

Targeted Financial Sanctions and Asset Confiscation: a Thorny Legal Path from Freeze to Confiscate

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1 Introduction

Currently, the overwhelming majority of both collective (UN-authorized) and unilateral sanctions are financial in nature,¹ as exemplified by the practice of the United Nations Security Council (UNSC) as well as that of individual states. The global sanctions database that covers the imposition of economic sanctions between 1950–2022 corroborates this view by concluding that “the use of financial sanctions maintained its steady rise since the early 1980s.”²

The UNSC has been playing an active role in demonstrating the potential of financial sanctions. In particular, it has mandated collective economic sanctions to pursue objectives as diverse as countering terrorism, preventing conflicts, promoting peace, protecting the civilian population, supporting democracy, improving resource governance, and preventing the proliferation of nuclear weapons.³ The UNSC utilized financial leverage in targeting individuals⁴ as well as governments.⁵

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- 1 Thomas J. Biersteker and others, *Targeted Financial Sanctions: A Manual for Design and Implementation*, (Thomas J Watson Jr Institute for International Studies 2001). The Manual that was published as a result of the “Interlaken Process” on targeted financial sanctions defined these measures as “the use of financial instruments and institutions to apply coercive pressure on transgressing parties – government officials, elites who support them, or members of non-governmental entities – in an effort to change or restrict their behavior.”
- 2 Constantinos Syropoulos and others, ‘The Global Sanctions Data Base. Release 3: COVID-19, Russia, and Multilateral Sanctions’ (2022) WIFO Working Papers 651/2022.
- 3 Thomas J Biersteker, Marcos Tourinho and Sue E Eckert, ‘Thinking about United Nations Targeted Sanctions’ in Thomas J Biersteker, Sue E Eckert and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016) 12.
- 4 “The second most frequent type of sanctions comprises measures against individuals, such as [...] asset freezes (63 per cent).” Francesco Giumelli, ‘Understanding United Nations Targeted Sanctions: an Empirical Analysis’ (2015) 91(6) *International affairs* 1351, 1361.
- 5 “National assets were targeted with sanctions on the central bank and sovereign wealth funds in the case of Libya 2, investment into Iran was prohibited, and financial services were targeted in the DPRK.” *Ibid* 1362.

The reliance upon financial sanctions is not confined to the UNSC. The United States' excessive use of financial sanctions has given rise to a phenomenon called "dollar unilateralism".⁶ In a similar vein, the European Union (EU) has been actively using financial sanctions to pursue various foreign policy goals, and the United Kingdom, Canada, Australia, Japan, and Switzerland have been displaying similar tendencies.⁷ In particular, recent sanction regimes that target perpetrators of grave human rights violations ("Magnitsky-style sanctions")⁸ and destructive cyber-attacks (cyber sanctions)⁹ heavily rely upon financial sanctions as a mechanism to deter and punish malicious behaviour.

The growing use of such sanctions has been described as "a new era of financial warfare"¹⁰ or a "weaponization of finance"¹¹ and these developments have been characterized as "the use of financial tools, pressure, and market forces to isolate rogue actors from the international financial and commercial systems and gain leverage over our enemies."¹² In other words, compliance with financial sanctions is reinforced by market forces for the reason that banks and other financial institutions are aware of the reputational and financial

6 "Dollar unilateralism occurs when the government uses the unique status of the U.S. dollar in global financial markets to pursue policy goals [...]" Suzanne Katzenstein, 'Dollar Unilateralism: The New Frontline of National Security' (2015) 90 *Indiana Law Journal* 293, 294–295.

7 Sanctions imposed by these states against the Russian Federation following its unprovoked aggression against Ukraine bear witness to the accuracy of this assertion. For example, the Brookings Sanctions Tracker monitors targeted financial sanctions and according to this tracker, all the above-mentioned states along with other states implemented targeted financial sanctions against Russian individuals and legal entities. Norman Eisen and others, 'The Brookings Sanctions Tracker' (*Brookings*, 14 March 2022, updated 19 July 2023) <www.brookings.edu/articles/the-brookings-sanctions-tracker/> accessed 17 October 2023.

8 Clara Portela, 'Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations—Impact, Trends and Prospects at EU Level' Study requested by the European Parliament's Subcommittee of Human Rights (2018) <[www.europarl.europa.eu/RegData/etudes/STUD/2018/603869/EXPO_STU\(2018\)603869_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603869/EXPO_STU(2018)603869_EN.pdf)> accessed 17 October 2023.

9 Iryna Bogdanova and Maria Vasquez Callo-Müller, 'Unilateral Cyber Sanctions: Between Questioned Legality and Normative Value' (2021) 54(4) *Vanderbilt Journal of Transnational Law* 911.

10 Juan C Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (Public Affairs 2013).

11 See the chapter written by Rosa M Lastra in this volume; Joanna Diane Caytas, 'Weaponizing Finance: U.S. and European Options, Tools, and Policies' (2017) 23 *Columbia Journal of European Law* 441.

