Advisory Committee
on Public International Law

Confiscation of foreign state property

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Contents

Introduction 4

— Part I
Scope and definitions 5

— Part II
The proposed measures relating to Russian assets 5

— Part III
Immunity of state property 6

— 1
Content and scope of the immunity of state property 7

— 2
The proposed measures in the light of the immunity of state property 8

— Part IV
Confiscation on the basis of other rules of international law 8

— 1
Countermeasures 9

— 2
Self-defence 11

— 3
Anti-terrorism conventions 12

— Part V
Financial and political risks 13

Conclusion and advice 16

List of abbreviations 17

Endnotes 18

Introduction

content

On 13 August 2024, in response to the international debate on the possible confiscation of frozen Russian assets, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (CAVV) to prepare an advisory report examining whether or not the confiscation of foreign state property is permitted under international law.[1] As this international debate has also involved consideration of other, less far-reaching measures regarding frozen foreign state property, such as the use of extraordinary revenues stemming from such property to finance a loan to a state, this advisory report will discuss these alternative measures as well.

The background to the Minister's request concerns, in particular, the 'use of immobilised assets of the Central Bank of Russia for the benefit of Ukraine'.[2] The CAVV would recall in this connection that Russia is obliged, by virtue of the international law of state responsibility,[3] to cease its aggression against Ukraine and proceed to make reparation, including compensating the damage resulting from violations of international law against Ukraine. In a 2022 resolution, the United Nations (UN) General Assembly recognised that Russia must be held to account for any violations of international law, including its aggression in violation of the UN Charter, and that it must bear all legal consequences, including making reparation for any damage.[4] In this resolution, the General Assembly also recommended the creation by the UN member states of an international register of damage,[5] which led to the establishment of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine.[6] The notion that Russia is responsible under international law and is obliged to pay compensation for all damage is (relatively) uncontroversial. What is more controversial is whether third states, such as EU member states – which are not as such victims of wrongful acts committed by Russia – may confiscate Russian state property with a view to making reparation payments to or supporting Ukraine.[7]

This advisory report discusses the issue in five parts. Part I delineates the scope of the report and defines a number of key concepts. Part II briefly explains what concrete measures are on the table with regard to frozen Russian assets so that the subsequent legal analysis can distinguish between these measures. Part III discusses the rule of immunity of state property, which may be an obstacle to confiscation (or alternative forms of intervention). Next, part IV discusses what rules of international law may permit confiscation (or alternative forms of intervention), notwithstanding any prima facie incompatibility with the rule of immunity of state property that may have been established in part III. The CAVV examines, in succession, the doctrine of countermeasures, the right to self-defence and rules on combating terrorism financing. The advisory report concludes in part V with some thoughts about the risks that the use of the examined measures may entail. Even if confiscation of foreign state property might be permitted in certain circumstances, this obviously does not mean that there are no political, economic or financial risks associated with taking such a measure. International law determines what measures are lawful, but deciding which of these lawful measures should be used is essentially a matter of political judgement.

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— Part I
Scope and definitions

The Minister has asked the CAVV for its view on whether or not the confiscation of foreign state property, especially Russian state property, is permissible under international law.
This question does *not* concern the possible confiscation of property belonging to private individuals of foreign nationality whose goods are seized, for example in response to breaches of sanction regulations, laundering, corruption or other forms of crime; confiscation of this kind is not considered as such in this advisory report. The CAVV is aware that it is always possible that foreign office holders may own private property abroad that originates from state property privatised as a result of corruption or other malfeasance. However, as the relevant property is in private hands, it does not fall within the scope of the present advisory report, which focuses on property that is formally owned by the foreign state, for example assets of a foreign central bank. What potentially does fall within the scope of this report is property of foreign state enterprises that can be identified with the foreign state.[8]

Just as in advisory report no. 44, the CAVV defines confiscation as a measure, usually judicial but potentially also administrative in nature, that results in a loss of property to the state. In Dutch law, confiscation is, in principle, a property sanction under criminal law. Such confiscation may take the form of a forfeiture order,[9] deprivation of illegally obtained advantage[10] or withdrawal from circulation of proceeds of crime.[11] The EU Confiscation Directive will also make it possible for goods of criminal provenance to be subject to confiscation even without being preceded by a conviction for a criminal offence.[12]

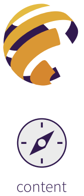
Under Dutch law, confiscation is a measure that is imposed by the courts. However, it cannot be ruled out that the Netherlands may allow administrative confiscation – albeit perhaps subject to judicial review – in exceptional cases, including confiscation of the property of foreign states (for example, where they have committed serious breaches of peremptory norms of international law). This is the scenario that seems to be envisaged by the Minister's question. It is also the scenario on which international proposals for confiscation of Russian state property are based.

— Part II
The proposed measures relating to Russian assets

Since the start of the Russian invasion of Ukraine in February 2022, there have been calls to seize the assets held by the Central Bank of Russia's (CBR) in Western countries and to transfer the proceeds to Ukraine. It was in that context that the United States adopted the REPO Act (Rebuilding Economic Prosperity and Opportunity for Ukrainians Act)[13] in 2024, which authorises the US President to confiscate and dispose of Russian sovereign assets.[14] In 2024, the Parliamentary Assembly of the Council of Europe recommended confiscation of this kind.[15] To date, however, no states have actually taken confiscation measures.

However, concrete steps have been taken to tax 'extraordinary revenues' (windfall profits) on CBR assets or use them to finance loans to Ukraine. In particular, the CBR's reserves in the form of securities held at central securities depositories, such as Euroclear in Brussels, generate substantial revenues as a result of the application of sanctions against the CBR. The EU Council describes the situation as follows:

> 'The prohibition of [transactions with the Central Bank of Russia] generates an extraordinary and unexpected accumulation of cash balances on the balance sheets of central securities depositories (...) that occupy a key position in the settlement and the central maintenance of financial instruments in the Union. That accumulation is due to the immobilisation of assets and reserves of the Central Bank of Russia, or those of any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia, such as the Russian National Wealth Fund, because any payments of principal and interest, coupons, dividends or other income on securities to the Central Bank of Russia and those persons, entities and bodies are prohibited.
>
> Central securities depositories are in a specific situation, which is different from that of other financial institutions because cash balances of or with customers of central securities depositories are usually transferred out of the central securities depositories before the end of the day and do not yield any remuneration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> for the customers. The cash balances held by central securities depositories in relation to the assets of the Central Bank of Russia, or those of any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia, such as the Russian National Wealth Fund, accumulating due to restrictive measures, subsequently need to be prudently managed by the central securities depositories. This results in the generation of unexpected and extraordinary revenues.'[16]

Specifically, an EU Council Decision defines extraordinary revenues as 99.7% of the net profits of the central securities depositories, after deduction of expenses and corporate tax.[17] These extraordinary revenues could be taxed, as Belgium has done previously.[18] But current and future revenue could also be used to fund the provision of loans to Ukraine. The G7 proposed this in June 2024.

> '[T]he G7 intends to provide financing that will be serviced and repaid by future flows of extraordinary revenues stemming from the immobilization of Russian Sovereign Assets held in the European Union and other relevant jurisdictions. To enable this, we will work to obtain approval in these jurisdictions to use future flows of these extraordinary revenues to service and repay the loans.'[19]

On the basis of this G7 proposal, the EU adopted a regulation under which loans totalling a maximum amount of €35 billion would be made available to Ukraine, financed from the extraordinary revenues generated by central securities depositories.[20] This arrangement is being given institutional form through the establishment of a Ukraine Loan Cooperation Mechanism, which will provide Ukraine with periodic financial assistance with a view to repayment of the loans.[21] It is important to note that Ukraine does *not* have to repay this assistance and that it takes the form of macro-financial assistance enabling Ukraine to alleviate its financial distress.[22] Technically, therefore, the extraordinary revenues are not treated as collateral and not used as such to finance reparation payments.

