are subject to the rules on the formation of customary international law (see part II). This means that a sufficient critical mass of states must be supportive of the legal development in question. As explained in part III, a rule of customary international law normally emerges on the basis of widespread, representative and consistent state practice that states accept as law. It may be possible to count on support for the possible confiscation of Russian financial assets being forthcoming from some of Ukraine's allies, but by no means from all states; after all, states have always regarded immunity of state property from execution to be the 'last bastion' of state immunity.⁴⁶

(c) How a particular legal consequence, as discussed here, might affect the Netherlands itself also needs to be considered. Such a development of the law could enable other states to disregard the rules of state immunity and not only freeze but even confiscate Dutch state property and official financial assets on the basis of alleged serious breaches of peremptory norms of general international law committed by the Netherlands. Depending on the specific circumstances of any such scenario, this might have significant repercussions for the sovereign interests and financial stability of the Netherlands. However unlikely such a scenario may seem, it cannot be ruled out categorically. The question of whether it would be in the long-term interests of the Netherlands for the law to develop in this way therefore needs to be considered.

(d) A further particular consequence of the lifting of state immunity and immunity of state property in the event of serious breaches of peremptory norms of general international law would not be confined to holding another state responsible. The imposition of a legal consequence of this kind would also bring with it a unilateral determination of the nature of a norm as being peremptory, the occurrence of a breach, the

breach's classification as serious, the obligation of reparation and compensation, *and* hence the (forced) implementation of the responsibility of another state.

The lifting of state immunity can be considered an additional form of self-help by states, which puts further strain on the multilateral nature of the international legal order. Unilateral lifting of state immunity should therefore be provided for multilaterally, ideally in a treaty. Specifically, this could be done by amending the UN Convention on the Jurisdictional Immunity of States and Their Property, in particular Part IV on state immunity from measures of constraint.⁴⁷ However, an amendment to this Convention itself, which has not yet entered into force, cannot be taken for granted. It is worth noting here that the Netherlands made the following declaration, among others, upon acceding to this convention in April 2025: 'The Kingdom of the Netherlands interprets the Convention as not precluding the possibility of restricting State immunity in case of war crimes or crimes of aggression as recognized by the international community and in accordance with international law.'⁴⁸ The declaration refers to the interpretation of the Convention, but it should be clear that even now the Convention itself does not provide for any restrictions on state immunity with regard to war crimes or the crime of aggression. The reference to the possibility of restricting state immunity as recognised by the international community and in accordance with international law would therefore seem more likely to indicate a possible reliance on UN decisions and customary international law.

The Netherlands, together with like-minded states, could work towards concluding a treaty that has regional scope or to the formation of regional customary law that provides for further particular legal consequences, such as the lifting of immunity in the event of breaches of peremptory norms of general international law. Within the Council of Europe, possibly through CAHDI,⁴⁹ the theme of state immunity, which gave rise to the 1972 European Convention on State Immunity⁵⁰ (to which the Netherlands has been party since 1985)⁵¹ could be readdressed. The CAVV would point out that this convention has been ratified by only a small number of states and contains (in article 23) a rule providing for almost absolute immunity from execution. The European Union



could also make useful contributions in this area, particularly within the framework of the Working Party on Public International Law of the Council of the European Union (COJUR).⁵² As already noted, however, the Netherlands should bear in mind here that the particular legal consequences relating to immunity as provided for in such a convention or in customary law could not, in principle, be invoked against third states that have not ratified the convention or do not support the rule of customary law.

The CAVV would also point out that decisions by organs of a multilateral organisation such as the United Nations (the Security Council, General Assembly or ICJ) that classify conduct as a serious breach of a peremptory norm of general international law do not automatically entail particular legal consequences, such as the lifting of state immunity. Nor is this the case even where these decisions remind the responsible state of its obligation to pay compensation and establish a mechanism for legal redress.

