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Legal: The Freezing of the Russian Central Bank's Assets

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Abstract

The freezing of the Russian Central Bank's (CBR) foreign currency reserves in the aftermath of Russia's full-scale invasion of Ukraine has been unparalleled in terms of the amounts involved and the swiftness of its international coordination. Despite the scepticism in some quarters of unilateral sanctions writ large, the key issue under international law is the compatibility of such measures with state immunity. Specifically, two questions arise. The first one is whether the law of state immunity allows for executive, as opposed to judicial, freezing of central bank property. The second one is whether, even if such measures were otherwise in breach of international law, circumstances precluding wrongfulness nonetheless render them lawful. As this article shows, the answer to the first question is finely balanced, but it is virtually certain that the ongoing attachment of the CBR's assets constitutes lawful countermeasures.

1 Introduction

The Group of Seven (G7) nations' coordinated freezing of the Russian Central Bank's (CBR) assets within days of Russia's full-scale invasion of Ukraine in February 2022 is unparalleled in terms of the amounts involved, estimated at approximately US $350 billion.[1] These measures are also unique in that it is third states – rather than Ukraine itself – that took them in response to Russia's aggression.[2] In terms of international law, this freezing of state-owned property is a potentially problematic component of a wider suite of sanctions that Russia is facing. These include, among other things, the

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[1] 'Background Press Call by a Senior Administration Official on Imposing Additional Severe Costs on Russia', *The White House* (27 February 2022), available at www.whitehouse.gov/briefing-room/press-briefings/2022/02/27/background-press-call-by-a-senior-administration-official-on-imposing-additional-severe-costs-on-russia/.

[2] They are, therefore, 'unilateral' in the eyes of international law despite their de facto multilateral origins. Moiseienko, 'Trading with a Friend's Enemy', 116(4) *American Journal of International Law* (*AJIL*) (2022) 720, at 728.

freezing of public and private property, travel bans, export controls, financing restrictions, and partial disconnection of Russian banks from the inter-bank SWIFT payment network.[3] Most of these measures restrict Russian access to sanctioning states' markets or financial infrastructure and, in the absence of any applicable treaty obligations, give rise to no viable international law claims.[4] This is not so in relation to the freezing of property – private or public.[5] While the human rights aspects of attaching private property are beyond the scope of this contribution, the ongoing freezing of central bank assets calls for consideration of sovereign immunity protections.

This article addresses two principal issues. The first one is whether the law of state immunity allows for executive, as opposed to judicial, freezing of central bank property. As will be discussed, answering this involves charting out the limits of state immunity and, in particular, considering how it differs from inviolability. The second issue is whether, even if such freezing of property were otherwise in breach of international law, circumstances precluding wrongfulness, such as countermeasures, would nonetheless render it lawful. As will be seen, the answer to the first question is finely balanced, but it is virtually certain that the ongoing attachment of the CBR's assets constitutes lawful countermeasures.

2 Russia Sanctions in Context

The European Commission, France, Germany, Italy, the United Kingdom (UK), Canada and the USA announced the freezing of the CBR's overseas assets two days after Russia's full-scale invasion of Ukraine on 24 February 2022.[6] The exact breakdown per country is not publicly known, but the governments concerned have indicated that approximately US $350 billion in the CBR's foreign currency reserves has been frozen.[7] This is in addition to the private property of the Russian citizens subject to sanctions, reportedly amounting to US $58 billion in the European Union (EU) alone as of April 2023.[8] Russia has decried the freezing of its overseas assets as 'highway robbery' and invoked state immunity, although it appears to have taken it half a year to expressly make an argument based on state immunity.[9]

[3] See C. Welt *et al.*, *Sanctions on Russia* (2022); European Council, 'EU Sanctions against Russia Explained' (undated), available at www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/.

[4] For an explanation of the distinction, see Ruys and Ryngaert, 'Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law* (*BYIL*) (2021) https://doi.org/10.1093/bybil/braa007, 1, at 11–16.

[5] For an analysis of issues related to private property, see A. Dornbierer, *From Sanctions to Confiscation while Upholding the Rule of Law* (2023); M. Nizzero, *How to Seize a Billion: Exploring Mechanisms to Recover the Proceeds of Kleptocracy* (2023).