It has also been proposed that the CBR assets could be used as *collateral* for loans provided by Western states to Ukraine, for example loans amounting to 300 billion dollars.[23] This goes further than the proposal mentioned above that only the – relatively limited – extraordinary revenues should be used to finance loans to Ukraine. As yet, it does not have the support of the G7. The idea of a collateral arrangement is predicated on Ukraine's repayment of loans through the reparation payments it receives from Russia in the future on the basis of Russia's international obligation to compensate Ukraine for the damage caused by internationally wrongful acts committed by Russia in and against Ukraine. If, as seems likely, Russia does not make these payments, Western states would confiscate the CBR assets. This arrangement can be interpreted as a transfer of debt claim, whereby Ukraine transfers (in part) its international claim against Russia to Western states, which can then take measures of constraint against CBR assets if Russia fails to pay the claim. In the most far-reaching scenario, as outlined in the US REPO Act mentioned previously and in the resolution of the Parliamentary Assembly of the Council of Europe, states could also *immediately confiscate* the CBR assets and transfer them to Ukraine, without using them as collateral for loans.

— Part III
Immunity of state property

Various rules of international law protect a state's property located on the territory of another state. The most far-reaching form of protection is diplomatic immunity. Embassy buildings and, for example, the residence of the ambassador and members of the diplomatic staff are inviolable under diplomatic law,[24] which means that the receiving state may not take any form of coercive measures against such premises, regardless of who owns them. Moreover, property of foreign states often enjoys immunity from the jurisdiction of the state within whose territory the property is situated. The latter state may only take measures of constraint against that property if it is not intended or used for public purposes.[25] The question is how this immunity of state property relates to the various measures described above. After briefly considering the content and scope of the rule of immunity of state property (section 1), this part of the report then discusses how this rule relates to confiscation of assets and/or

extraordinary revenues; the use of extraordinary revenues to finance a loan to a third country, the use of assets as collateral for a loan, and the levying of tax on extraordinary revenues (section 2).

— 1 Content and scope of the immunity of state property

To determine whether the immunity of state property precludes specific measures, it is necessary to establish first what property is protected by the immunity rule and then what that protection entails.

Immunity applies to the property of foreign states that is in use, or intended for use, for public purposes. In this advisory report, the main question is whether central bank assets and extraordinary revenues fall within the scope of the rule.

Article 21, paragraph 1 (c) of the UN Convention on Jurisdictional Immunities of States and Their Property (the UN Convention) does provide, in general terms, that 'property of the central bank or other monetary authority of the State' enjoys immunity from execution, but the customary law status of this article is not beyond dispute. For example, the Dutch Supreme Court held in 2021 that article 21, paragraph 1 (c) could not be regarded as codifying a rule of customary international law since central banks are taken to have less far-reaching immunity in the legislation and case law of many other states. According to the Supreme Court, immunity from execution applies only to the property of the central bank 'that is intended or used for the performance of tasks of the central bank in connection with monetary policy and exchange rate policy.'[26] State practice on this point is indeed not uniform.[27] It follows that customary law may not protect *all* central bank assets. An oft-heard argument is that sovereign wealth funds managed by central banks are not covered by immunity from execution.[28] The CAVV would note that there is no international consensus on this point, and that proving that assets are used for commercial purposes is no easy matter. There is a perceptible trend towards ever greater protection of central bank assets,[29] and there is in any event a presumption that such assets enjoy immunity.[30]

International law provides no answer to the question whether 'windfall profits' (extraordinary revenues) unexpectedly generated when central bank assets are frozen should also be classified as central bank assets and therefore covered by the presumption of immunity. How these profits should be classified and to whom they belong is determined by the relevant contracts and the applicable national law. The EU Council Decision of 21 May 2024 states that '[u]nexpected and extraordinary revenues do not have to be made available to the Central Bank of Russia under applicable rules, even after the discontinuation of the transaction prohibition. Thus, they do not constitute sovereign assets. Therefore, the rules protecting sovereign assets are not applicable to these revenues.'[31] However, as the contracts between Euroclear and the CBR are not public, the CAVV is unable to assess this determination.[32] It is also unclear what rules, other than contractual provisions, would apply.[33] The CAVV would merely note that *if* ownership of the extraordinary revenues were to belong to the CBR, there would be no ground under immunity law to distinguish them from its other assets.

Immunity shields foreign state property from the jurisdiction of the state in which the property is situated.[34] It is sometimes argued in the literature that immunity of state property applies only where measures of constraint are ordered by a court and therefore not where such measures are imposed by the executive branch of government.[35] Reference is often made in this connection to article 19 of the UN Convention, which regulates state immunity from execution only 'in connection with a proceeding before a court of another State'. The International Law Commission (ILC) explicitly noted that judicial functions are exercised in connection with legal proceedings.[36] The European Convention on State Immunity, which has been ratified by the Netherlands, also limits the scope of application to jurisdiction exercised by courts.[37]

However, the CAVV doubts whether customary international law on state immunity from execution should be interpreted so narrowly. The notion that foreign state property that serves a public purpose is fair game under international law where actions taken by the executive branch of government of the state in which that property is situated are concerned seems to be at odds with the principle of sovereign equality of states

on which the right of immunity is based, and is also illogical since the deeply entrenched rules of immunity from execution would seem to be of little value if they can easily be circumvented by the executive branch of government.[38] The International Court of Justice (ICJ) also seems to interpret the rule less narrowly. In its judgment in the *Jurisdictional Immunities* case, the ICJ held as follows: 'there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes (...)'[39] In short, the CAVV considers it likely that all measures of constraint taken against property of a foreign state intended or used for public purposes, including the great majority of the assets of a central bank, are contrary to the rule that state property is protected by immunity, also in cases where the measures are taken without any form of judicial review. It is worth noting here that not only possible confiscation but also the freezing of assets in itself constitutes, in principle, a breach of immunity.[40]

Finally, some authors suggest that the rule that state property is protected by immunity may evolve in such a way that in certain cases an exception to immunity from execution would apply, thereby allowing measures of constraint such as the freezing and confiscation of foreign state property.[41] The pace of this evolution could accelerate in response to exceptional events and paradigm shifts taking place in the international community. However, the CAVV does not think this will happen, as many states are likely to be wary of such a development. The idea that sufficient critical mass could be generated to bring about an immediate adjustment of customary law by means of a resolution of the UN General Assembly or the adoption of a widely supported convention is beset by both legal and political pitfalls and can, in the CAVV's opinion, be disregarded for the time being.

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The proposed measures in the light of the immunity of state property

Confiscation is a measure of constraint that is incompatible with the rule that state property is protected by immunity. Immunity is therefore an obstacle to the confiscation of the vast majority of a central bank's assets when an administrative confiscation takes place subject to judicial review.[42] The CAVV also takes the view that immunity of state property probably applies in the case of an administrative confiscation without judicial review.[43] The use of CBR assets as collateral for loans undoubtedly infringes the property rights of the foreign state. A restrictive measure of this kind is therefore also problematic under immunity law. The CAVV does not therefore consider it wise to proceed to confiscate (and also freeze) central bank assets or use them as collateral for loans, unless a justification for this can be found in the rules or doctrines of international law discussed below in part IV.

