

Government response to the advisory report of the Advisory Committee on Issues of Public International Law (CAVV) entitled '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'

On 17 November 2022, the Advisory Committee on Issues of Public International Law (CAVV) presented me with its advisory report entitled *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* (Annexe 1).¹ The government is grateful to the CAVV for this advisory report, which it prepared at my request.

Owing to the complexity of the subject matter and to the ongoing aggression of the Russian Federation against Ukraine and the ensuing international debate about taking countermeasures, more time than usual was needed to draw up the government's response to this advisory report.

In this advisory report, the CAVV considers the legal consequences of a serious breach of a peremptory norm (*jus cogens*), in particular the prohibition of aggression, in order 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. These legal consequences are of two types, namely the obligations to which the Netherlands becomes subject at the moment when a serious breach of a peremptory norm occurs and, second, the possibility for a State not directly injured by the breach to take countermeasures.

The government endorses the CAVV's conclusions about both these types of consequences. The government especially appreciates the parts of the report explaining how these obligations can be fulfilled in practice, given the lack of clear and extensive State practice. Moreover, the government, like the CAVV, considers that a determination by an international organisation that a breach of a peremptory norm has occurred could be part of the obligation to cooperate. The CAVV indicates that this would be desirable in order to prevent abuse of the special rules applicable to peremptory norms and also because individual States do not usually have sufficient proof to make such a determination. See also, for example, Dutch policy on the recognition of genocide, which attaches great importance to international determinations such as those made by international courts or criminal courts and the United Nations (UN) Security Council. At the same time, the government considers it would be desirable – and essential – for States to continue to be able to act unilaterally if they believe that taking a countermeasure would be in the general interest.

In addition, the government, like the CAVV, takes the view that while the obligation to cooperate is not an empty requirement and imposes on States a duty to fulfil it to the best of their abilities, it does not discharge them from their other obligations resulting from a serious breach of a peremptory norm. States have two obligations in this respect, namely to refrain, first, from recognising the situation created by the serious breach and, second, from rendering aid or assistance in maintaining that situation. Here too, the government endorses the CAVV's advice. In particular, the government shares the view that obligations are binding on States individually and are applicable to the individual acts and omissions of States. Although collective non-recognition of a serious breach of a peremptory norm can be effective, the failure to reach a collective decision on this does not detract from the obligation to which each State is subject individually. The government also endorses the exception on humanitarian grounds to the prohibition of recognition, as mentioned in the advisory report. The Netherlands too applies this exception in practice.

The second part of the advisory report deals with the lawfulness of countermeasures taken by States not directly injured by a breach. For an explanation of the government's position on countermeasures in the general interest, reference should be made to the letter to parliament on this subject of 13 April 2011.² In this letter, the government stated that it was still 'uncertain

¹ CAVV Advisory Report 41, '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', 17 November 2022.

² Parliamentary Papers, House of Representatives 2010/11, 32 500 V, no. 166.

whether international law as it stands permits a State or group of States to take countermeasures in the general interest without a legal basis in a treaty'. The government, like the CAVV, now believes that taking such countermeasures in the general interest is permitted, subject to the points for consideration identified by the CAVV. There are various norms in international law that serve the general interest. These include peremptory norms (*jus cogens*), such as the prohibition of aggression, but also norms of the law of the sea aimed at combating pollution of the high seas and norms of international space law aimed at safeguarding the right of every State to explore and use outer space. The CAVV rightly notes that there are legitimate concerns about abuses or excessive measures. These can be addressed if the conditions for taking countermeasures are respected. The government would stress in particular the condition that countermeasures must always be reversible and must be lifted as soon as the breach has ended.

The CAVV ends its report with a number of conclusions and recommendations. As already noted above, the government endorses the conclusions set out in points 1 to 6. In points 3, 6 and 7, the CAVV makes a number of recommendations. Points 3 and 6 concern the need for greater transparency, namely that States should indicate when a measure they take is intended to implement the obligation to cooperate (point 3), and that the Netherlands should explicitly state its views on the lawfulness of countermeasures taken in the general interest (point 6). The Netherlands will gladly adopt these recommendations. When the occasion arises, the Netherlands will therefore make it clear, either by an explanation of vote or in some other way, that a measure that has been taken is intended to implement its obligation to cooperate. If a countermeasure is taken in the general interest, the Netherlands will also indicate this explicitly.