[6] 'Joint Statement on Further Restrictive Economic Measures', *European Commission* (26 February 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1423.

[7] 'Background Press Call', *supra* note 1.

[8] 'Joint Statement from the REPO Task Force', *US Department of the Treasury* (9 March 2023), available at https://home.treasury.gov/news/press-releases/jy1329.

[9] 'Potential UN Resolution on Russia's Frozen Assets Would Be "Highway Robbery", — Diplomat', *TASS* (10 November 2022), available at https://tass.com/politics/1534425.

Before considering the legal issues concerned, it is useful to situate the CBR's predicament within a broader history of economic sanctions. This narrative is conventionally told in terms of a progression from comprehensive state-on-state sanctions, such as embargoes or blockades, to 'targeted' measures, such as asset freezes and travel bans against members of a country's ruling classes.[10] This shift has occurred partly in response to the humanitarian crises that comprehensive sanctions have tended to exacerbate, such as the US embargo against Haiti in the early 1990s.[11] The 1990s also saw targeted sanctions utilized against suspected terrorists, including by the United Nations (UN) Security Council, and so the model of using asset freezes and travel bans against one's adversaries – whether rogue governments, terrorists or anyone else – took hold.[12]

These developments had several ramifications. Crucially, they took the edge off the debate surrounding the legal status of economic sanctions writ large. That discussion never disappeared entirely, and critics have continued to decry 'economic coercion', but the relative decline of comprehensive sanctions has lowered the stakes.[13] Furthermore, judicial challenges to sanctions have become commonplace as they implicate individual rights under domestic constitutions and international human rights law.[14] Somewhat paradoxically, it is therefore targeted sanctions that are subject to judicial review rather than comprehensive ones, which affect millions.[15]

In short, despite criticism in some quarters, the effect of sanctions on the targeted state is not necessarily determinative of its legality, nor is it always correlated with the availability of procedural safeguards.[16] This is worth bearing in mind as one analyses the freezing of central bank assets, which have the potential to affect a foreign state's monetary policy. In Russia's case, however, the concerns about adverse humanitarian effects of such sanctions are remote for now as there is no evidence of them causing

[10] K. Alexander, *Economic Sanctions: Law and Public Policy* (2009), at 10–29; Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice', 13 *International Studies Review* (2011) 96.

[11] See, e.g., Reisman, 'Assessing the Lawfulness of Non-Military Enforcement: The Case of Economic Sanctions', 89 *ASIL Proceedings* (1995) 350, at 350–351; see also Gordon, 'Smart Sanctions Revisited', 25 *Ethics and International Affairs* (2011) 315, at 317 (citing UN Secretary-General Boutros Boutros-Ghali speaking about the sanctions against Iraq).

[12] This dates back to SC Res. 1267, 15 October 1999, dealing with the Taliban.

[13] For criticism of unilateral sanctions, see Tzanakopoulos, 'The Right to Be Free from Economic Coercion', 4 *Cambridge Journal of International and Comparative Law* (2015) 616; Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions', in A.Z. Marossi and M.R. Bassett (eds), *Economic Sanctions under International Law* (2015) 83.

[14] See, e.g., Barnes, 'United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence', in M. Happold and P. Eden (eds), *Economic Sanctions and International Law* (2016) 678; I. Cameron (ed.), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (2013).

[15] G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), at 306; I. Cameron, *Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play* (2008), at 35.

[16] However, see a recent argument that otherwise lawful sanctions could be 'coercive' if they involve severe harm to the sanctioned state. Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', *AJIL* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4504816. Such sanctions would still be lawful unless they intrude on the sanctioned state's *domaine reserve* (*ibid.*).

widespread hardship in Russia or even of a sustained and significant decline in the rouble's value.[17]

In the absence of an international law framework that would govern 'sanctions' as a distinct category of state action, the description of a particular measure as a 'sanction' continues to mean nothing as a matter of international law. To inquire into the lawfulness of the specific measure(s) concerned, one therefore must study the applicable treaty and customary obligations. Here, this means, first and foremost, considering the law of state immunity.

