
Illegal, Unless: Freezing the Assets of Russia's Central Bank

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Abstract

In response to the Russian invasion of Ukraine on 22 February 2022, the European Union (EU) and states such as Canada, Japan, Switzerland, the United Kingdom and the United States of America froze assets of the Russian central bank held in their jurisdictions. The sanctions fit in a longer pattern of states freezing assets of foreign central banks, which has been criticized by several states to be incompatible with the law of state immunity. The criticism on these types of sanctions raises the question whether freezing assets of Russia's central bank complies with the law of state immunity. This article answers this question by investigating whether the law of state immunity is confined to the jurisdiction of courts or if it also applies in the context of executive action. Considering that the law of state immunity also applies to executive action, these sanctioning states (and the EU) violated Russia's state immunity by freezing assets of Russia's central bank. These sanctions, however, could be justified as (third party) countermeasures in response to Russia's invasion of Ukraine.

1 Introduction

On 24 February 2022, the Russian Federation invaded Ukraine under the guise of a 'special military operation'.¹ In response to the invasion, Canada, Japan, Switzerland, the United States of America (USA), the United Kingdom (UK) and the European Union (EU) announced the imposition of financial sanctions against Russia's central bank.² By way of

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¹ A. Osborn and P. Nikolskaya, 'Russia's Putin Authorises "Special Military Operation" against Ukraine', *Reuters* (24 February 2022), available at www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/.

² The Russia (Sanctions) (EU Exit) (Amendment) (No 25) Regulation, no. 205, 2022, Art. 3 (UK Sanctions Regulation); Special Economic Measures (Russia) Regulations SOR/2014-58, Art. 3 (Canada Sanction Regulation); Ordonnance du 4 mars 2022 instituant des mesures en lien avec la situation en Ukraine, Doc. RS 946 231 176 72), Art. 24 (Switzerland Sanction Order); Government of Japan, *Japan Stands with Ukraine*, 21 April 2022, available at https://japan.kantei.go.jp/ongoingtopics/pdf/jp_stands_with_ukraine_eng.pdf; Directive no. 4 under Executive Order 14024, Prohibitions Related to

Council Regulation 2022/334, the EU prohibited '[t]ransactions related to the management of reserves as well as of assets of the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia'.³ On the same day, the USA prohibited 'any transaction involving the Central Bank of the Russian Federation'.⁴ The UK, Canada, Japan and Switzerland have implemented very similar sanctions.⁵ These sanctions essentially freeze any assets and foreign reserves held by Russia's central bank in those respective jurisdictions.

The sanctions against Russia's central bank were imposed to 'prevent [Russia] from deploying its international reserves in ways that undermine the impact of [the] sanctions'.⁶ According to the EU, these sanctions 'impose severe consequences on Russia for its actions and... effectively thwart Russian abilities to continue the aggression'.⁷ Similarly, the USA stated that the sanctions 'significantly limit Russia's ability to use assets to finance its destabilizing activities, and target the funds [Russia] depend[s] on to enable [its] invasion of Ukraine'.⁸ The sanctions against Russia's central bank have had destabilizing effects on the rouble and the Russian economy.⁹ Prior to Russia's invasion of Ukraine, Russia had €579 billion in international reserves that were being used to stabilize its currency. Around 60 per cent (€363 billion) of the reserves have been frozen pursuant to these sanctions, which means that Russia cannot access its assets (such as securities and reserves) held in central and commercial banks located in those states.¹⁰ This has led to a 'free fall' of the Russian rouble, an estimated 15 per cent decline in Russia's economy and a spike in inflation of 20 per cent.¹¹

Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation, 19 May 2023 (USA Sanctions Order); Council Regulation (EU) 2022/334 Concerning Restrictive Measures in View of Russia's Actions Destabilizing the Situation in Ukraine, OJ 2022 L 57/1 (EU Sanctions Directive).

³ *Ibid.*

⁴ Directive no. 4 under Executive Order 14024, *supra* note 2.