In the case of the Russian aggression towards Ukraine, the General Assembly has strongly deplored this aggression,⁵³ declared that the attempted annexation of Ukrainian regions lacks validity under international law,⁵⁴ and recognised that Russia should be held to account for its aggression in violation of the UN Charter and has a duty to make reparation for the injury, including any damage, caused by its violations within or against Ukraine.⁵⁵

However, these resolutions are not binding as such; the General Assembly has not independently imposed international obligations on Russia and other member states.⁵⁶ Consequently, although member states themselves may proceed to implement General Assembly resolutions, when doing so they are obliged to act in accordance with international law, including the law on state immunity. It is worth noting that the General Assembly did not recommend setting aside the immunity of Russian state property, perhaps because confiscation of the official financial assets of a major power such as Russia could sow division within the international community. It is also noteworthy that although the General Assembly recognised the need for the establishment of a mechanism for reparation for damage, loss or injury,⁵⁷ it did not itself establish such a

mechanism in the form of a subsidiary organ of the General Assembly.⁵⁸ If it had done so, any subsequent decisions would have had much greater legitimacy than if a (limited) number of member states were to undertake their implementation (see Part V for the Register of Damage set up within the Council of Europe). Finally, it should be noted that the General Assembly resolutions affirming, in principle, the protection of Ukraine's sovereignty, independence and territorial integrity were adopted by large majorities (with 140 (or more) in favour, around 5 against and some 35 abstentions), whereas the resolutions supporting more concrete measures against Russia, such as the General Assembly resolution on reparation, were adopted by smaller majorities (with fewer than 95 member states in favour and a larger number against).⁵⁹

(e) In view of the current uncertainty about what rules constitute peremptory norms of general international law, it will not always be clear what conduct by states can lead to the lifting of immunity. The list of rules identified by the ILC in 2022⁶⁰ as having the status of peremptory norms of general international law is explicitly described as non-exhaustive, which could open the way for a wide range of claims regarding the status of rules of international law as peremptory norms. It should also be noted that in the case of some of the examples cited by the ILC – the prohibition of crimes against humanity and the fundamental rules of international humanitarian law – neither the scope nor the content of the (alleged) peremptory norm of general international law has been established.⁶¹ Hence it is not entirely clear what conduct on the part of the responsible state would fall within the scope of a possible particular legal consequence of lifting immunity. States should in any event define what breaches of peremptory norms of general international law and what conduct of states fall within the scope of a further particular legal consequence.

(f) The Netherlands should realise that, if it works towards the lifting of immunity as a particular legal consequence, it will have to apply this rule consistently. To maintain its international credibility, it must refrain from applying double standards. The Netherlands will also therefore have to take steps to lift the immunity of state property belonging to 'friendly' states involved in serious breaches of peremptory norms of general international law. In other words, a rule providing

for the lifting of immunity as a particular legal consequence could present serious complications for Dutch foreign policy.

– Part V

Alternative ways of providing compensation

For the reasons given in the previous section, the CAVV does not recommend taking steps, at least unilaterally, to work towards the development of the law in such a way as to establish a further particular legal consequence, namely the setting aside of immunity of state property in the event of serious breaches of peremptory norms of general international law, in addition to the legal consequences set out in article 41, paragraphs 1 and 2 of the ARSIWA. It is clear to the CAVV that the current request for advice is connected with its recent advisory report no. 48 concerning the confiscation of frozen financial assets of the Central Bank of Russia and possible ways in which these assets can be used for the benefit of Ukraine. In this part, the CAVV will therefore (once again) briefly consider the scope for compensating Ukraine under the law as it stands.

It is important to reiterate here that Russia has an obligation, on account of its aggression, to bring to an end its breaches of international law and make reparation to Ukraine in the form of restitution and compensation. Owing to the serious breach(es) of the peremptory prohibition of aggression, all other states besides Ukraine as the injured state, are also entitled to invoke the responsibility of Russia and claim cessation of its violations and reparation for the benefit of Ukraine or beneficiaries of the breached obligation(s) (article 48, paragraph 2 of the ARSIWA). The CAVV also stated in its previous advisory report that taking countermeasures in the general interest is, in principle, an option that is open to other states.⁶²