3 State Immunity and Inviolability

The law of state immunity is of customary nature.[18] Several sources are often,[19] but not invariably,[20] taken to be an authoritative indication of what it requires. Foremost among them is the UN Convention on Jurisdictional Immunities of States and Their Property (UNCSI), adopted in 2004 on the basis of a multi-year study by the International Law Commission (ILC) but not yet in force.[21] The much earlier European Convention on State Immunity (ECSI), adopted in 1972, is in force for eight states parties.[22] Broadly speaking, under the law of state immunity, states enjoy immunity from adjudication, while state property is immune from execution.[23]

Among the many similarities between the UNCSI, the ECSI and the ILC's reports is that all of them only explicitly speak of immunity as opposable to *judicial* measures. In particular, Article 5 of the UNCSI provides as follows: 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.' The definition of a 'court' in the convention suggests, somewhat circuitously, that 'a "court" means any organ of a State, however named, entitled to exercise judicial functions'.[24] Judicial functions are not defined in the UNCSI itself, but the ILC's commentary suggests that the term 'may, under different constitutional and legal systems, cover the exercise of the power to

[17] M. Snegovaya *et al.*, *Russia Sanctions at One Year: Learning from the Cases of South Africa and Iran* (2023) ('by the end of the spring of 2022, the ruble emerged as the world's best-performing currency, defeating the original expectations of sanctions experts').

[18] H. Fox and P. Webb, *The Law of State Immunity* (2015), at 2.

[19] *Ibid.*, at 291–292.

[20] Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?', in A. van Aaken and I. Motoc (eds), *The European Convention on Human Rights and General International Law* (2018) 264.

[21] United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), UN Doc. A/59/508, 2 December 2004.

[22] European Convention on State Immunity 1972, ETS no. 074.

[23] Brown and O'Keefe, 'State Immunity from Measures of Constraint in Connection with Proceedings before a Court', in R. O'Keefe and C.J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013) 290.

[24] UNCSI, *supra* note 21, Art. 2(1)(a).

order or adopt enforcement measures (sometimes called "quasi-judicial functions") by specific administrative organs of the State'.[25]

Likewise, Articles 18 and 19 of the UNCSI provide for the immunity from 'pre-judgment measures of constraint' and 'post-judgment measures of constraint', respectively. This includes 'attachment, arrest or execution', which plainly covers the freezing of a state's assets. Here, too, however, the link with judicial proceedings is explicit. Similar provisions are to be found in Articles 3 and 23 of the ECSI, dealing with the immunity from adjudication and execution respectively. (Although Article 23 speaks in broad terms of 'measures of execution or preventive measures against the property of a Contracting State', its placement within Chapter III of the Convention, entitled 'Effects of Judgment', suggests that a link to court proceedings is nonetheless required.)

A *The Freezing of Assets as a Quasi-Judicial Function*

The uncertainty insofar as the CBR's assets are concerned is easily apparent. The measures at hand were adopted by governments, not courts. This opens three possible lines of argument. First, one may consider the freezing of assets as a quasi-judicial function falling within the ambit of the law of state immunity. Second, one may argue that the wording of the conventions and domestic legislation is not exhaustive of the content of customary international law; any freezing of a state's property, whether ordered by the courts or the executive, would infringe state immunities. Third, one may accept that sovereign immunities do not in fact apply to purely executive, as opposed to judicial, action.

The first of these views holds little force.[26] As indicated previously, non-judicial freezing of the property of individuals, companies and, occasionally, states is no longer a rare occurrence. This includes 15 sanctions regimes currently operated by the UN Security Council as well as multiple unilateral, or autonomous – that is, non-UN-mandated – sanctions programmes run by the EU and individual states around the world.[27] This does not appear to have led to any suggestion – let alone, a widely accepted one – that respective international or domestic agencies, such as the UN Security Council, the EU Council, the US Office of Foreign Assets Control, His Majesty's Treasury in the UK or others, are thereby acting in a quasi-judicial capacity. In fact, the conventional view of sanctions, albeit one that does not fully account for their occasional use for criminal justice purposes,[28] is that they constitute a foreign policy tool to be wielded

[25] ILC, Report of the Commission to the General Assembly on the Work of Its Forty-third Session, UN Doc. A/CN.4/SER.A/1991/Add.l (Part 2), 19 July 1991, at 14.