From a legal perspective, the use of extraordinary revenues to finance a loan amounts to confiscation of those revenues. If ownership of the extraordinary revenues belongs to the CBR, there is, as stated previously, no basis in immunity law to distinguish these assets from its other assets. In that case, this measure is at odds with immunity law. However, if it transpires that the CBR does not own the extraordinary revenues, immunity law does *not* apply and restrictive measures *are* possible.[44]

Any immunity which might apply to the extraordinary revenues (if they must be classified as property of the central bank) would not prevent tax from being levied on them. After all, a state has the sovereign right to levy taxes on certain income and profits in so far as they have an actual connection with that state.[45] For example, extraordinary revenues generated by Euroclear have a connection with Belgium, which therefore has the right to levy taxes. If it is possible under national law to tax extraordinary revenues, the tax revenue generated in this way is, naturally, the property of the taxing state, which can use this revenue as it sees fit.

— Part IV
Confiscation on the basis of other rules of international law

As noted in part III, confiscation of foreign state property, such as CBR assets, is at odds with international law on state immunity. In this part, the CAVV studies the scope for confiscation on

the basis of *other* rules of international law. In doing so, it examines whether confiscation can be justified as a countermeasure (section 1) or as a form of (collective) self-defence (section 2). Finally, the CAVV considers whether confiscation is possible under anti-terrorism treaties (section 3).

— 1 Countermeasures

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. In principle, countermeasures are taken by the state directly affected by the previous breach, i.e. the injured state.[46] In 2022, the CAVV concluded in its advisory report no. 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' that even states that are not themselves directly affected by the previous breach may take countermeasures in certain circumstances.[47] In such a case, the countermeasures are referred to as being taken in the general interest or as collective countermeasures.

In the present advisory report, the CAVV builds on advisory report no. 41 and specifically addresses those aspects of particular relevance to the issue of the lawfulness of the confiscation of Russian financial assets by third states. A number of conditions must be met to justify the exercise of the right to take countermeasures. The following issues will be dealt with in turn below: (i) the possibility for non-injured states to take countermeasures in the general interest; (ii) the requirements of necessity and proportionality; (iii) the prohibition of certain countermeasures; and, finally, (iv) the object and nature of countermeasures, as reflected, in particular, in the requirements that they be temporary and reversible.

(i) Countermeasures in the general interest

An absolute prerequisite for the exercise of the right to take countermeasures is that they are taken against a state which is internationally responsible for an internationally wrongful act.[48] It is generally accepted in this connection that Russia, in violation of its obligations under the UN Charter and customary international law, has committed aggression against Ukraine.[49] It follows that Russia is internationally responsible and is obliged to cease its continuing violations and to make reparation,[50] as also recognised by the United Nations General Assembly.[51]

Compliance with Russia's obligations to cease its continuing violations and make reparation is owed, above all, to Ukraine as injured state. However, the ILC has established that compliance may also be owed to several states or to the international community, depending on the character and content of the international obligation and on the circumstances of the breach.[52] It has gone on to provide that states other than the injured state are entitled to invoke state responsibility for breaches of collective obligations and obligations owed to the international community.[53] Other states may then claim from the responsible state (a) cessation of the breach, and assurances or guarantees of non-repetition; and (b) performance of the obligation to make reparation in the interests of the injured state or other beneficiaries of the obligation breached.[54]

As noted above and in the previous CAVV advisory report no. 41, other states that are not themselves directly affected by a breach of obligations may also, in certain circumstances, take countermeasures in the general interest. Such countermeasures presuppose the breach of an obligation under international law which is not of a bilateral but of a collective nature. In that previous advisory report, the CAVV stated that countermeasures in the general interest may be taken only in response to breaches of certain serious, collective obligations, including in any event serious breaches of peremptory norms of general international law *(jus cogens)*.[55]

In the context of the present advisory report, it can be established that the breaches of international law committed by Russia in and against Ukraine concern significant collective obligations and peremptory norms. By using military force and annexing Ukrainian territory (Crimea, Donetsk, Luhansk, Zaporizhzhia and Kherson), Russia has committed particularly serious breaches, which continue to this day. The CAVV has no doubt that,

given their nature and gravity, these breaches justify taking countermeasures in the general interest.

(ii) Necessity and proportionality

Countermeasures must be both necessary and proportionate. Necessity requires that the responsible state be first called upon to fulfil its obligations to cease breaches and make reparation, that notification be given of the decision to take countermeasures and that the decision be preceded by an offer to negotiate.[56] Proportionality requires that countermeasures be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[57]

In the case of collective countermeasures, it is essential to strictly monitor that the combined measures are commensurate with the damage suffered by the injured state. However, from both a quantitative perspective (the gravity of the ongoing breaches and the damage suffered) and a qualitative perspective (the nature of the peremptory norms involved and Ukraine's rights to sovereignty, independence and territorial integrity), there can be little doubt that the utilisation of Russian assets by means of confiscation, the use of extraordinary revenues to finance loans and the use of assets as collateral for loans would be proportionate measures.[58]

(iii) Prohibited countermeasures

Countermeasures may not affect certain obligations;[59] in such cases, the countermeasures are described as 'prohibited'.[60] Examples mentioned in article 50 of the ARSIWA are the obligation to refrain from the threat or use of force, obligations for the protection of fundamental human rights and other obligations under peremptory norms of general international law. In addition, article 50 provides that a state taking countermeasures is not relieved from fulfilling its obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

The confiscation of Russian financial assets cannot be classified as a prohibited countermeasure. Rules governing the immunity of state property (from execution) do not constitute peremptory norms of international law *(jus cogens)*, and are also separate from rules concerning diplomatic immunity.

(iv) Object and nature of countermeasures

The object of taking countermeasures is to induce the responsible state to comply with its obligation to end the wrongful conduct and make reparation.[61] Although this wording is somewhat euphemistic, the function of countermeasures lies in exercising a degree of coercion in order to ensure that a state reverts to respecting international law.[62]

Countermeasures are therefore, by definition, of a temporary nature: as soon as the responsible state ends the breach and makes reparation, the countermeasure must be terminated.[63] It also follows that countermeasures must as far as possible be reversible, in other words taken in such a way as to permit resumption of performance of the obligations in question.[64] The words 'as far as possible' indicate that where a state has a choice between various countermeasures, it should select one which permits resumption of performance of the suspended obligations.[65] The ILC indicates that this duty is admittedly not absolute, but stresses that where irreparable damage is inflicted on the responsible state, this may be regarded as a punishment or sanction for non-compliance and no longer as a countermeasure.[66]

Unlike asset freezing, confiscation of the property of a foreign state and transfer of that property to the directly injured state constitutes, in principle, an irreversible countermeasure. If Russia ends the breaches of international law and also makes reparation for the breaches it has committed, it will not be possible to reverse the confiscation of the property. However, since the assets confiscated would be financial, it can nonetheless be argued that confiscation is reversible in this specific case. After all, money is fungible; confiscating states can always return the assets using tax revenues or other financial resources.[67]

It should also be noted that if the property remains in the hands of the confiscating states, with the assets being used, for example, as collateral for loans to Ukraine to fulfil Russia's obligation to make reparation, the financial assets could still be

returned to Russia if an agreement on making reparation is reached. In addition, if a judicial body were to rule that the conditions for the lawful exercise of the right to take countermeasures have not been met, the confiscation could still be reversed in such circumstances.