In its previous advisory report, the CAVV noted that the macro-financial assistance to Ukraine does not seem to be provided directly for the purpose of reparation and compensation,⁶³ nor does it appear to be specifically earmarked for strengthening Ukraine's military capabilities. Under the rules of state responsibility, any confiscation of the frozen financial assets of the Central Bank of Russia could, in principle, result in those assets being used to pressure Russia to bring to an end its violations⁶⁴ or to compensate

Ukraine and its inhabitants.⁶⁵ The CAVV believes that it would be more appropriate for assets to be used for compensation purposes than for strengthening Ukraine's military capabilities. That is because, in the event of a ceasefire or peace agreement, Russia's obligation to cease its violations will end,⁶⁶ but the obligation to pay compensation will continue.

The CAVV therefore considers that the appropriate course of action would be to establish an international compensation mechanism to assess and pay compensation claims submitted by Ukraine and its people against Russia. The establishment by the Council of Europe of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine represents a first step in this direction. Article 2.5 of the Statute of the Register provides that a possible next step could be the establishment of an international compensation mechanism in the form of a claims commission.⁶⁷ Discussions about this have already been held in four preparatory meetings,⁶⁸ and negotiations are expected to lead to a treaty to be adopted within the Council of Europe establishing a Claims Commission for Ukraine.⁶⁹

The establishment of a claims commission normally takes place with the consent of the states concerned,⁷⁰ but Russia's consent is obviously hardly likely to be forthcoming as matters stand at present. One of the few situations in which such consent was given, in any event nominally, was by Iraq for the establishment of the United Nations Compensation Commission and the associated Compensation Fund by the UN Security Council.⁷¹ The legal basis for the United Nations Compensation Commission and the Compensation Fund thus lay not only in Iraq's assent to Resolution 687,⁷² but also in binding decisions of the Security Council in the exercise of its powers under Chapter VII of the UN Charter.⁷³ However, this last option cannot be pursued in this case as Russia is a permanent member of the UN Security Council and can exercise its veto to block all substantive and binding decisions on this point.

The Achilles heel of any compensation mechanism that is established will be in raising sufficient resources and financial contributions to enable any compensation awards to be paid out. In the case of Iraq, this was achieved by using the contributions arising from the export of oil and





petroleum products to finance the fund, as determined by the UN Security Council.⁷⁴ It should be noted that the Security Council did not decide to confiscate Iraq's official assets abroad, some of which were already frozen, in order for them to be used to pay compensation for damage suffered. In principle, consideration could be given to a similar arrangement under which profits made by private parties trading with Russian companies are diverted to the corresponding fund. The disadvantage of such an arrangement would be that it could not be made binding on Russia and other states, and would therefore be highly dependent on the extent to which states participate in a future treaty.⁷⁵

Alternatively, the fund could be financed by voluntary contributions from the future parties to the treaty, but as Russia cannot be expected to be willing to fulfil its compensation obligations, the financial risk would then rest entirely with states that are prepared to contribute. Another consideration is that the amount of any contributions is bound to remain uncertain as budgetary authority within states is invariably vested in parliament. Moreover, the damage inflicted on Ukraine and its people by the Russian aggression is so severe and widespread that the level of the compensation awards will be unprecedented.

The CAVV therefore understands why thoughts are turning to using the frozen financial assets of the Central Bank of Russia to finance the fund and compensate Ukraine and its people. In its previous advisory report, the CAVV indicated that there is in any event a presumption that central bank assets are covered by the immunity of state property, and that whether this also applies in the case of the extraordinary revenues generated by the freezing of the Russian assets will depend on their ownership.⁷⁶ In this context, the CAVV would reaffirm its previous position that Russia's aggression justifies taking countermeasures in the general interest.⁷⁷ The *freezing* of the Central Bank of Russia's financial assets therefore poses no legal problems here, since such a measure is of a temporary nature and is reversible.⁷⁸