[26] For similar analysis, see 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* (2019) 670, at 680–684.

[27] 'Sanctions', *UN Security Council*, available at www.un.org/securitycouncil/sanctions/information. On unilateral sanctions, see Ruys and Ryngaert, *supra* note 4.

[28] See, e.g., Moiseienko, 'Crime and Sanctions: Beyond Sanctions as a Foreign Policy Tool', *German Law Journal* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4478056.

by governments.[29] Consistent with this, as Tom Ruys notes, EU sanctions are adopted within the framework of the Common Foreign and Security Policy.[30] This is a far cry from the exercise of quasi-judicial functions, and there is simply no authority suggesting that sanctions should be viewed as an exercise of such functions.

B *State Immunity, Inviolability and Executive Action*

The second alternative – namely, that state immunity reaches beyond judicial action alone – requires one to ascertain the content of the customary law of state immunity. One way of doing so is to look for state practice and *opinio juris* in connection with prior instances of the freezing of state property. Most, if not all, relevant examples are to be found in relation to the USA, including its freezing of property belonging to Afghanistan, Cuba, Iran, Syria and Venezuela.[31] It has been suggested that these measures have generated remarkably few references to state immunity by the states affected.[32] While those references have indeed been less prominent and persistent than one might have expected, they have not been entirely absent. Iran brought immunity-related claims against the USA in the International Court of Justice (ICJ), but they were dismissed for lack of jurisdiction.[33] Immunities were also raised by Russia, as mentioned earlier, and in a remark by Venezuela's foreign minister, made in the context of a statement focused primarily on presenting US sanctions as a crime against humanity.[34] However, neither the sanctioning states nor – crucially – the unaffected third states without any direct stake in the matter have expressed any concerns around immunity.[35]

Another route one might take to establish the content of applicable customary rules is to reason from first principles. If judicial measures trigger the application of state immunities, surely it would be incongruous for non-judicial action, which is equivalent in effect but probably subject to less rigorous safeguards, to be exempt from the

[29] B. O'Toole and S. Sultoon, *Sanctions Explained: How a Foreign Policy Problem Becomes a Sanctions Program* (2019); Elliott, 'Trends in Economic Sanctions Policy: Challenges to Conventional Wisdom', in P. Wallensteen and C. Staibano (eds), *International Sanctions: Between Words and Wars in the Global System* (2005) 3; Fitzgerald, 'Drug Kingpins and Blacklisting: Compliance Issues with U.S. Economic Sanction (Part 1)', 4 *Journal of Money Laundering Control* (2001) 360.

[30] Ruys, *supra* note 26, at 683.

[31] On Afghanistan, see I. (Wuerth) Brunk, 'Central Bank Immunity, Afghanistan, and Judgments against the Taliban', *TL Blog* (1 February 2023), available at https://tlblog.org/central-bank-immunity-afghanistan-and-judgments-against-the-taliban/. On Cuba, Iran and Syria, see J.K. Elsea, *Suits against Terrorist States by Victims of Terrorism* (2005).

[32] Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds', *George Washington Law Review* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4363261.

[33] *Certain Iranian Assets (Islamic Republic of Iran v. United States)*, Preliminary Objections, Judgment, 13 February 2019, ICJ Reports (2019) 7.

[34] L. Ojeda, 'Canciller Plasencia: Medidas Coercitivas Unilaterales constituyen crímenes de lesa humanidad', *Gobiemo Bolivariano de Venezuela*, 15 September 2021, available at https://mppre.gob.ve/2021/09/15/plasencia-medidas-coercitivas-unilaterales-crimenes-lesa-humanidad/; 'Potential UN Resolution', *supra* note 9.

[35] Brunk, *supra* note 32, at 18.

remit of those rules.[36] This argument raises the question of what the rationale is behind a state's immunity from execution. This issue does not seem to have ever been addressed with great clarity,[37] but one plausible account is that such immunity serves the pragmatic function of minimizing tensions between states.[38] If that is correct, then there is no support for disparate treatment of judicial and executive measures.