12 Zarate (n 10) 2–3.

costs of non-compliance.¹³ In its recent report the UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights emphasized that financial sanctions often result in overcompliance as a consequence of the private entities' willingness to avoid penalties for non-compliance.¹⁴

Traditionally, targeted financial sanctions are temporary measures of constraint, which do not entail a transfer of ownership. The UK Office of Financial Sanctions Implementation (OFSI) in its guidance on UK financial sanctions makes this point explicit: "An asset freeze does not involve a change in ownership of the frozen funds or economic resources, nor are they confiscated or transferred to OFSI for safekeeping."¹⁵ Thus, as a rule, financial sanctions do not have an effect on the ownership of the frozen/blocked/immobilized assets. This being said, there have been instances when targeted financial sanctions resulted in a confiscation of previously frozen assets.

The objective of this contribution is to analyse existing laws, state practices and recent precedents of asset confiscation that emerged as a continuation of targeted financial sanctions, including proposals of partial asset confiscation (e.g., appropriation of profits generated by the seized assets). This analysis inevitably includes a discussion of various principles and norms of international law: international humanitarian law, human rights law, state immunity and state responsibility. Before we delve into this discussion, the use of terms should be clarified. Diverse terms are used to describe actions that result in appropriation of a property, either during times of war or during peacetime.¹⁶ Among this diversity, the two most generic terms are seizure and confiscation; while seizure refers to a temporary establishment of control over property implying a duty to return such property or compensate

13 This argument was expressed in different ways in the literature: Zarate (n 10); Daniel Drezner, 'Targeted Sanctions in a World of Global Finance' (2015) 41(4) *International Interactions* 755; Katzenstein (n 6); Caytas (n 11).

14 Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, 'Secondary Sanctions, Civil and Criminal Penalties for Circumvention of Sanctions Regimes and Overcompliance with Sanctions' (UN Doc A/HRC/51/33, 15 July 2022).

15 Office of Financial Sanctions Implementation (OFSI), 'UK Financial Sanctions: General Guidance for Financial Sanctions under the Sanctions and Anti-Money Laundering Act 2018' (*Gov.UK*, 31 January 2023) <www.gov.uk/government/publications/ofsi-guidance-html-documents/uk-financial-sanctions-general-guidance-for-financial-sanctions-under-the-sanctions-and-anti-money-laundering-act-2018> accessed 17 October 2023.

16 These terms are confiscation, seizure, requisition, sequestration, expropriation, nationalization, economic warfare and others.

its value, confiscation denotes permanent appropriation of property without any compensation.¹⁷

This chapter aims to answer two research questions: first, under what circumstances can assets frozen as a result of targeted financial sanctions be subject of confiscation? Second, how does such confiscation comport with the existing norms of international law?

The chapter is structured as follows. Section 2 analyses the confiscation of frozen assets in times of war or international armed hostilities and the legality of such a move. Section 3 scrutinizes the European Union's initiative to authorize the confiscation of frozen assets as a response to sanctions violations, while section 4 studies the emerging practice of asset confiscation based on sanctions laws without criminal proceedings. Section 5 is dedicated to the discussion of the proposal to appropriate profits generated by the immobilized Russian central bank assets, either through active management of such assets or through excessive taxing of such profits.

In this contribution, execution of the judgements against state-owned assets of a state designated as a "state sponsor of terrorism" permitted in some jurisdictions would not be analysed because such practice relates to the execution of the court judgements and not to the government actions to confiscate property.¹⁸

2 Confiscation of Frozen Assets in Times of War or International Armed Hostilities

2.1 *United States Laws and Practice*

The practice of prohibiting trade with the enemy is not new. For example, in the midst of World War I Congress passed the Trading with the Enemy Act to

17 Hans-Georg Dederer, 'Enemy Property' (2015) Max Planck Encyclopedia of Public International Law <opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e294?rskey=OHUV8B&result=7&prd=MPIL> accessed 17 October 2023; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) also distinguishes between "freezing" or "seizure", as a temporary measure "prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property" and "confiscation" as "a measure [...] resulting in the final deprivation of property".

18 For analysis, see Ingrid (Wuerth) Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (2023) Vanderbilt Law Research Paper 23–12 (*forthcoming* in George Washington Law Review).

prevent trade with Germany and its allies.¹⁹ The actions that fell under the ambit of the concept “to trade” covered a broad range of economic activities.²⁰ The Act and subsequent amendments allowed not only the transfer of the alien property to a custodian but also its permanent confiscation.²¹ Despite being heavily criticized, the practice of wartime confiscation of the enemy’s property found its way into the post-war legal order.²² According to historian Benjamin A. Coates: “[...] World War I crystallized new conceptions about the relationship between property and war. [...] No longer could one expect private property to remain unaffected by international conflict.”²³ Other scholars echo this view.²⁴