Even if confiscation of assets is, in principle, reversible, the CAVV considers that invoking the right to take countermeasures may be open to legal challenge. The confiscation of official Russian financial assets could, in theory, be used to put pressure on Russia to end its breaches, i.e. the aggression against Ukraine and the occupation of Ukrainian territory. The CAVV would note first of all that the stated object of the proposed measures is to support Ukraine, not to put pressure on Russia. Moreover, the necessity for confiscation as a countermeasure has not been established. Confiscation would add little to the pressure to end breaches already being exerted by the current freezing of assets. Indeed, it could even be argued that confiscation would actually lessen this pressure since compliance with international obligations would not immediately lead to the assets becoming available. However, taking countermeasures may be open to legal challenge, above all because confiscation would not achieve the object of, in the words of article 49, paragraph 1 of the ARSIWA, *inducing the responsible state to comply* with its obligation to make reparation. Confiscation of assets as such would not be aimed at inducing Russia to comply with its obligations, but at *implementing* those obligations without Russia's cooperation.[68] It follows that confiscation would pursue an object not envisaged by the ILC.

Nonetheless, the CAVV would point out that the conditions for countermeasures are not interpreted uniformly in all cases, and that the practice and views of states vary.[69] Moreover, international law is always in a state of development and states can influence the evolution of customary law. For example, Federica Paddeu has noted with regard to 'compensatory countermeasures' that the current situation 'provides an opportunity to consider whether a richer variety of responses may be needed in cases of aggression.'[70] She explains this as follows:

> 'While the ILC had good reasons, as noted earlier, to limit countermeasures to an inducement purpose, it may be that these reasons do not hold in cases where a State is manifestly committing aggression. Indeed, it may be that different rules are needed for countermeasures against aggressors in light both of the gravity and the manifest character of their wrongdoing (…) Perhaps a different balance between facilitating enforcement and avoiding abuse is necessary in these cases, one that allows scope for a wider variety of responses. These may include what we might call "compensatory" countermeasures, adopted to secure payment for the damage caused by aggression through the aggressor's assets located abroad. Of course, legal development requires broad support. Unilateral action, by a few powerful (and mostly western) States, is unlikely to be conducive to consensus, more so when it relies on strained, and unprecedented, interpretations of accepted and established rules.'[71]

The CAVV notes 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.

It should also be noted that the primary object of the measures taken by the EU – the use of extraordinary revenues from Russian assets – is to provide Ukraine with exceptional macro-financial assistance, not to compensate it for the damage caused as a result of internationally wrongful acts committed by Russia.[72] It follows that the concept of compensatory countermeasures is not even relevant to these measures.

— 2
Self-defence

In the literature it has been argued that confiscation can also be justified as a form of collective self-defence (on the basis of Article 51 of the UN Charter).[73] According to this argument, third states (such as Western states) may intervene in the defence of another state (such as Ukraine) which is the victim of an unlawful armed attack (such as by Russia) not only by military means but also by non-military means, for example by confiscating state property.

The CAVV doubts, however, whether the right to self-defence extends so far as to allow the regime of state immunity to be sidelined. Although the ILC admittedly stated in its commentary to article 21 of the ARSIWA that '[s]elf-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4 of the Charter of the United Nations [prohibition of the use of force], provided that such non-performance is related to the breach of that provision', it added that '[t]his is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations'.[74] The CAVV would point out that in any case there is hardly any state practice to support the notion that it is permissible to invoke the right to self-defence as a justification for non-military measures, such as confiscation.

The CAVV would also note that self-defence can be successfully invoked only as long as an armed attack is taking place. Once the attack is over, the right to self-defence is extinguished. In the case of Russia and Ukraine, it follows that a state will no longer be able to take measures once Russia stops using force against Ukraine. In this sense, measures based on self-defence are always of a temporary nature: they must cease as soon as the armed attack (or the risk of such an attack) is over.

The CAVV therefore concludes that invoking the right to self-defence to justify a breach of immunity law may be open to legal challenge.[75] However, it would point out that confiscation, if justified as a legitimate form of self-defence, can serve an object that differs from that of a countermeasure. Whereas the purpose of confiscation as a countermeasure is, in principle, to secure reparation payments, its primary purpose as a form of self-defence can be to generate resources to strengthen Ukraine's military capabilities in the short term.[76]

— 3
Anti-terrorism conventions

Some policy documents suggest that conventions to combat terrorism financing could provide a justification for confiscation.[77] International conventions specifically aimed at combating terrorism financing make it a criminal offence and oblige states to prevent it or take measures if it occurs, including confiscation. Conventions of particular relevance here are the 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT),[78] and the Council of Europe's 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention).[79] Russia is a party to these conventions.

If applicable, the conventions provide for the possibility of confiscating financial assets pursuant to a court order. In such a case, the contracting states must also cooperate in the freezing of assets and making confiscation possible.[80]

However, the CAVV queries whether these conventions are applicable to Russian state property. Two questions are of crucial importance. First, whether acts committed by Russia (aggression and war crimes) qualify as terrorism (or state terrorism) within the meaning of the conventions referred to above. Second, if so, whether this could be a justification for confiscating the CBR's assets.

To answer the first question, it is important to ascertain whether there is a legal definition of terrorism. Although international law gives no general definition of terrorism, the ICSFT provides some guidance. An act of terrorism is defined in general terms in article 2, paragraph 1 (b) of that convention as: '[a]ny (...) act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.'[81] The description of the conduct or act as such could apply to Russia's actions, were it not for the fact that this definition relates to the actions of individuals.[82]

There are no specific conventions aimed at combating state terrorism. The existing international anti-terrorism conventions are exclusively intended to criminalise acts of terrorism committed by individuals, and thus provide no basis for determining whether an action constitutes state terrorism. It should be noted, however, that in a recent judgment in 2024, the ICJ held that the ICSFT also covers the actions

of state agents, and that the term 'any person' covers 'individuals comprehensively'.[83] But the ICJ also indicated that state terrorism falls outside the scope of the ICSFT.[84] The CAVV would add that there is no definition in international law of state terrorism, although reports accusing Russia of state terrorism have appeared in the legal literature,[85] and the European Parliament adopted a resolution in 2023 accusing Russia of state terrorism.[86] The CAVV therefore concludes that, although the possibility cannot be excluded that Russian actions qualify as state terrorism, such actions in any event do not fall within the scope of the anti-terrorism conventions.

The remaining question in relation to the potential applicability of the anti-terrorism conventions is whether the actions of Russian state agents can be treated as *individual* acts of terrorism. Article 2 of the ICSFT provides that the Convention applies 'if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out' an act which constitutes a terrorist offence as defined in the convention itself or in the anti-terrorism treaties listed in the annex to the convention, as described above.

If applicable, the conventions provide for the possibility that financial assets may be confiscated pursuant to a court order.[87] In such a case, the contracting states must also cooperate in the freezing of assets and in making confiscation possible. Incidentally, article 5 of the Warsaw Convention provides that the legislative measures relating to freezing and confiscation also apply to:

> '(a) the property into which the proceeds have been transformed or converted; (b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; (c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.'[88]

Any income or other profits arising from the financial assets that have been frozen or confiscated would therefore also be covered by this provision. In addition, article 8, paragraph 4 of the ICSFT provides that each State Party must consider establishing mechanisms whereby the funds derived from the confiscated funds are utilised to compensate the victims of terrorism.

However, even if the actions of Russian agents can be described as acts of individual terrorism, it would still be necessary to determine whether this could justify confiscation of CBR assets. The CAVV would point out that confiscation is only possible if it can be proved that the Russian agents specifically used CBR assets to commit offences, or that these assets were the proceeds of offences committed by these persons.[89] The CAVV considers this unlikely.

Finally, it is important to note the limitations arising from applicable immunities. Although the Warsaw Convention does not explicitly refer to the applicability of immunity, article 28 does refer to the possibility that contracting states may refuse to cooperate in the freezing or confiscation of assets if this would be contrary to the fundamental principles of their legal system, or to the principles of sovereignty.[90] This may mean that the applicable immunity rules are also covered by this provision. It is worth noting that, given the Convention's focus on individual criminal liability, it is not surprising that it does not include a separate provision on immunity. Finally, it is important to bear in mind that the ICSFT *does* refer in articles 20 and 21 to the obligation to respect state sovereignty and other obligations under international law, which may include the rules on immunity.