Conversely, one might view state immunities as a protection against the unique affront to a state's sovereignty and dignity involved in another state's courts purporting to exercise their authority over that first state or its property.[39] This might strike one as an oddly ephemeral rationale that is lacking in pragmatism, but it does have its practical underpinning. States do occasionally freeze – or, indeed, seize – each other's property without judicial involvement. One might argue that the law of state immunity is not calculated to preclude all such interferences but only those that rise to the level of involving the courts.

Thus, and again as highlighted by Ruys, in the discontinued ICJ dispute between East Timor and Australia, East Timor argued that Australia had infringed East Timor's immunities by seizing the documents that belonged to the latter.[40] Australia's response was that international law knows of a legal regime that forbids all interferences, judicial or otherwise, with a state's property – namely, diplomatic inviolability.[41] On this argument, to extend state immunities beyond judicial action is to afford inviolability to a foreign state's property. That would not be in line with the prevailing understanding of current international law.

Against this backdrop, caution is warranted in considering the arguments eloquently made in this issue's opposing contribution. On that view, freezing the CBR's assets is a 'constraining act of authority' as envisaged by the ICJ in *Arrest Warrant* and *Mutual Assistance in Criminal Matters*.[42] Whether that act is of executive or judicial origin is irrelevant. The constraint is all the more evident, the argument goes, given that such freezing interferes with Russia's ability to carry out its monetary policy.

[36] Thouvenin and 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* (2019) 245, at 250 ('non- judicial measures can hinder the foreign State's management of its property and should in principle be covered by immunity from execution').

[37] Most classic work in the field treats the immunity from execution as an afterthought compared to the immunity from adjudication. See, e.g., Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYIL* (1951) 220; X. Yang, *State Immunity in International Law* (2012); C.H. Schreuer, *State Immunity: Some Recent Developments* (1988); S. Sucharitkul, *State Immunities and Trading Activities in International Law* (1959).

[38] Paulsson, 'Sovereign Immunity from Execution in France', 11 *International Lawyer* (1977) 673.

[39] See, e.g., *Federal Marine Commission v. South Carolina State Ports Authority*, 535 US 743, at 760 (2002).

[40] Ruys, *supra* note 26, at 681–682.

[41] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Counter-Memorial, 28 July 2014, paras 5.59–5.64, available at https://www.icj-cij.org/sites/default/files/case-related/156/18702.pdf.

[42] *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, Judgment, 11 April 2000, ICJ Reports (2002) 3; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ICJ Reports (2008) 177.

There is no doubt that an asset freeze is a measure of constraint. However, the abovementioned cases hardly shed any light on the question of whether only judicial measures of constraint trigger the application of state immunity. In fact, the relevant passage in *Arrest Warrant* speaks of immunity and inviolability: 'That immunity and that inviolability protect [a state's foreign minister] against any act of authority of another State which would hinder him or her in the performance of his or her duties.'[43] In *Mutual Assistance in Criminal Matters*, the ICJ likewise makes mention of inviolability before concluding – in an apparent elision of the difference between inviolability and immunity – that any subjection of a head of state 'to a constraining act of authority' therefore amounts to 'an attack on the immunity of the Head of State'.[44] The inviolability of heads of state is not a new doctrine,[45] but extending such inviolability to state property outside the context of a diplomatic mission would be a departure from existing law and practice. Therefore, the better view of that statement by the ICJ is as a momentary lapse in the precision of its drafting rather than an indication as to whether state immunity applies to executive measures.

C *Current State of the Debate*

In short, the argument as to whether state immunities extend beyond judicial action is a finely balanced one. Scholarly opinion is, unsurprisingly, divided. Those who argue that the freezing of a state's property does not trigger state immunities include Ingrid (Wuerth) Brunk, Tom Ruys and, more tentatively, Philippa Webb.[46] The opposite view is represented most forcefully, at the level of principle, by Jean-Marc Thouvenin and Victor Grandaubert.[47] However, insofar as the CBR's property specifically is concerned, Thouvenin not only argues that its freezing is legal but also advocates in favour of its confiscation in Ukraine's favour in the exercise of lawful collective self-defence.[48] Matthias Goldmann likewise contends that state immunity applies but so do countermeasures and collective self-defence, with the consequence that the freezing of the CBR's overseas property is lawful.[49]

This points to an academic consensus taking shape as to the ultimate conclusion in the matter of frozen Russian assets, if not the legal reasoning that underpins it. But, if one were pressed to nail one's colours to the mast, the better argument appears to be that the freezing of a state's assets based on executive action alone does

[43] *Arrest Warrant Case*, *supra* note 42, para. 54.