On the subject of the possible *confiscation* of the Russian assets, the CAVV pointed out that confiscation is, in principle, an irreversible measure since it entails the transfer of ownership. But, as the CAVV added, financial

assets should be considered fungible owing to their monetary nature and it could therefore be argued that in this specific case the measure is after all reversible.⁷⁹ However, in its previous advisory report, the CAVV did indicate that invoking confiscation as a countermeasure might not be aimed at achieving the object of countermeasures as formulated by the ILC in article 49, paragraph 1 of the ARSIWA.⁸⁰ That object is to induce a responsible state to comply with its obligation to bring to an end its violations and make reparation. As confiscation could possibly result in Russian assets being transferred to Ukraine or used to pay compensation, it would not be aimed at inducing Russia to comply with its obligations, but at implementing those obligations without Russia's cooperation. Since confiscation would therefore pursue an object not envisaged by the ILC, the CAVV indicated that relying on countermeasures to justify confiscation may be open to legal challenge.⁸¹ The CAVV also discussed the possibility of confiscated assets remaining in the hands of the confiscating states and being used as collateral for loans to Ukraine to satisfy Russia's obligation to pay compensation, so that the confiscation could still be reversed in the event of a potential agreement on reparation.⁸² Similarly, the confiscated assets could be used as collateral for financial contributions to the fund, which could pay compensation to Ukraine and its inhabitants pursuant to decisions to be taken by the Claims Commission for Ukraine.

Conclusion and advice



In this advisory report, the CAVV has considered whether a development of the law under article 41, paragraph 3 of the ARSIWA would be legally expedient (desirable), particularly whether further particular legal consequences can be attached to the commission by a state of a serious breach of a peremptory norm of general international law. In this connection the CAVV focused mainly on addressing the lifting of immunity from execution of the property of the state concerned.

The CAVV has arrived at the following conclusions and recommendations:

- 1 Under article 41, paragraphs 1 and 2 of the ARSIWA, states have three obligations when responding to serious breaches of peremptory norms of general international law, 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 the situation created by the breach, and (3) the obligation not to render aid or assistance in maintaining that situation. In article 41, paragraph 3 of the ARSIWA, the ILC explicitly left open the possibility that the law could develop with regard to further particular legal consequences.
- 2 In its draft conclusions adopted in 2022 on identification and legal consequences of peremptory norms of general international law, the ILC did not provide further clarification about development of the law under article 41, paragraph 3 of the ARSIWA. It did not give any further consideration to the subject of particular legal consequences regarding state immunity that may have developed since 2001.
- 3 Under current international law, the lifting of state immunity does not constitute a particular legal consequence of a serious breach of a peremptory norm of general international law. Such a legal consequence will only occur if a rule of international law develops on this matter.
- 4 The CAVV recognises that reasons may conceivably exist for attaching new particular legal consequences, such as the lifting of immunity, to serious breaches of a limited category of peremptory norms of general international law, for example for the sake of the realisation and the effectiveness of international law. Nonetheless, the CAVV considers that a development of the law that amounts to the lifting of state immunity from execution in the event of breaches of peremptory norms of general international law would not be desirable or plausible for several reasons:
 - a Immunity and sovereignty are fundamental principles of public international law that cannot simply, without proper cause, be called into question.
 - b Widespread, representative and consistent state practice legally accepted by states is required for the law to develop.
 - c Such a development of the law could enable other states to disregard the rules of state immunity and confiscate Dutch state property and official financial assets on the basis of alleged serious breaches of peremptory norms of general international law by the Netherlands.
 - d The lifting of state immunity constitutes an additional form of self-help by states, which puts further pressure on the multilateral nature of the international legal order.
 - e In the case of some peremptory norms of general international law, neither their scope nor their content has been established. Hence, it is not entirely clear what conduct on the part of responsible states would fall within the scope of a possible particular legal consequence of lifting immunity.
 - f If the new norm materialises, the Netherlands will also have to take steps to lift the immunity of state property belonging to ‘friendly’ states involved in serious breaches of peremptory norms

of general international law. Such a norm could therefore present serious complications for Dutch foreign policy.