For the reasons given above, the CAVV does not consider that a convincing argument can be made for using international conventions aimed at combating terrorism financing as a legal basis for confiscation.

— Part V
Financial and political risks

The CAVV has described above those aspects of the confiscation of Russian state property and the use of extraordinary revenues from Russian assets to finance loans to Ukraine that

are legally problematic and unclear. And even if these arrangements would be permitted under international law, they entail certain financial and political risks.

As regards extraordinary revenues, the CAVV has previously pointed out in this advisory report that the ownership of such revenues is legally uncertain. It would also note that there are certain financial risks associated with the use of extraordinary revenues to finance loans to Ukraine. First, it is questionable whether such revenues, which are to some extent uncertain, will be sufficient to cover the amount lent to Ukraine. The EU seems to be passing the financial risk for this to Ukraine, but it is debatable whether Ukraine will even be able to make repayment (unless it receives reparation payments from Russia).[91] Second, it cannot be ruled out that Western states may at some point lift their financial sanctions against Russia. In that case, no more extraordinary revenues would be generated. Western states would then suffer financial losses because it is unlikely that Ukraine would be able to repay the loans, thereby adversely impacting national budgets in the West to a corresponding extent. That scenario is not unrealistic, especially in the case of the EU.[92] Since every six-month extension of restrictive measures requires unanimity, sanctions would have to be lifted if just one EU member state breaks ranks. The CAVV is aware that the EU wishes to mitigate this risk by making the lifting of (financial) sanctions dependent on the requirement that Russia ceases the aggression against Ukraine and compensates Ukraine for the damage caused by the war,[93] but the CAVV wonders whether the latter condition is realistic.

As regards the confiscation of Russian state assets, the CAVV would point out that, even if confiscation were not unlawful (for instance, because it is justified as a countermeasure), it would inevitably set a precedent. There is a risk that other states might seize on this precedent in the future in a way that impacts Dutch interests, for example Dutch central bank assets abroad. There is also a risk that other states might no longer hold their assets in Western countries, including eurozone countries, for fear that all or part of these assets may be confiscated at some point if political relations deteriorate. Any such capital flight could, for instance, adversely affect the stability of the euro.[94]

Moreover, the CAVV would point out that, although international law, in principle, requires full reparation for the injury caused by internationally wrongful acts, full reparation payments are not always made in practice, especially after the end of a war that has caused large-scale damage. In peace treaties, for example, it may be agreed that the aggressor state, for political and economic reasons, will provide only *partial* compensation.[95] In 2014, the International Law Association even observed that it could be counterproductive to the purpose of ending an armed conflict to explicitly name a responsible party in a peace treaty, let alone impose onerous obligations on such a party.[96] This problem seems to be acknowledged in international case law as well. Although the ICJ has not questioned the principle of full compensation as such, it has noted that compensation can take the form of 'a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations',[97] including 'the financial burden imposed on the responsible State, given its economic condition, in particular if there is any doubt about the State's capacity to pay without compromising its ability to meet its people's basic needs.'[98] In 2017, in a case concerning the conflict between Armenia and Azerbaijan, the European Court of Human Rights noted that 'some situations – especially those involving long-standing conflicts – are not, in reality, amenable to full reparation', and directed the states concerned to find a solution 'on the political level'.[99] Similar reasoning can be found in the decision of the Eritrea-Ethiopia Claims Commission in 2009.[100] This cautious approach can be seen as a reaction to Article 231 of the 1919 Treaty of Versailles, which imposed the obligation on Germany and its allies to pay full reparations for the loss and damage caused by the First World War.[101] This obligation to pay reparations led to revanchism in Germany and can be seen as one of the factors leading to the Second World War.[102] After the Second World War, the Allied states and victims of Nazi persecution received reparation payments from Germany, but these certainly did not amount to full compensation.[103]

In this context the CAVV would point out that it is not impossible that Russia will demand as conditions of any peace treaty to end the war with Ukraine that (a) it will not make any

reparation payments and that (b) Western states must return frozen or confiscated assets (and perhaps even extraordinary revenues from these assets) to Russia. Especially in the case of a loan arrangement in which Russian assets serve as collateral for loans, Western states that have provided the loans – as well as any private investors who, by purchasing government bonds, have supplied the Western states with the necessary financial resources for these loans – have an interest in ensuring that Russia makes payment or at least in the assets not being returned to Russia. Advocates of a syndicated loan to Ukraine with assets serving as collateral have therefore argued that the G7, given its financial interests, should be part of the negotiations leading to an end to the war.[104] Whether this would be desirable is debatable. After all, there is a risk that the G7 might 'hold Ukraine hostage' by blocking a peace treaty that does not serve its financial interests, for example if the treaty provides for waiver of reparation payments.

It should be noted that if the G7 does not insist on repayment of the loan granted to Ukraine for which Russian assets have served as collateral, the reparation payments will in fact be made by G7 taxpayers. And, in so far as G7 countries intend to have the loan financed by private investors, it is questionable whether these investors would even be prepared to take the political risk of losing their investment as a result of the G7's waiver of reparation payments.

Conclusion and advice

content

In this advisory report, the CAVV examines the lawfulness of confiscating foreign state property under international law, against the background of proposals to use assets of the Central Bank of Russia for the purpose of making reparation payments to Ukraine. In doing so, the CAVV considers not only confiscation in the strict sense but also the use of extraordinary revenues stemming from the assets to finance loans to Ukraine and the use of the assets as collateral for loans.

The CAVV gives the following advice:

1. Immunity of state property under international law is an obstacle to the confiscation of a central bank's assets. In principle, this also applies to administrative confiscation without judicial review.

2. As regards extraordinary revenues on central bank assets, the ownership of these unexpected and exceptional profits is determined by the applicable contracts and applicable national law. If it transpires that the central bank does not own these profits, the immunity of state property is not applicable and the profits can be used to finance loans.

3. The use of central bank assets as collateral for loans is at odds with immunity law.

4. Invoking the right to take countermeasures in the general interest in order to justify confiscation may be open to legal challenge, as the object of confiscation is not to induce the foreign state to comply with its obligations to make reparation (including in the form of reparation payments), but to implement those obligations without that state's cooperation. Confiscation would thus be intended to achieve an object not envisaged by the International Law Commission.

5. Invoking the right to self-defence in order to justify confiscation may be open to legal challenge given the absence of relevant state practice and the temporary nature of self-defence.

6. The notion that anti-terrorism conventions can be invoked to enable confiscation is unconvincing, as these treaties do not in principle concern state terrorism and do not contain provisions on the absence of immunity.

7. Any decision on whether to confiscate foreign state property may also take into account the financial and political risks.