⁵ See note 2 above.

⁶ European Commission, Joint Statement on Further Restrictive Economic Measures, 26 February 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1423.

⁷ Council of the EU and the European Council, EU Sanctions against Russia Explained (2022), available at www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/.

⁸ US Department of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth, 28 February 2022, available at <https://home.treasury.gov/news/press-releases/jy0612#:~:text=Pursuant%20to%20the%20Russia%2Drelated,Finance%20of%20the%20Russian%20Federation.>

⁹ 'US Escalates Sanctions with a Freeze on Russian Central Bank Assets', *New York Times*, 28 February 2022, available at www.nytimes.com/2022/02/28/us/politics/us-sanctions-russia-central-bank.html.

¹⁰ M. Bernstam, 'Central Bank Sanctions Strike at the Foundations of Russia's Economy', *Financial Times* (3 March 2022), available at www.ft.com/content/3f1c7151-93ed-48ff-a23c-496320919621.

¹¹ N. Gordon, 'Banks Are Stopping Putin from Tapping a \$630 Billion War Chest Russia Stockpiled before Invading Ukraine', *Fortune* (3 March 2022), available at <https://fortune.com/2022/03/03/russia-sanctions-central-bank-rouble-us-eu-foreign-reserves/>; A. Rappeport, 'US Escalates Sanctions with a Freeze on Russian Central Bank Assets', *New York Times* (28 February 2022), available at www.nytimes.com/2022/02/28/us/politics/us-sanctions-russia-central-bank.html; I. Ivanova, 'Western Sanctions Are Pummeling Russia's Economy', *CBS News* (6 April 2022), available at www.cbsnews.com/news/sanctions-russia-economy-effect/.

The law of state immunity is a body of rules in international law that reflects a 'basic state right based on the respect for a state's sovereignty and independence'.¹² State immunity holds that states are immune from foreign jurisdiction, and the rules can be separated into immunity from adjudication and immunity from enforcement.¹³ The freezing of assets of the Russian central bank raises the question if such action is compatible with the law of state immunity. This article answers this question in the negative. By freezing assets of Russia's central bank, the EU and the sanctioning states violated Russia's state immunity as they hindered Russia from exercising acts inherent to its sovereignty and public authority. These sanctions, however, may be justified as (third party) countermeasures in response to Russia's invasion of Ukraine.

2 Sanctions and the Law of State Immunity

States have attempted to codify a part of the law of state immunity in two international instruments: the European Convention on State Immunity (ECSI) and the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCJI).¹⁴ It should be noted that the ECSI is only in force for eight European states and will only be referenced in this article as evidence of state practice in relation to those eight states. On the other hand, although the UNCJI is not in force, it will be relied upon as an authoritative source in the following sections as certain provisions of the UNCJI are said to reflect customary international law.¹⁵

A The Requirement of a Nexus with a 'Judicial Proceeding' under the UNCJI

According to Article 1 of the UNCJI, the convention 'applies to the immunity of a State and its property from the jurisdiction of the courts of another State'. However, the sanctions in question have not been imposed by the respective states' courts but, rather, by

¹² Finke, 'Sovereign Immunity: Rule, Comity or Something Else?', 21 *European Journal of International Law* (EJIL) (2010) 853, at 854.

¹³ H. Fox and P. Webb, *The Law of State Immunity* (3rd edn, 2015), at 23.

¹⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCJI), UN Doc. A/59/508, 2 December 2004; European Convention on State Immunity (ECSI) 1972, ETS no. 074.