[44] *Mutual Assistance in Criminal Matters*, *supra* note 42, para. 170.

[45] See Fox and Webb, *supra* note 18, at 545–546.

[46] Brunk, *supra* note 32; Ruys, *supra* note 26; P. Webb, 'Ukraine Symposium – Building Momentum: Next Steps Towards Justice for Ukraine', *Lieber Institute* (2 May 2022), available at https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/.

[47] Thouvenin and Grandaubert, *supra* note 36; Thouvenin, 'Gel des fonds des banques centrales et immunité d'exécution', in A. Peters *et al.* (eds), *Immunities in the Age of Global Constitutionalism* (2014) 209; see also Bastid-Burdeau, 'Le gel d'avoirs étrangers', 124 *Journal du droit international* (1997) 5, at 39.

[48] J.-M. Thouvenin, 'Let's Guarantee That Russia Will Pay for the Reconstruction of Ukraine', *Le Monde* (2 May 2022).

[49] M. Goldmann, 'Hot War and Cold Freezes: Targeting Russian Central Bank Assets', *Verfassungsblog* (28 February 2022), available at https://verfassungsblog.de/hot-war-and-cold-freezes/.

not implicate state immunity. Whether it might implicate inviolability – for example, as a result of an international custom arising from the 'near absolute' protections that central bank assets tend to enjoy under domestic laws[50] – is a more difficult question to answer definitively in light of its novelty. To my mind, therefore, the fairest summary is this: it is plausible that a purely executive freezing of central bank assets does not implicate either immunity or inviolability rules, but it would take a brave legal counsel to advise their government that such a freezing is lawful on that basis alone.

4 Countermeasures

It would, however, be wholly artificial to consider the issue without reference to the circumstances giving rise to the freezing of the CBR's assets. The sole reason for their uniquely swift freezing is Russia's illegal war of aggression. Credible allegations have also been made of war crimes and crimes against humanity.[51] The damage that Ukraine suffers as a result of these internationally wrongful acts grows day by day and amounts to, at a minimum, hundreds of billions of dollars.[52] Against this backdrop, it is impossible to escape the question of whether Russia's breaches of international law would render lawful an otherwise illegal departure from observing the immunity or inviolability of the CBR's assets, even assuming either of the two applies. As mentioned earlier, countermeasures and collective self-defence come in contention as potentially applicable circumstances precluding wrongfulness.[53] For the sake of brevity, this article focuses on countermeasures alone, which supply a sufficient legal basis for the continued freezing of the CBR's property.

A *Countermeasures and State Immunity*

Article 49 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which are widely accepted to reflect customary international law,[54] lays out the features of countermeasures:

> 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. …
> 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
> 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.[55]

[50] Brunk, *supra* note 32.

[51] See, e.g., Office of the United Nations High Commissioner for Human Rights, Killings of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation's Armed Attack Against Ukraine (2022).

[52] 'Ukraine Recovery and Reconstruction Needs Estimated $349 Billion', *World Bank* (9 September 2022), available at www.worldbank.org/en/news/press-release/2022/09/09/ukraine-recovery-and-reconstruction-needs-estimated-349-billion.

[53] Thouvenin, *supra* note 48; Goldmann, *supra* note 49.

[54] See R. Higgins *et al.*, *Oppenheim's International Law: United Nations*, vol. 1 (2018), at 944–945.

[55] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001.

Another key requirement, contained in Article 51 of the ARSIWA, is that countermeasures must be proportionate to the breach they seek to address. The ILC's commentary explains that all those requirements aim to ensure that countermeasures are not punitive but merely calculated to restore the state of compliance with international law as between the parties.[56]

Given the nature and scale of Russia's ongoing breaches of international law, such as the waging of aggressive war, there is little doubt that the freezing of its state-owned property is a proportionate response, as would be most other conceivable non-military measures. While some obligations cannot be deviated from by way of countermeasures, such as those involving the respect for human rights or diplomatic inviolability, no such exception exists for either state immunity or, should it exist, the inviolability of central bank assets.[57] Nor does the freezing, as distinct from seizure (confiscation), raise any difficult issues concerning the temporary and reversible nature of countermeasures.