Finally, the CAVV would note that the Ukraine Loan Cooperation Mechanism adopted by the EU, under which loans to Ukraine are financed from extraordinary revenues stemming from assets of the Central Bank of Russia, is not as such intended to enable reparation to be made, but to provide macro-financial assistance in the broad sense. No international mechanism has yet been set up to coordinate reparation payments to Ukraine. However, a Register for Damage has been established in The Hague, under the auspices of the Council of Europe. In that context, preparatory meetings have been held since July 2024 with a view to establishing a Claims Commission for Ukraine.[105]

List of abbreviations

ARSIWA
Articles on Responsibility of States for Internationally Wrongful Acts

ECtHR
European Court of Human Rights

EU
European Union

ICSFT
International Convention for the Suppression of the Financing of Terrorism

ICJ
International Court of Justice

ILC
International Law Commission

CBR
Central Bank of Russia

Warsaw Convention
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

UN
United Nations

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

Endnotes

1 When requesting the CAVV in 2023 to prepare an advisory report on the accession of the Netherlands to the UN Convention on Jurisdictional Immunities of States and Their Property, the Minister asked the CAVV for its view on the accession of the Netherlands to the UN Convention in the light of the international debate on the confiscation of Russian assets. In its subsequent advisory report no. 44, the CAVV indicated that this debate need not play a role in deciding whether or not to accede to the UN Convention. This was because the UN Convention would not involve any relevant new obligations for the Netherlands; the rules of state immunity that might conflict with the confiscation of certain assets are already part of customary international law. The CAVV stated that it would be willing to address this issue in a separate advisory report should this be considered necessary. See Minister of Foreign Affairs, Request for advice on the UN State Immunity Convention, 29 June 2023, https://www.adviescommissievolkenrecht.nl/publicaties/adviesaanvragen/2023/07/04/vn-verdrag-staatsimmuniteit and see CAVV, Advisory report on the accession of the Netherlands to the UN Convention on Jurisdictional Immunities of States and Their Property, Advisory report no. 44, 22 December 2023.

2 Minister of Foreign Affairs, Request for advice on the confiscation of state assets, 13 August 2024, https://www.adviescommissievolkenrecht.nl/publicaties/adviesaanvragen/2024/08/13/adviesaanvraag-confiscatie-staatstegoeden.

3 See article 31 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) (ARSIWA), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 91 and 92.

4 Resolution adopted by the UN General Assembly on 14 November 2022, 'Furtherance of remedy and reparation for aggression against Ukraine', 15 November 2022, UN Doc. A/RES/ES-11/5, para. 2.

5 Ibid., paras. 3 and 4.

6 Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, https://www.rd4u.coe.int/en/.

7 Article 48, para. 2 (b) of the ARSIWA states that a non-injured third State is entitled to invoke the responsibility of another State in the event of breaches of collective obligations and to claim, among other things, 'performance of the obligation of reparation (...), in the interest of the injured State or of the beneficiaries of the obligation breached'. Although this provision emphasises the *interest* that third states have in securing performance of the obligation to make reparation to the injured state, it does not as such provide a basis for confiscation by third states. 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. 126.

8 See, for example, the judgment of The Hague District Court of 15 August 2024, ECLI:NL:RBDHA:2024:13221 *(Gazprom v. Slavutich)*, in which the District Court held that it was satisfied that a claim by a Ukrainian company (Slavutich) against the Russian state-owned company Gazprom in Ukraine had a good chance of success on the basis of the identification principle, with Gazprom being held liable, as an alter ego of the Russian Federation, for debts of the Russian Federation (paras. 4.26-4.28). The CAVV will not examine the criteria for identification in greater depth in this report.

9 Article 33a, para. 1 of the Criminal Code.

10 Article 36e, paras. 2 and 3 of the Criminal Code.

11 Article 36b et seq. of the Criminal Code.

12 Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, (*OJ* 2024, L2024/1260) (Confiscation Directive).

13 H.R. 815 – 118th Congress (2023-2024): Making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes (24 April 2024), https://www.congress.gov/bill/118th-congress/house-bill/815.

14 Section 104(b)(1) REPO, H.R. 4175 – 118th Congress (2023-2024): REPO for Ukrainians Act (7 November 2023), https://www.congress.gov/bill/118th-congress/house-bill/4175/text.

[15] Resolution 2539 (2024) of the Parliamentary Assembly of the Council of Europe, 16 April 2024.

[16] EU, Council Decision (CFSP) 2024/1470 of 21 May 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (*OJ* 2024, L2024/1470), 21 May 2024, recitals 15-16.

[17] Ibid., Article 1, para. 2.

[18] J. Payne, 'Belgium expects to use $2.4 billion in tax on frozen Russian assets to fund Ukraine,' *Reuters* 11 October 2023. In the first quarter of 2024, Euroclear paid almost €400 million in taxes on profits from the immobilised Russian assets. P. Suy, 'Bevroren Russische tegoeden bij Euroclear leveren België 400 miljoen euro op' (Frozen Russian assets generate €400 million for Belgium), *De Tijd*, 1 May 2024.

[19] Apulia G7 Leaders' Communiqué, Borgo Egnazia, Italy, 14 June 2024 at: https://www.g7italy.it/en/summit.

[20] Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024 establishing the Ukraine Loan Cooperation Mechanism and providing exceptional macro-financial assistance to Ukraine (*OJ* 2024, L2024/2773), 28 October 2024, Article 10, para. 1.

[21] Ibid., Article 7 (in which 'the Mechanism' refers to the Ukraine Loan Cooperation Mechanism) and Article 8, para. 1 (which provides that Ukraine may submit a request for non-repayable financial support twice a year).

[22] Ibid., Article 3.

[23] See, for example, H. Dixon, L. Buchheit and D. Singh, 'Ukrainian Reparation Loan: How it Would Work', 20 February 2024, https://ssrn.com/abstract=4733340.

[24] Article 22, para. 1 and article 30, para. 1 of the Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, *Dutch Treaty Series* 1962, 101 and 159.

[25] Article 19c of the United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, *Dutch Treaty Series* 2010, 272 refers in this connection to 'government non-commercial purposes'. Although this article is concerned solely with measures of constraint 'in connection with a proceeding before a court of another State', the CAVV considers it likely that, under the customary law rule, state property that serves a public purpose is protected more generally against measures of constraint taken by the state within which the property is located. See also part III, section 1.

[26] Supreme Court, 6 July 2021, ECLI:NL:HR:2021:1042, paras. 6.2.3 and 6.2.4.

[27] For an overview, see I. Wuerth, 'Immunity from Execution of Central Bank Assets', in T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019, pp. 269-278.

[28] I. Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds', *George Washington Law Review* 91, 2023, p. 1627; P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 9.

[29] I. Wuerth, 'Immunity from Execution of Central Bank Assets', in T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019, p. 281.

[30] See, for example, P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 8.

[31] EU, Council Decision (CFSP) 2024/1470 of 21 May 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (*OJ* 2024, L2024/1470), 21 May 2024, recital 17.

[32] See also J.P. Sexton and V. Kerr, 'EU Support to Ukraine through Windfall Profits: Reparative Value, International Law, and Future Pathways', *Articles of War*, Lieber Institute West Point, 23 September 2024; and P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 41.

[33] These could possibly be certain rules of Belgian or EU law, but this point has not been elaborated by the EU.

[34] The concept of 'jurisdiction' is defined broadly here to include the jurisdiction to take enforcement measures against property of foreign states.

[35] See, for example, T. Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions', in: T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019, pp. 670-710. P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, pp. 11-14; A. Moiseienko, 'Trading with a Friend's Enemy', *American Journal of International Law* 116, 2022, p. 726; I. Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds', *George Washington Law Review* 91, 2023, p. 1633.

[36] In this respect, article 2, para. 1 (a) of the UN Convention defines 'court' as 'any organ of a State, however named, entitled to exercise judicial functions'. The ILC's commentary to the draft articles underlying the Convention confirms that judicial functions can also be exercised by administrative organs. See ILC, 'Draft articles on jurisdictional immunities of States and their property and commentaries thereto' in: *Yearbook of the International Law Commission*, 1991, vol. II (Part Two), p. 14, para. 3 of the Commentary to Article 2, para. 1(a).

[37] European Convention on State Immunity and Additional Protocol, 16 May 1972, Dutch Treaty Series 1973, no. 43. The fourth recital of the preamble states that the member states of the Council of Europe which have signed the Convention desire '[...] to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State [...]'. The Explanatory Report to the Convention states: 'The Convention applies only to the jurisdiction of courts, whether judicial or administrative. It does not deal with the treatment of Contracting States by the administrative authorities of other Contracting States.' Explanatory Report to the European Convention on State Immunity, ETS No. 74, Council of Europe, 1972, p. 3, para. 8.