¹⁵ In *Jurisdictional Immunities*, the International Court of Justice (ICJ) referred to the rules of the UNCJI when trying to establish custom even though both parties to the dispute (Germany and Italy) had not acceded to the convention at the time. The European Court of Human Rights, as well as various national courts have confirmed that specific provisions of the convention reflect custom. See *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, paras 56, 59, 61, 64, 66, 69, 89, 129; ECtHR, *Cudak v Lithuania*, Appl. no. 15869/02, Judgment of 23 March 2010, para. 67; French Court of Cassation, *Société NML Capital v. Argentina and Total Austria*, Case no. 10-25938, 28 March 2013; House of Lords, *Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26; Audit, Angelet and Van den Bossche, 'Immunity from Execution and Domestic Procedural Rules: Preventive Control, Burden of Proof and Discovery', in T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (2019) 379, at 379; Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions against Iran', 17 *Journal of Conflict and Security Law* (2012) 301, at 314; X. Yang, *State Immunity in International Law* (2012), at 35.

their ‘executive’ organs.¹⁶ The term ‘court’ in the UNCSI is defined as ‘any organ of a State, however named, entitled to exercise judicial functions’.¹⁷ Whilst this definition seemingly includes any organs of the state (including those from the executive branch), it is unclear whether, in this context, the entities imposing the sanctions exercise ‘judicial functions’.

The International Law Commission (ILC), in its commentary on the 1991 draft of the UNCSI, clarified that jurisdictional immunities include ‘all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial state, in relation to a *judicial proceeding*’.¹⁸ Similarly, the ILC comments that states enjoy immunities from ‘measures of constraint... in connection with a proceeding before a court’.¹⁹ Although the financial sanctions imposed on Russia’s central bank can be considered ‘measures of constraint’ (see also section 2.B), they are still not connected with judicial proceedings.²⁰

Given that the law of state immunity has its origins in customary international law, it is illustrative to look at the national legislation on foreign immunities with respect to the question whether there needs to be a nexus with ‘judicial proceedings’.²¹ Some states that are neither signatories nor contracting states to the UNCSI have taken the same approach as the UNCSI, referring to the ‘courts’ of that state.²² Moreover, the ECSI (which is in force for eight European countries) ‘applies only to the jurisdiction of courts’.²³ The requirement of a nexus with a ‘judicial proceeding’ or ‘court’ has led scholars such as Tom Ruys and Ingrid Wuerth to conclude that sanctions fall outside the scope of the law of state immunity.²⁴ As Ruys writes, ‘given the absence of any connection to ‘legal proceedings’... the adoption of such sanctions does not trigger (or breach) the rules on State immunity’.²⁵ Similarly, Wuerth concludes that ‘[f]oreign sovereign immunity simply does not apply’ because it ‘does not involve a court nor

¹⁶ These include the Council of the European Union, the UK government, Office of Foreign Assets Control, the Canadian Minister of Finance, the Japanese government, and the Swiss Federal Council (see note 2 above).

¹⁷ UNCSI, *supra* note 14, Art. 2(1)(a).

¹⁸ International Law Commission (ILC), Report of the International Law Commission on the Work of Its Forty-third Session (Commentary 1991 Draft Articles), UN Doc. A/CN.4/SER.A/1991/Add.I, 29 April–19 July 1991, at 13 (emphasis added).

¹⁹ *Ibid.*

²⁰ Thouvenin, ‘Gel des fonds des banques centrales et immunité d’exécution’, in A. Peters *et al.* (eds), *Immunities in the Age of Global Constitutionalism* (2015) 209, at 214.

²¹ Yang, *supra* note 15, at 33.

²² Inmunidad Jurisdiccional de los Estados Extranjeros Ante los Tribunales Argentinos, Ley no. 24 488 31 May 1995, Art. 1 (Argentina); Foreign States Immunities Act 1985, Art. 3(1) (Australia); State Immunity Act, RSC 1985, c S-18, Art. 3(1) (Canada); Foreign States Immunity Law, No. 5769-2008, Art. 2 (Israel); State Immunity Ordinance VI of 1981, Art. 3(1) (Pakistan); State Immunity Act 1979, Art. 3 (Singapore); Foreign States Immunities Act, No. 87, 1981, Art. 2(1) (South Africa); Foreign Sovereign Immunities Act, 1976, 28 USC 1604.