It is plain, therefore, that the freezing of another state's central bank assets can in principle be a lawful countermeasure. In the past, there has been some controversy around the interplay between state immunity and countermeasures. However, it involved issues that are peculiar to the immunity from adjudication, as distinct from the immunity from execution that might be implicated here. If the immunity from adjudication is claimed before a domestic court, this may preclude the court from establishing the facts that would have formed the basis for the lifting of the immunity as a countermeasure.[58] Furthermore, if the immunity from adjudication is lifted to enable private claims against a foreign state, there is a risk that the volume of claims will be out of proportion with the breach giving rise to the countermeasures.[59] None of these concerns apply to the freezing of state-owned property ordered by an executive body.

B *Third Party Countermeasures*

Some challenges do arise though. The first one is that we are concerned with (potential) countermeasures taken by states other than Ukraine, the directly injured state, without UN authorization. Such countermeasures are widely known as third party countermeasures, although this is arguably a misnomer: in principle, they are imposed in response to breaches of *erga omnes* obligations, which are owed to all states, such that there are no third parties. Third party countermeasures proved controversial during the ILC's development of the ARSIWA, and, as a result, the articles are non-committal as to their permissibility.[60]

[56] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10 (2001), at 75, 129, 139.

[57] ARSIWA, *supra* note 55, Art. 50(2)(b).

[58] Longobardo, 'State Immunity and Judicial Countermeasures', 32 *European Journal of International Law* (2021) 457, at 470–473.

[59] See Franchini, 'State Immunity as a Tool of Foreign Policy', 60 *Virginia Journal of International Law* (2020) 433, at 478 (arguing that proportionality should be assessed on a case-by-case basis in this context).

[60] ARSIWA, *supra* note 55, Art. 54.

If *erga omnes* obligations are owed to all states, it follows that all states are able to invoke the international responsibility of a state in breach, which includes the imposition of countermeasures. This argument in favour of the availability of third party countermeasures is simple and compelling, and there is no doubt that a war of aggression constitutes a violation of an *erga omnes* obligation.[61] There are two potential objections to the general applicability of third party countermeasures. The first one is to do with the dearth of state practice. States are often reluctant to describe what they do as countermeasures and, therefore, whether a particular measure counts as a third party countermeasure can be debatable.[62] However, it would be a stretch to deduce from this that third party countermeasures are impermissible. It is understandable that states would be keen to avoid admitting that they are engaged in a course of action that is only legal on account of another state's prior breach. Furthermore, third party countermeasures are exceptional by their nature since they involve a state acting in response to a breach that, in practical terms, primarily affects another state.

The second objection is one of principle and relates to the opportunities that third party countermeasures arguably create for abuse by powerful states.[63] This concern is at the heart of the opposition to third party countermeasures. There is no doubt a kernel of truth in it. At the same time, the absence of a multilateral response to egregious breaches of international law would be at least as fertile for abuse by powerful states, if not more so. This becomes apparent if one contemplates, as a thought experiment, a parallel universe where Russia's invasion of Ukraine led to no economic response by the collective West.

C *Procedural Requirements*

Let us now move from the general principle to its application in this specific case. The ARSIWA stipulate certain procedural requirements for the imposition of countermeasures, including the obligation to 'notify the responsible State of any decision to take countermeasures and offer to negotiate with that State'.[64] This does not appear to entail a requirement to describe the measure taken as a countermeasure but merely to notify the state concerned of its imposition:

> Countermeasures can have serious consequences for the target state, which should have the opportunity to reconsider its position faced with the proposed countermeasures.[65]

In principle, this should happen before countermeasures are taken, but some flexibility is permitted: '[T]he injured State may take such urgent countermeasures as are necessary to preserve its rights.'[66] The phrase 'preserve its rights' might