[38] See also O.A. Hathaway, M.M. Mills and T.M. Poston, 'War Reparations: The Case for Countermeasures', *Stanford Law Review* 76, 2024, pp. 1001-1004; J. Thouvenin and V. Grandaubert, 'The Material Scope of State Immunity from Execution', In: T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019, p. 247; D. Franchini, 'Ukraine Symposium – Seizure of Russian State Assets: State Immunity and Countermeasures', *Articles of War*, Lieber Institute West Point, 8 March 2023. Although the report of the European Parliament Research Service argues that immunity applies only in connection with judicial proceedings, it adds that '[e]xecutive actions that are unrelated to judicial proceedings ... may infringe broader international obligations such as sovereign equality and protections accorded to foreign-owned property.' See: P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 14.

[39] The ICJ described the essence of this provision as being of a customary law nature, ICJ, 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, para. 118. See also ICJ, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, I.C.J. Reports 2008*, p. 177, para. 170: 'the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority.'

[40] See also O.A. Hathaway, M.M. Mills and T.M. Poston, 'War Reparations: The Case for Countermeasures', *Stanford Law Review* 76, 2024, p. 1113 et seq.; the International Institute for Strategic Studies, 'On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine', 20 May 2024, p. 7, para. 8.

[41] P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, pp. 13-15.

[42] As regards the extraordinary revenues, the CAVV has already noted above that the ownership of these unexpected and exceptional revenues is determined by the applicable contracts and applicable national law. If the CBR does not own these revenues, as stated in the above-mentioned recital 17 of the preamble to Council Decision (CFSP) 2024/1470, immunity of state property does not prevent confiscation. See: EU, Council Decision (CFSP) 2024/1470 of 21 May 2024 amending Decision 2014/512/CFSP concerning

restrictive measures in view of Russia's actions destabilising the situation in Ukraine (*OJ* 2024, L2024/1470), 21 May 2024.

[43] Incidentally, it is hardly conceivable that an administrative measure involving confiscation of goods could be taken in the Dutch legal system *without* the intervention of a court. The government's response to the CAVV's advisory report no. 44 on the accession of the Netherlands to the UN Convention on Jurisdictional Immunities of States and Their Property also seems to imply that if the exceptional measure of administrative confiscation were to be used, this would be done subject to judicial review. That government response contains the following passage on page 6: 'However, it cannot be ruled out that the Netherlands will at some point allow administrative confiscation – subject to judicial review – in exceptional cases, especially in the case of the property of foreign states that have committed serious breaches of peremptory norms of international law *(jus cogens)*.' It is this specific situation that the government is interested in.' Government response to CAVV advisory report no. 44, Parliamentary Papers, House of Representatives 2023/2024, 36 410 V, no. 80, p. 6. Cf. also Canada, Special Economic Measures Act 1992, (S.C. 1992, c. 17), Section 5.1.a.

[44] The question may arise in this connection whether central securities depositories such as Euroclear may be entitled to the revenues and can oppose confiscation on this ground. According to the EU Council, central securities depositories such as Euroclear 'cannot expect to gain an undue and unintended economic benefit from' the implementation of EU sanctions: EU, Council Decision (CFSP) 2024/1470 of 21 May 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (*OJ* 2024, L2024/1470), 21 May 2024, recital 18. However, this issue is not directly governed by international law.

[45] C. Ryngaert, 'Nexus and International Tax Jurisdiction', *Cahiers de droit fiscal international* 108, International Fiscal Association, 2024, pp. 102-120. However, this sovereign right can be limited by treaties intended to avoid double taxation as well as by investment treaties. The CAVV will not consider this topic at greater length here.

[46] Article 49 in conjunction with article 42 of the ARSIWA.

[47] 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. 13-18 and 20.

[48] See article 49 in conjunction with articles 1 and 2 of the ARSIWA. See also ICJ, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 83. As countermeasures are often taken unilaterally, without a prior internationally wrongful act having been established by an international body or court, there is a risk that a contrary ruling may be given later on the existence of that wrongful act or on the fulfilment of other conditions for the taking of countermeasures. See in this connection Arbitral Award (Riphagen, Ehrlich and Caflisch), *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, Decision of 9 December 1978*, in: UN, *Reports of International Arbitration Awards*, Volume XVIII, 2006, p. 417, para. 91; and article 49, para. 3 of the ARSIWA, and commentary: 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. 130, para. 3.

[49] See Resolution of the UN General Assembly (2 March 2022), 'Aggression against Ukraine', UN Doc. A/RES/ES-11/1, paras. 2 and 3.

[50] Articles 29, 30 (a), 31 and 34, in conjunction with articles 35-37 of the ARSIWA.

[51] Resolution of the UN General Assembly (14 November 2022), 'Furtherance of remedy and reparation for aggression against Ukraine,' UN Doc. A/RES/ES-11/5, para. 2.

[52] Article 33, para. 1 of the ARSIWA.

[53] Article 48, para. 1 of the ARSIWA.

[54] Article 48, para. 2 of the ARSIWA.

[55] 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. 16. In response to advisory report no. 41, the government stated that, in its view, only the nature of the obligation should be decisive in determining

whether countermeasures can be taken in the general interest, and that the weight of the obligation plays no part in this. The government gave as examples rules from maritime law concerning the prevention of pollution on the high seas and rules from space law concerning preservation of the right of every state to access and use outer space. See Government response to CAVV advisory report no. 41, Parliamentary Papers, House of Representatives 2023/2024, 36 410 V, no. 80, pp. 3 and 5. However, as countermeasures in the general interest are controversial, the CAVV still considers it appropriate not to equate their lawfulness with all situations in which international responsibility can be invoked by a non-injured state under article 48 of the ARSIWA, but, as argued in advisory report no. 41, to impose additional conditions.

56 Article 52, para. 1 of the ARSIWA.

57 Article 51 of the ARSIWA; Arbitral Award (Riphagen, Ehrlich and Caflisch), *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, Decision of 9 December 1978*, in: UN, *Reports of International Arbitration Awards*, Volume XVIII, 2006, p. 417, paras. 83 and 90; ICJ, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, paras. 85 and 87. See, generally, E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', *European Journal of International Law* 12, 2001, p. 889; R. O'Keefe, 'Proportionality', in: J. Crawford et al. (eds.), *The Law of International Responsibility*, Oxford Commentaries on International Law, 2010, p. 1157.

58 In February of this year, the World Bank estimated the cost of recovery and reconstruction in Ukraine to be $486 billion; see World Bank Group, 'Updated Ukraine Recovery and Reconstruction Needs Assessment Released', press release of 15 February 2024.

59 Article 50 of the ARSIWA.

60 See, for example, article 50 of the ARSIWA and commentary: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 133 and 134, para. 14.

61 Article 49 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.'

62 See article 18 of the ARSIWA and the commentary: 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. 70, para. 3. 'Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.'

63 Article 49, para. 2 and article 53 of the ARSIWA.

64 Article 49, para. 3 of the ARSIWA and commentary: 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. 131, para. 9. See also ICJ, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 87.

65 Ibid. It should be noted that the ILC does not provide further clarification of the criterion of 'reversibility'. When defining this criterion, it seems desirable to seek alignment with other concepts such as 'impossibility of performance' (article 61 of the Vienna Convention on the Law of Treaties) or 'inflicting irreparable damage', as also mentioned in para. 9 of the commentary to article 49, para. 3 of the ARSIWA. See also L.F. Damrosch, 'The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts', *Ecology Law Quarterly* 46, 2019, pp. 106-108.