²³ ECSI, *supra* note 14; Explanatory Report to the European Convention on State Immunity, ETS no. 74, 16 May 1972 para. 8.

²⁴ Ruys, ‘Immunity, Inviolability and Countermeasures: A Closer Look at Non-UN Targeted Sanctions’, in Ruys, Angelet and Ferro, *supra* note 15, 670; I. Wuerth, ‘Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?’, *Lawfare Blog* (7 March 2022), available at <https://www.lawfaremedia.org/article/does-foreign-sovereign-immunity-apply-sanctions-central-banks>.

²⁵ Ruys, *supra* note 24, at 683.

does it involve any form of enforcement or execution of a judgment'.²⁶ This reaffirms that, while actions of executive organs may fall under the scope of the UNCSI, there must still be a nexus with a 'judicial proceeding', which is not the case with the sanctions against Russia's central bank.

B An Alternative Perspective: The Law of State Immunity Also Applies to Executive Action

Scholars such as Jean-Marc Thouvenin, Victor Grandaubert, and Emanuel Castellarin argue for a broader interpretation of the notion of 'immunity from execution' under customary international law.²⁷ They argue that, although 'immunity from execution' within the scope of the UNCSI is restricted to judicial proceedings, the notion outside the convention and under customary international law prohibits measures of constraint against another state by any state organ.²⁸ According to the UNCSI preamble, 'rules of customary international law continue to govern matters not regulated by the provisions of the present Convention'.²⁹ Similarly, the explanatory report to the ECSI explains that it applies only to the jurisdiction of courts and not to 'the treatment of Contracting States by the administrative authorities of other Contracting States'.³⁰ Scholars argue *a contrario* that the rules on 'immunity from execution' outside the context of judicial proceedings are not regulated by the conventions and are found instead in customary international law.

Thouvenin and Grandaubert argue that, outside the context of the UNCSI, 'immunity from constraint covers any kind of measure of constraint, whether of executive, legislative or judicial nature, imposed by the forum State upon the foreign State that infringes its sovereignty'.³¹ The basis for this general prohibition of measures of constraint is the principle of the sovereign equality of states.³² In *Jurisdictional Immunities*, the International Court of Justice (ICJ) held that the rule of state immunity 'derives from the principle of sovereign equality of States, which... is one of the fundamental principles of the international legal order'.³³ The ICJ continued, stating that '[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality'.³⁴ The principle of the sovereign equality of states, which is enshrined in Article 2(1) of the UN Charter, and as complemented by the Latin maxim '*par in parem non habet imperium*', gives all states equal rights and duties. The European Court of Human Rights held that sovereign immunity 'developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the

²⁶ Wuerth, *supra* note 24.

²⁷ Thouvenin, *supra* note 20; Castellarin, 'Le gel des avoirs d'une banque centrale étrangère comme réaction décentralisée à un fait internationalement illicite: rétorsion ou contremesure?', in N. Labranos and R.A. Kok (eds), *Hague Yearbook of International Law* (2012) 25; Thouvenin and Grandaubert, 'The Material Scope of State Immunity from Execution', in Ruys, Angelet and Ferro, *supra* note 15, 245.

²⁸ Thouvenin, *supra* note 20, at 212–213.

²⁹ UNCSI, *supra* note 14.

³⁰ Explanatory Report, *supra* note 23, para. 8.

³¹ Thouvenin and Grandaubert, *supra* note 27, at 247.

³² Thouvenin, *supra* note 20, at 213.

³³ *Jurisdictional Immunities*, *supra* note 15, para. 57.