As regards this last point, reference can be made to the letter to parliament of 18 February 2023 about the steps taken in the diplomatic relations with the Russian Federation. In this letter, the government announced the closure of the Russian trade office in Amsterdam as a countermeasure against the serious breaches of international humanitarian law by the Russian Federation.³ More generally, the Netherlands is and will remain committed to cooperation, preferably within the UN, in order to put an end to the Russian Federation's breach of the prohibition of aggression.

In point 7, the CAVV recommends further regulation of countermeasures in the general interest, in particular with regard to six specific subjects, namely the nature of the obligations and seriousness of the breaches, the determination of breaches, dispute settlement, proportionality, unintended consequences and fundamental human rights. The government notes that the lack of regulation is mainly attributable to a lack of State practice. This may possibly be explained by the current absence of widespread State practice in response to the commission of serious breaches of peremptory norms. At the same time, the government considers that the regulation desired by the CAVV cannot be achieved other than through the formation of customary law on the basis of State practice and the related *opinio juris* of States.

As regards the subjects specifically identified by the CAVV for regulation, the government's position is as follows. First, the government considers that the general rules for taking countermeasures also apply to countermeasures taken in the general interest. These rules include adequate provisions on proportionality, unintended consequences and the protection of fundamental human rights. There is therefore no immediate need for further regulation, although the clarity and viability of these rules could be improved by strengthening their definition in State practice and the related *opinio juris*.

Second, the existence of a dispute between States about whether or not a countermeasure taken in the general interest is justified is essentially no different from any other dispute about the actions of one or more States under international law. The general rules on peaceful dispute settlement therefore apply in full to countermeasures in the general interest, as well as the specific provision on the relationship between countermeasures and dispute settlement as formulated in the draft articles of the UN's International Law Commission (ILC) on State responsibility (Articles on the Responsibility of States for Internationally Wrongful Acts, ARSIWA). The ARSIWA provide

³ Parliamentary Papers, House of Representatives 2022/23, 35 373, no. 30.

that taking countermeasures does not relieve a State of its obligations under dispute settlement procedures applicable between that State and the State against which the countermeasure has been taken (Article 50 (2)(a)). Moreover, a State may not take a countermeasure, and must suspend a countermeasure already taken, if the dispute between that State and the responsible State is pending before a court or tribunal which has the authority to make decisions binding on both parties (Article 52 (3)(b)). However, these rules do not apply if the responsible State fails to implement the dispute settlement procedures in good faith (Article 52 (4)).

At present, there does not appear to be much prospect of agreement within the community of States on the establishment of a dispute settlement procedure for countermeasures in the general interest. The same applies to reaching consensus on appointing an authority for determining breaches. Although it shares the CAVV's preference for such determinations to be made through UN procedures, the government considers it desirable, as already indicated above, for unilateral determination to remain possible. This is to ensure that a political stalemate within the UN does not prevent countermeasures from being taken in the general interest.

Third, the government considers that countermeasures in the general interest are in any event permissible in response to a serious breach of a peremptory norm, but would not wish to limit their use to this. In the government's view the decisive criterion for determining whether a countermeasure may be taken in the general interest is not the 'weight' of an obligation, as noted by the CAVV, but rather the nature of the obligation: namely, that it serves a collective interest and for that reason that there is a collective interest in compliance. This applies to both collective obligations that carry great weight, such as the prohibition of aggression, and collective obligations with less weight, such as pollution of the high seas. Applying the principle of proportionality as a condition for a lawful countermeasure ensures that a countermeasure taken in the general interest against a breach of a collective obligation is proportionate to that obligation. The government would therefore like to express its support for the position taken by the ILC, which places the taking of measures in the general interest in the context of collective obligations, and not exclusively of serious breaches of peremptory law.