- 5 The Netherlands, together with like-minded states, could work towards concluding a treaty that has regional scope, for example within the Council of Europe, or to the formation of a customary law norm that provides for further particular legal consequences, such as the lifting of immunity in the event of breaches of peremptory norms of general international law. However, norms included in such a treaty or formed through customary law could not be invoked against third states that have not ratified the treaty or do not support the customary law norm.
- 6 In its advisory report no. 48, the CAVV already observed that confiscation of foreign state property could possibly be justified as a countermeasure in the general interest. In this regard, confiscation of financial assets can, in principle, be seen as a reversible measure. Confiscation, or the use of such assets as collateral for a loan, could generate financial resources for a fund that pays compensation to Ukraine and its citizens.
- 7 In its advisory report no. 48, the CAVV noted that invoking the right to take countermeasures in order to justify confiscation may be open to legal challenge because, in the event of confiscation, Russia would not be induced to comply with its international legal obligation to make reparation. That obligation would be implemented through confiscation without Russia's cooperation. This would entail pursuing an object not envisaged for countermeasures by the ILC in the ARSIWA.

List of abbreviations



ARSIWA

Articles on Responsibility of States for Internationally Wrongful Acts

CAHDI

Committee of Legal Advisers on Public International Law of the Ministries of Foreign Affairs of the members states of the Council of Europe

CAVV

Advisory Committee on Issues of Public International Law

COJUR

Working Party on Public International Law of the Council of the European Union (Comité Juridique)

ICJ

International Court of Justice

ILC

International Law Commission

UN

United Nations

Endnotes



- ¹ Minister of Foreign Affairs, Request for advice on article 41 of the ARSIWA and confiscation of foreign state property, 10 April 2025; <https://www.adviescommissievolkenrecht.nl/adviestrajecten/publicaties/adviesaanvragen/2025/04/10/adviesaanvraag-41-arsiwa-en-confiscatie>
- ² CAVV, *Confiscation of foreign state property*, Advisory report no. 48, 20 December 2024.
- ³ Article 41 of the ILC's 'Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), with commentaries (2001) (ARSIWA)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 113 and 114, 'Particular consequences of a serious breach of an obligation under this chapter'.
- ⁴ CAVV, *Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression*, Advisory report no. 41, 17 November 2022, p. 4.
- ⁵ ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries' in: *Yearbook of the International Law Commission*, 2022, vol. II, Part Two, p. 27, Conclusion 3 ('A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character.')
- ⁶ *Ibid.*, p. 48, Part Three on the legal consequences of peremptory norms of general international law (*jus cogens*). See also articles 53 and 64 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *Dutch Treaty Series* 1985, 79 (Vienna Convention on the Law of Treaties).
- ⁷ ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries' in: *Yearbook of the International Law Commission*, 2022, vol. II, Part Two, p. 89, Annex.
- ⁸ Artikel 40 ARSIWA en toelichting: 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. 113, para. 8
- ⁹ *Ibid.*
- ¹⁰ *Ibid.*
- ¹¹ *Ibid.*
- ¹² CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory report no. 40, 12 September 2022 (implicit confirmation); CAVV, *Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression*, Advisory report no. 41, 17 November 2022, pp. 4-5 and 17; CAVV, *Advisory report on the long-term consequences of establishing an alternative tribunal for the crime of aggression and other options for prosecuting Russia's President Putin*, Advisory report no. 45, 24 January 2024; CAVV, *Confiscation of foreign state property*, Advisory report no. 48, 20 December 2024, pp. 4, 10, 11 and 15.
- ¹³ CAVV, *Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression*, Advisory report no. 41, 17 November 2022, pp. 6-18.
- ¹⁴ Articles 28-39 of the ARSIWA.
- ¹⁵ ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries' in: *Yearbook of the International Law Commission*, 2022, vol. II, Part Two, p. 70, Conclusion 19, para. 4: 'This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.'
- ¹⁶ *Ibid.*, pp. 84 and 85, Commentary on conclusion 22, para. 2.
- ¹⁷ *Ibid.*, p. 85, Commentary on conclusion 22, para. 3.
- ¹⁸ ILC, *Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, UN Doc A/CN.4/714 (2018), paras. 121-132.
- ¹⁹ CAVV, *Advisory report on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction*, Advisory report no. 43, 30 June 2023.
- ²⁰ ILC, *Sixth report on immunity of State officials from*



- foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/722 (2018) para. 12.*
- ²¹ See D. Tladi, 'Particular Consequences of Jus Cogens Norms', in: D. Tladi, *The International Law Commission's Draft Conclusions on Peremptory Norms*, Oxford 2024, pp. 190-193.
- ²² ICJ, 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.
- ²³ *Ibid.*, para. 92.
- ²⁴ *Ibid.*, paras. 93 and 94.
- ²⁵ *Ibid.*, para. 95.
- ²⁶ On this last point, it should be noted that the ILC's Draft conclusions on identification and legal consequences of peremptory norms (*jus cogens*) lead to the same conclusion. See ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries' in: *Yearbook of the International Law Commission, 2022, vol. II, Part Two*, p. 48 et seq., Conclusions 10-16, 18 and 20; and p. 79, Commentary on Conclusion 20, para. 1. 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. 12.
- ²⁷ CAVV, *Advisory report on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction*, Advisory report no. 43, 30 June 2023, pp. 18-19.
- ²⁸ Cf. The Hague District Court, 29 January 2020, ECLI:NL:RBDHA:2020:559; The Hague Court of Appeal, 7 December 2021, ECLI:NL:GHDHA:2021:2374; Supreme Court, 25 August 2023, ECLI:NL:HR:2023:1132 (concerning Gaza).
- ²⁹ Cf. The Hague District Court, 2 April 2025, ECLI:NL:RBDHA:2025:5598; The Hague District Court, 5 June 2025, ECLI:NL:RBDHA:2025:9883; The Hague District Court, 14 July 2025, ECLI:NL:RBDHA:2025:12573; The Hague District Court, 17 July 2025, ECLI:NL:RBDHA:2025:14067.
- ³⁰ Article 34 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *Dutch Treaty Series* 1985, 79 (Vienna Convention on the Law of Treaties).
- ³¹ A.M. Kravik, 'An analysis of stagnation in multilateral law-making – and why the law of the sea has transcended the stagnation trend', *Leiden Journal of International Law* 34, 2021, pp. 935-956; J. Pauwelyn, R.A. Wessel and J. Wouters, 'When structures become shackles: stagnation and dynamics in international lawmaking', *European Journal of International Law* 25, 2014, pp. 733-763; J. Wouters, 'International law, informal law-making, and global governance in times of anti-globalism and populism', in: H. Krieger, G. Nolte and A. Zimmermann (eds.), *The International Rule of Law: Rise or Decline? - Approaching Current Foundational Challenges*, Oxford, Oxford University Press, 2019, pp. 242-264.
- ³² ILC, 'Draft conclusions on identification of customary international law, with commentaries', in: *Yearbook of the International Law Commission, 2018, Vol. II, Part Two*, p. 122.
- ³³ *Ibid.*, p. 124, conclusion 2 and p. 130, conclusion 4 at 1.
- ³⁴ *Ibid.*, p.135, conclusion 8.
- ³⁵ *Ibid.*, p.136, commentary on conclusion 8, para. 3.
- ³⁶ *Ibid.*, pp. 136 and 137, commentary on conclusion 8, para. 4.
- ³⁷ *Ibid.*, p.152, conclusion 15.
- ³⁸ *Ibid.*, p. 154, commentary on conclusion 16, para. 7. See also A. de Hoogh, 'Regionalism and the Unity of International Law from a Positivist Perspective', in: M. J. Aznar and M. E. Footer (eds.), *Select Proceedings of the European Society of International Law*, Hart, 2012, pp. 59-63.
- ³⁹ ICJ, 20 February 1969, *North Sea Continental Shelf, (Federal Republic of Germany v. the Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, para. 74. On this point, see also: O. Sender, and Sir M. Wood, 'Between 'Time Immemorial' and 'Instant Custom': The Time Element in Customary International Law' in: *Grotiana*, 42-2, 2021, pp. 229-251.
- ⁴⁰ N. Krisch and E. Yildiz, 'The Many Paths of Change in International Law: A Frame', in: N. Krisch en E. Yildiz (eds), *The Many Paths of Change in International Law*, Oxford University Press, 2023, pp. 24-25.
- ⁴¹ P. H. Verdier and E. Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014). See also 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, para. 207, where the ICJ observed