³⁴ *Ibid.*

jurisdiction of another State'.³⁵ According to the Friendly Relations Declaration, sovereign equality includes, *inter alia*, that '[s]tates are judicially equal', that '[e]ach State enjoys the rights inherent in full sovereignty' and that '[e]ach State has the duty to respect the personality of other States'.³⁶

The law of state immunity is separated into immunity from adjudicatory jurisdiction and immunity from enforcement jurisdiction.³⁷ While the former is subjected to more exceptions (reflecting the restrictive doctrine of immunity), the latter remains largely absolute.³⁸ This separation of concepts was also referenced by the ICJ, which held that enforcement immunity 'goes further than jurisdictional immunity'.³⁹ The reason for this distinction is that immunity from execution, in the words of the ILC, represents 'the last bastion of State immunity'.⁴⁰ Additionally, the ILC noted that, '[i]f it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign state... it follows *a fortiori* that no measure of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property'.⁴¹ This larger scope of immunity of enforcement (in comparison to immunity from adjudication), based on the principle of the sovereign equality of states, supports the notion that immunity from measures of constraint also applies outside a judicial context.

Ruys criticizes this line of reasoning, stating that 'the mere fact that the rules on State immunity are inspired by the principle of sovereign equality does not necessarily imply that the two should be equated'.⁴² However, reference to the principle of sovereign equality does not purport that they should be equated. Instead, it forms the foundational basis from which the rules of state immunity are derived.⁴³ Similarly to how the rules on jurisdictional immunity derive from this basic tenet, so do the more general rules on measures of constraint immunity.⁴⁴ *Par in parem non habet imperium* means that equals do not have authority/power over one another; this clearly establishes a 'substantive and nominal relationship between the rule of foreign State immunity and the principle of sovereign equality of States'.⁴⁵ To interpret 'the state' as the

³⁵ ECtHR, *Al-Adsani v. United Kingdom*, Appl. no. 35763/97, Judgment of 21 November 2001, para. 54; ECtHR, *Fogarty v. United Kingdom*, Appl. no. 37112/97, Judgment of 21 November 2001, para. 34; ECtHR, *McElhinney v. Ireland*, Appl. no. 31253/96, Judgment of 21 November 2001, para. 35.

³⁶ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970.

³⁷ Fox and Webb, *supra* note 13, at 23.

³⁸ *Ibid.*

³⁹ *Jurisdictional Immunities*, *supra* note 15, para. 113.

⁴⁰ Commentary 1991 Draft Articles, *supra* note 18, at 56.

⁴¹ *Ibid.*

⁴² Ruys, *supra* note 24, at 685.

⁴³ *Jurisdictional Immunities*, *supra* note 15, para. 57.

⁴⁴ Thouvenin, *supra* note 20, at 213.

⁴⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment on Preliminary Objections, 6 June 2018, ICJ Reports (2018) 292, para. 25, Joint Dissenting Opinion of Xue, Sebutinde, Robinson and Kateka.

judiciary exclusively (and not also the executive or legislative) is inconsistent with this principle of international law.⁴⁶

Although the Latin maxim refers to exercising authority/power over another, the sanctions in question do not directly bind Russian organs; it binds entities within their own jurisdiction. Nevertheless, the ICJ held in *Arrest Warrant* and *Certain Questions Concerning Mutual Legal Assistance* that the determining factor as to whether immunity was breached was whether that state was subjected to a 'constraining act of authority'.⁴⁷ Note here that, although those cases refer to the immunity of state representatives, the cases can be applied by analogy as those individuals are said to represent the state and their immunity protects states from the exercise of authority by another state.⁴⁸ In *Arrest Warrant*, the Court concluded that the (mere) 'issue of the warrant constituted a violation of an obligation of Belgium towards the Democratic Republic of the Congo, in that it failed to respect ... the inviolability then enjoyed by [the minister] under international law'.⁴⁹ Similarly to how issuing an arrest warrant does not bind Congolese authorities, financial sanctions that freeze Russian central bank assets do not bind Russian authorities. They do, however, hinder Russia from exercising its sovereign authority (see more in section 2.C).

While the scope of the UNCSI is limited to measures of constraint in judicial proceedings, a broader interpretation of 'immunity of execution' precludes states from 'any kind of measure of constraint... imposed by the forum State upon the foreign State that infringes its sovereignty'.⁵⁰ Freezing central bank assets constitutes such a measure of constraint and falls within this broader scope of the law of state immunity. Now it must be assessed whether Russia's central bank enjoys such immunity.