[61] *Barcelona Traction (Belgium v. Spain)*, Judgment, 24 July 1970, ICJ Reports (1970) 3, para. 34.
[62] See M. Dawidowicz, *Third-Party Countermeasures in International Law* (2017), at 111–238 (for a survey of state practice). *Cf.* Lanovoy, 'Third-Party Countermeasures in International Law: Book Review', 113(1) *AJIL* (2019) 200, at 202–203.
[63] Dawidowicz, *supra* note 62, at 72–110; Lanovoy, *supra* note 62, at 201.
[64] ARSIWA, *supra* note 55, Art. 51(1)(b).
[65] ILC, *supra* note 56, at 136.
[66] ARSIWA, *supra* note 55, 52(2).

cast doubt on how this requirement should apply to third party countermeasures, but, in all likelihood, this wording is simply a reflection of the ARSIWA's default frame of reference, which is 'regular', rather than third party, countermeasures. The ILC's commentaries explain that the need for urgency encompasses situations where a state in breach may seek to 'immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State'.[67] This is precisely why no prior warning to Russia would have been feasible in this instance.

D *The Nature of Russia's Breach*

All in all, it is exceedingly likely that the freezing of the CBR's assets constitutes a lawful (third party) countermeasure in response to Russia's own ongoing breaches of international law. How exactly one defines such breaches by Russia is of significance for the potential duration of the countermeasures. Even if Russia withdrew its troops, it is likely that Western nations would, at a minimum, wish to keep its assets frozen until it complied with its obligation to make full reparation to Ukraine for the damage caused.[68] That is leaving aside the potential for outright seizure (confiscation) of Russian state-owned property and its transfer to Ukraine.[69]

In this context, Ingrid Brunk notes that 'the duty to pay reparations may not itself be an *erga omnes* norm', which could undermine the ability to keep in place third party countermeasures on that basis.[70] Whether this is correct is another novel legal issue raised by the ongoing collective sanctions against Russia. The obligation to make full reparation is a secondary obligation that is predicated on the breach of the primary obligation – in this instance, one stemming from a prohibition on aggressive war.[71] If one takes as a starting point the notion of *erga omnes* obligations being of particular importance to the international community at large, it is possible to argue that other states do not have the same interest in Ukraine's obtaining full reparation as they do in Russia's cessation of its war of aggression. Conversely, it is at least equally plausible to argue that the provision of reparations to a state aggrieved by a severe breach of the UN Charter is also a matter of universal concern that goes directly to the maintenance of international peace and security. On balance, the latter appears to me to be the better view. However, if one day Russia did withdraw its troops from Ukraine but refused to pay reparations, one may expect this discussion to unfold with vigour.

67 ILC, *supra* note 56, at 136.

68 Ongoing freezing is the European Union's default position. S. Fleming and H. Foy, 'EU to Examine Seizing Confiscated Russian Assets for Reconstruction', *Financial Times* (23 January 2023), available at www.ft.com/content/dab0fe80-dae0-4973-88ea-de2d95cd9a4a.

69 For a broad outline of the issues involved, see Moiseienko *et al.*, 'Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options', *World Refugee and Migration Council* (2022).

70 I. Brunk, 'Countermeasures and the Confiscation of Russian Central Bank Assets', *Lawfare Blog* (1 May 2023), available at www.lawfareblog.com/countermeasures-and-confiscation-russian-central-bank-assets.

71 ILC, *supra* note 56, at 60 (speaking of 'secondary obligations of reparation, including restitution').

5 Conclusion

The freezing of the CBR's foreign currency reserves involves swift and coordinated action by the G7 states. The immunity that attaches to such assets – or, potentially, their inviolability – offers the most plausible grounds for impugning those measures under international law. However, no state has described the freezing of the CBR's assets as a violation of state immunity to date, save for Russia itself. Scholarly opinion is divided as to the appropriate analysis, but not as to the ultimate result: some argue that non-judicial freezing of state assets does not implicate state immunities at all, whereas others disagree but suggest that, in this instance, circumstances precluding wrongfulness apply. Indeed, unless one rejects the notion of third party countermeasures altogether, it is difficult to deny that, even if it were otherwise incompatible with state immunity, the freezing of the CBR's assets constitutes a lawful countermeasure to Russia's own ongoing, egregious breaches of international law.