- as follows in connection with the non-intervention principle: ‘Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.’
- ⁴² 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. 6.
- ⁴³ ICJ, 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, *Judgment*, *I.C.J. Reports 1970*, p. 32, paras. 33-34; article 48, para. 1 (b) of the ARSIWA.
- ⁴⁴ Article 48, para. 2 (b) of the ARSIWA.
- ⁴⁵ H. Fox and P. Webb, *The Law of State Immunity (revised and updated 3rd edition)*, Oxford University Press, 2015, p. 481.
- ⁴⁶ J. Ostrander, ‘The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments’, *Berkeley Journal of International Law*, 22-3, 2004, p. 541.
- ⁴⁷ United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, *Dutch Treaty Series* 2010, 272. For the status of the convention, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.
- ⁴⁸ See United Nations Treaty Collection, United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, *Declarations Kingdom of the Netherlands*, 23 April 2025.
- ⁴⁹ CAHDI is the Committee of Legal Advisers on Public International Law of the Ministries of Foreign Affairs of the members states of the Council of Europe: <https://www.coe.int/en/web/cahdi>. It should be noted, incidentally, that CAHDI monitors developments concerning state immunity, see <https://www.coe.int/en/web/cahdi/immunities>.
- ⁵⁰ European Convention on State Immunity, Basel, 16/5/1972, *Dutch Treaty Series* 1973, 43. See, for example, A. Orakhelashvili, ‘Treaties on state immunity: the 1972 and 2004 Conventions’, in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, 2015, pp. 274-296.
- ⁵¹ European Convention on State Immunity, Basel, 16/5/1972, *Dutch Treaty Series* 1985, 38.
- ⁵² On this subject, see F. Hoffmeister, ‘Public International Law Working Group (Comité Juridique (COJUR))’, in *Max Planck Encyclopedia of Public International Law*, 2019.
- ⁵³ Resolution ES-11/1 of the UN General Assembly (18 March 2022), ‘Aggression against Ukraine’, UN Doc A/RES/ES-11/1, para. 2.
- ⁵⁴ Resolution ES-11/4 of the UN General Assembly (13 October 2022), ‘Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations’, UN Doc A/RES/ES-11/4, paras. 2-5; see also Resolution ES-11/1 of the UN General Assembly (18 March 2022), ‘Aggression against Ukraine’, UN Doc A/RES/ES-11/1, para. 5.
- ⁵⁵ Resolution ES-11/5 of the UN General Assembly (15 November 2022), ‘Furtherance of remedy and reparation for aggression against Ukraine’, UN Doc A/RES/ES-11/5, para. 2.
- ⁵⁶ S. Schmahl, ‘Article 10’, in: B. Simma et al., *The Charter of the United Nations, A Commentary*, Volume I, Oxford University Press, 2024, p. 631. The General Assembly can take decisions binding on the member states only on matters concerning the internal organisation of the United Nations, such as the admission of new members, the adoption of the budget and the budgetary contributions of member states. *Ibid.*, p. 49.
- ⁵⁷ Resolution ES-11/5 of the UN General Assembly (15 November 2022), ‘Furtherance of remedy and reparation for aggression against Ukraine’, UN Doc A/RES/ES-11/5, para. 3.
- ⁵⁸ Article 22 of the UN Charter.
- ⁵⁹ On this point, see resolutions A/RES/ES-11/1 to A/RES/ES-11/8 of the **11th Emergency Special Session** of the UN General Assembly, and **the result of the votes**.
- ⁶⁰ ILC, ‘Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries’ in: *Yearbook of the International Law Commission*, 2022, vol. II, Part Two, p. 85, conclusion 23 and p. 89, Annex.
- ⁶¹ ILC, ‘Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries’ in: *Yearbook of the International Law Commission*, 2022, vol. II, Part Two, p. 17, commentary to conclusion 1, paras. 3 and 4 and p. 84, conclusion 22, para. 2, p. 85, conclusion 23, paras. 1 and 5 indicate that the draft conclusions are not intended to establish the content of individual peremptory norms. Last year, the International Court of Justice