C Russia's Central Bank Enjoys Immunity from Measures of Constraint under International Law

In order to ascertain whether Russia's central bank enjoys immunity under international law, the rules of 'immunity from enforcement jurisdiction' in the UNCSI will be applied by analogy. These rules, as outlined in Part IV of the UNCSI, are relevant because they serve the same purpose as immunity from measures of constraint, which is to preserve the sovereignty and independence of states. It is immaterial whether a state is acting purely in its executive capacity or in its executive capacity pursuant to a judicial judgment, as the underlying principle remains the same: no state should be

⁴⁶ Viola, Snidal, and Zürn, 'Sovereign (In)Equality in the Evolution of the International System', in S. Leibfried et al. (eds), *The Oxford Handbook of Transformations of the State* (2015) 221.

⁴⁷ *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, Judgment, 11 April 2000, ICJ Reports (2002) 3, para. 54; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ICJ Reports (2008) 177, para. 170.

⁴⁸ Thouvenin, *supra* note 20, at 214.

⁴⁹ *Arrest Warrant*, *supra* note 47, para. 70.

⁵⁰ Thouvenin and Grandaubert, *supra* note 27, at 247; Castellarin, *supra* note 27, at 8; Dupont, *supra* note 15, at 314; Fox and Webb, *supra* note 13, at 31–32; Ronzitti, 'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective', in N. Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law* (2016) 1, at 22.

able to exercise its sovereign power over another state, hindering the latter's ability to exercise its public authority. The freezing of assets bears a similarity to a pre-judgment measure of constraint due to its revocable and temporary nature and its nature as a possible precursor to appropriation of the assets by the EU (which would be similar to an execution measure).⁵¹ The rules in the UNCSI will, therefore, be applied analogously as they outline when a state, acting in its executive capacity, can (and cannot) freeze, seize, appropriate or execute another state's property.

State practice, in relation to the immunity of central banks, is divided in line with the distinct absolute and relative approaches to state immunity. Certain states, such as China, Israel and the UK provide absolute immunity from execution/enforcement of property of foreign central banks.⁵² On the other hand, states such as Australia, Japan and the USA allow for central bank assets to be seized if it is intended for use for non-government commercial purposes.⁵³ For example, in Canada, 'property of a foreign central bank or monetary authority that is held for its own account and is *not used or intended for a commercial activity* is immune from attachment and execution'.⁵⁴ Most states accept that central banks enjoy immunity from execution; they differ only to the extent that this immunity exists.

Under the UNCSI, a 'state' includes 'agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State'.⁵⁵ Tom Grant and other scholars consider central banks to fall under this definition as long as they perform sovereign acts.⁵⁶ Russia's central bank is enshrined in its Constitution and federal law.⁵⁷ Therein, the principal function of Russia's central bank is to '[protect] and [ensure] the stability of the rouble... independently of other State governmental bodies'.⁵⁸ As Russia's central bank

⁵¹ European Commission, Statement by President von der Leyen on Russian Accountability and the Use of Russian Frozen Assets, 30 November 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307.

⁵² Foreign Central Banks Jurisdictional Immunity from Execution of Assets Act, 2005, Art. 21(1)(c) (China); Foreign States Immunity Law, *supra* note 22, Art. 18 (Israel); State Immunity Ordinance VI of 1981, *supra* note 22, Art. 15(4) (Pakistan); State Immunity Act 1979, *supra* note 22, Art. 16(4) (Singapore); Foreign States Immunities Act, *supra* note 22 Art. 15(3) (South Africa); State Immunity Act 1978, Art. 14(4) (United Kingdom).