66 Article 49, para. 3 of the ARSIWA and commentary: 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. 131, para. 9.

67 P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 27

68 Cf. F. Paddeu, 'Transferring Russian Assets to Compensate Ukraine: Some Reflections on Counter-

measures', *Just Security* 1 March 2024; M. Mills, T. Poston and O.A. Hathaway, 'How to Make Russia Pay to Rebuild Ukraine', *Just Security* 20 February 2024. But for a different view, see: P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, pp. 26 and 30; The International Institute for Strategic Studies, 'On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine', 20 May 2024, pp. 11-14, paras. 27-41. Enforced compliance with an obligation to make reparation was previously imposed on Iraq by the United Nations Security Council for its illegal invasion and occupation of Kuwait and was implemented through the United Nations Compensation Commission. See UN Security Council Resolution 687 (3 April 1991), UN Doc S/RES/687 (1991), paras. 16, 18 and 19. For a general discussion of this, see T.A. Mensah†, 'United Nations Compensation Commission (UNCC)', *Max Planck Encyclopedia of Public International Law*, April 2011.

69 See generally, for example, D.J. Bederman, 'Counterintuiting Countermeasures', *American Journal of International Law* 96, 2002, p. 817; Y. Iwasawa and N. Iwatsuki, 'Procedural Conditions', in J. Crawford et al. (eds.), The *Law of International Responsibility*, Oxford Commentaries on International Law, 2010, pp. 1150-1151; L.F. Damrosch, 'The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts', *Ecology Law Quarterly* 46, 2019, pp. 105-106.

70 See, in particular, F. Paddeu, 'Transferring Russian Assets to Compensate Ukraine: Some Reflections on Countermeasures', *Just Security* 1 March 2024.

71 Ibid.

72 Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024 establishing the Ukraine Loan Cooperation Mechanism and providing exceptional macro-financial assistance to Ukraine (OJ 2024, L2024/2773), 28 October 2024.

73 See, for example, A. Ripenko, 'Should Third States Follow Ukraine's Lead and Confiscate Russian State Assets?', *Völkerrechtsblog* 19 June 2023.

74 Article 21 of the ARSIWA and commentary: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 74 and 75.

75 See, for example, P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 31.

76 In this sense, see also J.P. Sexton and V. Kerr, 'EU Support to Ukraine through Windfall Profits: Reparative Value, International Law, and Future Pathways', *Articles of War* 23 September 2024.

77 P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service, 2024, p. 42.

78 International Convention for the Suppression of the Financing of Terrorism (ICSFT), New York, 9 December 1999.

79 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005, *Dutch Treaty Series* 2006, no. 104.

80 Article 6 of the Warsaw Convention and article 8 of the ICSFT.

81 This is the general definition of terrorism. Article 2, para. 1 (a) of the ICSFT also refers to specific manifestations of terrorism, which constitute offences under a number of treaties listed in the annex to the ICSFT. However, in accordance with article 2, para. 2 (a) of the ICSFT, states may exclude the application of the ICSFT to these more specific offences.

82 Article 2, para. 1 of the ICSFT.

83 ICJ, 31 January 2024, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, (Ukraine v. Russian Federation), Judgment*, p. 36, para. 56 (with reference to *I.C.J. Reports* 2019 (II), p. 585, para. 61). The ICJ held that '[the Convention] applies both to persons who are acting in a private capacity and to those who are State agents'.

84 Ibid.

[85] K. Rekawek, 'Russian State Terrorism and State Sponsorship of Terrorism', *ICCT Report*, September 2024.

[86] European Parliament, 'European Parliament declares Russia to be a state sponsor of terrorism,' press release of 23 November 2022.

[87] Articles 3 and 5 of the Warsaw Convention and article 8 of the ICSFT.

[88] Article 5 of the Warsaw Convention.

[89] Article 3, para. 1 and article 1 (a) and (c) of the Warsaw Convention.

[90] Article 28, para. 1 (a) and (b) of the Warsaw Convention.

[91] Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024 establishing the Ukraine Loan Cooperation Mechanism and providing exceptional macro-financial assistance to Ukraine (OJ 2024, L2024/2773), 28 October 2024, Article 15, para. 2 (f), points (iii) and (iv).

[92] M. Rahman, 'Russia should pay for Ukraine – but using frozen assets won't be easy', *Politico* 24 May 2024 ('The biggest concern is that the U.S. plan relies on a highly uncertain revenue stream from profits that accrue from immobilized Russian assets, which in turn depend on the EU's sanctions regime.').

[93] Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024 establishing the Ukraine Loan Cooperation Mechanism and providing exceptional macro-financial assistance to Ukraine (OJ 2024, L2024/2773), 28 October 2024, recital 12; A. Steinbach, 'How to harvest the windfall profits from Russian assets in Europe', *Bruegel* 24 June 2024.

[94] J. Payne and J. Strupczewski, 'EU unlikely to confiscate Central Bank of Russia assets – officials', *Reuters* 23 January 2024.

[95] The following is partly based on L. Pasquet and C. Ryngaert, 'Reparations for aggression and other crimes committed in Russia's war against Ukraine', in L. Dalhuisen et al. (eds.), *Rechtvaardig redresseren. Een verkennend juridisch-empirisch onderzoek naar rechtvaardigheidsopvattingen over remedies bij verantwoordelijkheid en aansprakelijkheid*, (Just Redress: an exploratory legal/empirical study of conceptions of justice as regards remedies for responsibility and liability), Boom Uitgevers 2024, pp. 121-140.

[96] International Law Association Committee on Reparation for Victims of Armed Conflict, 'Washington Conference Report', 2014, Commentary on Principle 10, third paragraph, https://www.ila-hq.org/en_GB/documents/conference-report-washington-2014-2.

[97] ICJ, 9 February 2022, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13, para. 106.

[98] Ibid., para. 110.

[99] ECHR, 12 December 2017, ECLI:CE:ECHR:2017:1212JUD004016706 *(Sargsyan v Azerbaijan)*, paras. 35 and 57.

[100] Eritrea-Ethiopia Claims Commission – Final Award – Eritrea's Damages Claims, 'Report of International Arbitral Awards', 17 August 2009, Vol. XXVI, pp. 522-524, paras. 19-22. As noted by L. Blank in 'War Reparations for Ukraine: Key Issues', *Justsecurity.org* 2 May 2022, the Claims Commission awarded reparations 'to both sides in the conflict, but with the amounts nearly cancelling each other out.'

[101] Article 231 of the Treaty of Versailles ('The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.'). For the official English text, see: Australian Treaty Series 1920 No 1, Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol, https://www.austlii.edu.au/au/other/dfat/treaties/1920/1.html.

[102] S. Woodbridge, 'World War I: Is It Right to Blame the Treaty of Versailles for the Rise of Hitler?' *The Conversation*, 7 November 2018.

[103] H. Rumpf, 'Die deutsche Frage und die Reparationen', *Heidelberg Journal of International Law* 33, 1973, pp. 344–371; M. Piatkowski, 'The legal questions behind Poland's claim for war reparations from Germany', *Notes from Poland*, 9 September 2022.

[104] H. Dixon, L. Buchheit and D. Singh, 'Ukrainian Reparation Loan: How it Would Work', 20 February 2024, https://ssrn.com/abstract=4733340, p. 6.

[105] Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, and Council of Europe, 'Third Preparatory Meeting on a Claims Commission for Ukraine Convened in The Hague', press release of 15 November 2024, https://rd4u.coe.int/en/-/third-preparatory-meeting-on-a-claims-commission-for-ukraine-convened-in-the-hague.