- held that in cases of foreign occupation the right to self-determination constitutes a peremptory norm of international law. ICJ, 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 233.
- ⁶² CAVV, *Confiscation of foreign state property*, Advisory report no. 48, 20 December 2024, p. 10.
- ⁶³ *Ibid.*, pp. 5,6 and 12.
- ⁶⁴ Articles 29 and 30 (a) of the ARSIWA.
- ⁶⁵ Article 36 of the ARSIWA.
- ⁶⁶ That is at least in respect of the obligation to cease active acts of war. A ceasefire under which Russia's occupation of eastern Ukraine and Crimea persists would be deemed to continue Russian aggression, as is apparent from UN General Assembly Resolution 3314 (XXIX) (14 December 1974), 'Definition of Aggression', Annex, article 3 (a): 'Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.'
- ⁶⁷ Resolution [CM/Res\(2023\)3](#) (12 May 2023) of the Council of Europe's Committee of Ministers 'establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine'. See also the explanatory notes on the website of the Register of Damage, at [When should claimants expect compensation?](#)
- ⁶⁸ 'Final Preparatory Meeting on a Claims Commission for Ukraine held in The Hague - Formal Treaty Negotiations to Start in March', *Register of Damage for Ukraine*, 31 January 2025.
- ⁶⁹ 'Progress Continues in Third Round of Negotiations on Claims Commission for Ukraine', *Register of Damage for Ukraine*, 21 July 2025.
- ⁷⁰ See generally H.M. Holtzman, 'Mass Claims', in *Max Planck Encyclopedia of Public International Law*, 2008; S. Giroud en S. Moss, 'Mass Claims Processes under Public International Law', in: E. Lein (ed.) et al., *Collective redress in Europe, why and how?*, British Institute of International and Comparative Law, 2015, pp. 481-503.
- ⁷¹ See UN Security Council Resolution 687 (8 April 1991), UN Doc S/RES/687 (1991), paras. 16, 18 and 33; UN Security Council Resolution 692 (20 May 1991), UN Doc S/RES/692 (1991), para. 3; T.A. Mensah, 'United Nations Compensation Commission', in *Max Planck Encyclopedia of Public International Law*, 2011, paras. 4, 6.
- ⁷² See UN Security Council Resolution 687 (8 April 1991), UN Doc S/RES/687 (1991), para. 33.
- ⁷³ *Ibid.*, par. 20.
- ⁷⁴ *Ibid.*, para. 19; UN Security Council Resolution 692 (20 May 1991), UN Doc S/RES/692 (1991), paras. 6 and 7.
- ⁷⁵ As treaties are binding only on states that have given their consent, they do not create either obligations or rights for third states. See articles 26 and 34 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *Dutch Treaty Series* 1985, 79 (Vienna Convention on the Law of Treaties).
- ⁷⁶ CAVV, *Confiscation of foreign state property*, Advisory report no. 48, 20 December 2024, pp. 7 and 8.
- ⁷⁷ *Ibid.*, p. 10.
- ⁷⁸ *Ibid.*, p. 11. As regards the requirements that measures must be temporary and reversible, see article 49, paragraphs 2 and 3 of the ARSIWA.
- ⁷⁹ CAVV, *Confiscation of foreign state property*, Advisory report no. 48, 20 December 2024, p. 11.
- ⁸⁰ Article 49, para. 1 of the ARSIWA. '1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.'
- ⁸¹ CAVV, *Confiscation of foreign state property*, Advisory report no. 48, 20 December 2024, pp. 11 and 12. The CAVV added that 'the conditions for countermeasures are not interpreted uniformly in all cases, and that the practice and views of states vary', and also that 'international law is always in a state of development and states can influence the evolution of customary law'. The CAVV noted that 'there is in any event at present little (or in any case insufficient) state practice to support this approach, i.e. an approach under which countermeasures are intended to be compensatory'.
- ⁸² *Ibid.*, pp. 6, 8-11 and 16.