⁵³ Foreign States Immunities Act 1985, *supra* note 22, Arts. 30, 32 and 35 (Australia); State Immunity Act, *supra* note 22, Art. 12(4) (Canada); Code monétaire et financier (French Monetary and Financial Code), Doc. L-153-1, Art. 18(1); Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Act no. 24, April 2009, Art. 18(1) (Japan); Foreign Sovereign Immunities Act of 1976, *supra* note 22, Art. 18(1) (USA).

⁵⁴ State Immunity Act, *supra* note 22, Art. 12(4) (Canada) (emphasis added).

⁵⁵ UNCSI, *supra* note 14, Art. 2(1)(b)(iii).

⁵⁶ Grant, 'Article 2(1)(a) and (b)', in R. O'Keefe, C.J. Tams and A. Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013) 40, at 50–51; Castellarin, *supra* note 27, at 10; Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', 17 *EJIL* (2006) 803, at 823; Wuerth, 'Immunity from Execution of Central Bank Assets', in Ruys, Angelet and Ferro, *supra* note 15, 266, at 278.

⁵⁷ Constitution of the Russian Federation (adopted at National Voting on December 12, 1993); Federal Law no. 86-FZ, 10 July 2002 on the Central Bank of the Russian Federation, Art. 3 (Russian Federal Law).

⁵⁸ Constitution of the Russian Federation, *supra* note 57, Art. 75(2).

is enshrined in its Constitution and federal law, it can be considered as 'entitled to perform acts in the exercise of sovereign authority' of the Russian Federation. Furthermore, as the central bank conducts Russia's monetary and credit policy as well as numerous other functions in conformity with its goals, it is said to actually perform acts in the exercise of the sovereign authority of Russia pursuant to Article 2(1)(b)(iii) of the UNCSI.

Article 19 of the UNCSI establishes that measures of constraint may be taken against the property of a state if 'it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes'. This approach has also been codified in certain states (such as in the USA and Canada). However, Article 21 of the UNCSI negates such an assessment; it considers that all property of the central bank is immune from measures of constraint. Accordingly, in applying the rules of the UNCSI by analogy, property of Russia's central bank enjoys immunity from measures of constraint.

Even excluding the establishment of immunity provided by Article 21 of the UNCSI and adopting the restrictive approach of state immunity, the Russian central bank and its assets still enjoy immunity from measures of constraint. According to Russian federal law, the Russian central bank does not seek to 'derive profits', and its assets are used to 'organise and implement its currency regulation and currency control'.⁵⁹ This includes the 'purchase and sale by the Bank of Russia of foreign currency on the currency market for exerting an impact upon the exchange rate of the rouble'.⁶⁰ In practice, it is worth considering the specific intended uses of each of the frozen assets (and if it is intended for governmental purposes); however, given the comprehensive nature of the freeze on all assets of Russia's central bank, it is unlikely that assets utilized for Russia's monetary policy were exempt. Accordingly, and unless proven otherwise, the assets of Russia's central bank are not used for commercial purposes and enjoy immunity from measures of constraint.⁶¹

By freezing the assets held by Russia's central bank, the respective states violated Russia's immunity from measures of constraint. By freezing the assets and funds of Russia abroad, the sanctioning states prevented Russia from exercising authority over its assets, which is an attribute that immunity protects.⁶² As mentioned in section 2.B, the ICJ held that immunity has been breached if it has been subjected

⁵⁹ Russian Federal Law, *supra* note 57.

⁶⁰ *Ibid.*, Art. 41.

⁶¹ Scholars have assumed a similar position. For example, Wuerth argues that foreign currency reserves are 'entitled to absolute protection', and Sucharitkul has stated that the funds of central banks 'should under no circumstances be seized or detained'. See also Castellarin, *supra* note 27; van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution', in A. Peters *et al.* (eds), *Immunities in the Age of Global Constitutionalism* (2015) 129, at 163; 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/>; Wuerth, *supra* note 56; ILC, Seventh Report on Jurisdictional Immunities of States and Their Property, by Mr Sompong Sucharitkul, Special Rapporteur, UN Doc A/CN.4/388, 28 March 1985, para. 105.

⁶² Thouvenin, *supra* note 20, at 214.

to a ‘constraining act of authority’.⁶³ The *Arrest Warrant* and *Certain Questions of Mutual Assistance* cases are applied analogously to this situation because the immunity that protects state representatives in those cases also protects states from the exercise of authority by another state. In those cases, the ICJ held that immunity protects ‘against any act of authority of another State which would hinder [them] in the performance of [their] duties’.⁶⁴ In *Arrest Warrant*, the Democratic Republic of the Congo argued that the ‘mere issuance [of the arrest warrant] constituted a coercive measure ... even if it was not executed’.⁶⁵ The ICJ agreed, stating that this issuance constituted a violation by Belgium towards the Democratic Republic of the Congo.⁶⁶ As the US Court of Appeals held in *Af-Cap Inc. v. Republic of Congo*, immunity from execution seeks to protect ‘funds so central to a nation’s operations as a sovereign that uses thereof would “interrupt the public acts of [this] foreign State”’.⁶⁷ Similarly and by analogy, the immunity held by the state, and, in this case, the central bank, protects it against any constraining acts that would hinder the exercise of its sovereign authority.⁶⁸

By prohibiting the central bank from making any transactions relating to the management of its reserves and assets (essentially, freezing its assets), the sanctioning states prevented Russia (through its central bank as an agency or instrumentality of the state) from exercising public authority (that is, to regulate Russia’s monetary policy). As Hazel Fox and Philippa Webb put it, ‘[s]tates increasingly maintain some of their national wealth in foreign reserves, and discretion as to their disposal is seen as an element in the exercise of sovereign authority’.⁶⁹ Therefore, freezing assets of Russia’s central bank can be considered a ‘constraining act of authority’ that prevents Russia from exercising acts inherent to its sovereignty (that is, regulating its monetary policy). These sanctions thus constitute a breach of the law of state immunity.

3 Justifiable as a Countermeasure?

Although freezing Russia’s central bank assets violates the law of state immunity, it can possibly be justified as a countermeasure in response to Russia’s invasion of Ukraine. Justifying freezing central bank assets as a countermeasure, however, does raise controversial questions under international law. Can states that are not directly injured, such as the ones sanctioning Russia in this case, implement countermeasures (so-called third party countermeasures)? Can state immunity, in particular, be revoked as a countermeasure (jurisdictional countermeasures)? Are the asset freezes

⁶³ *Arrest Warrant Case*, *supra* note 47, para. 54; *Certain Questions of Mutual Assistance*, *supra* note 47, para. 170.

⁶⁴ *Arrest Warrant Case*, *supra* note 47, para. 54; *Certain Questions of Mutual Assistance*, *supra* note 47, para. 170.

⁶⁵ *Arrest Warrant Case*, *supra* note 47, para. 63.

⁶⁶ *Ibid.*, para. 70.

⁶⁷ *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, para. 371 (5th Cir. 2004).

⁶⁸ Thouvenin, *supra* note 20, at 214.

⁶⁹ Fox and Webb, *supra* note 13, at 481.

proportional to Russia's invasion? If the sanctioning states decide to appropriate frozen assets (which certain states have urged the EU to do for the reconstruction of Ukraine), can they still be justified as countermeasures?⁷⁰ All in all, freezing the assets of the Russian central bank violates the law of state immunity and has destabilizing effects; its use should be employed cautiously and could (potentially) be used only as countermeasures in response to prior (severe) violations of international law.

⁷⁰ Ministry of Finance of the Republic of Lithuania, 'Minister of Finance G. Skaistė: "Russia's Frozen Assets Should be Used for the Reconstruction of Ukraine"', *Finmin.lrv.lt* (24 May 2022), available online at <https://finmin.lrv.lt/en/news/minister-of-finance-g-skaiste-russias-frozen-assets-should-be-used-for-the-reconstruction-of-ukraine>.