The subsequent application of the Trading with the Enemy Act to peacetime emergencies was the subject of a heated debate in the United States.²⁵ This debate resulted in the amendment of the Act’s most controversial provisions, as well as in the adoption of the International Emergency Economic Powers Act (IEEPA) in 1977. The IEEPA, after being amended in 2001,²⁶ grants authority to the US President to confiscate property in the following cases:

19 Trading with the Enemy Act 1917 Pub. L. 65–91.

20 Ibid.

21 On the practice of enemy property confiscation during World War I, see Benjamin A. Coates, ‘The Secret Life of Statutes: A Century of the Trading with the Enemy Act’ (2018) 1(2) *Modern American History* 151. On the practice of enemy property confiscation during World War II: “With America’s entry into the Second World War in 1941, Congress again amended TWEA [Trading with the Enemy Act] to grant the President extensive powers over the disposition of private property, adding the so-called “vesting” power, which authorized the permanent seizure of property. Now in its most expansive form, TWEA authorized the President to declare a national emergency and, in so doing, to regulate foreign exchange, domestic banking, possession of precious metals, and property in which any foreign country or foreign national had an interest.” Christopher A. Casey, Dianne E. Rennack and Jennifer K. Elsea, ‘The International Emergency Economic Powers Act: Origins, Evolution, and Use’ (2022) Congressional Research Service.

22 Coates (n 21).

23 Ibid 159–160.

24 Analyzing British, German, and French laws and state practice of first establishing temporary administration over the enemy-owned property and then allowing liquidation/confiscation of such property during World War I, Daniela Caglioti concludes: “The First World War can thus be regarded as a watershed in the conception and defence of property rights.” Daniela L. Caglioti, ‘Property Rights in Time of War: Sequestration and Liquidation of Enemy Aliens’ Assets in Western Europe during the First World War’ (2014) 12(4) *Journal of Modern European History* 523.

25 Coates (n 21).

26 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107–56, 115 Stat. 272.

“when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States.”²⁷ The confiscated assets can subsequently be “held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.”²⁸ These statutory powers ended up being at the centre of the debate on whether existing laws allow the US President to confiscate frozen Russian assets to finance Ukraine’s reconstruction.²⁹

Congressional Research Service’s report reveals that the US Presidents used this authority only once: on 20 March 2003, President George W. Bush issued Executive Order 13290, thus ordering “property of the Government of Iraq and its agencies, instrumentalities, or controlled entities” to be vested “in the Department of the Treasury ... [to] be used to assist the Iraqi people and to assist in the reconstruction of Iraq.”³⁰ As a result, \$1.7 billion that has been frozen in the United States since Iraq’s invasion of Kuwait in 1990 was confiscated.³¹ Later, the UNSC Resolution 1483 adopted in May 2003 obligated UN

27 International Emergency Economic Powers Act Pub. Law 95–223, § 1702 Presidential authorities.

28 Ibid.

29 Legal commentators have been wrangling over the legality of asset confiscation under the US domestic law. The crux of the debate is the interpretation of the relevant IEEPA provisions. For example, Professor Laurence H Tribe heavily relies on textual interpretation to argue that the IEEPA grants such authority to the President. Laurence H Tribe and Jeremy Lewin, ‘\$100 Billion. Russia’s Treasure in the U.S. Should Be Turned Against Putin’ *The New York Times* (New York, 15 April 2022) <www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html> accessed 17 October 2023. At the same time, Scott R Anderson and Chimène Keitner contend that the legislative history of the IEEPA supports a narrow interpretation of the President’s competencies. Scott R Anderson and Chimène Keitner, ‘The Legal Challenges Presented by Seizing Frozen Russian Assets’ (*Lawfare blog*, 26 May 2022) <www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets> accessed 17 October 2023.

30 Executive Order 13290 Confiscating and Vesting Certain Iraqi Property (20 March 2003) <georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030320-10.html> accessed 17 October 2023.

31 Edmund L Andrews, ‘A Nation at War: Iraqi Assets; Bush Asks Seizure of \$1.7 Billion Held in U.S.’ *The New York Times* (New York, 22 March 2003) <www.nytimes.com/2003/03/22/world/a-nation-at-war-iraqi-assets-bush-asks-seizure-of-1.7-billion-held-in-us.html> accessed 17 October 2023.

Members to freeze assets of the previous Iraqi regime and transfer them to the Development Fund for Iraq.³²

2.2 *Ukraine's Laws and Practice*

In the early days of the Russian invasion, Ukraine introduced a new law and amended its sanctions legislation, thus establishing two parallel legal regimes allowing confiscation of the Russian property and property of sanctioned Russian nationals. In March 2022, the Law 'On the Basic Principles of Forcible Seizure of Property of the Russian Federation and its Residents in Ukraine' was adopted.³³ In its preamble, the law acknowledges the Convention (IV) respecting the Laws and Customs of War on Land and its annex (1907), which sets standards of treatment to which the enemy's property is entitled.³⁴ Pursuant to this law, the confiscation (forcible seizure) "is carried out on the grounds of public necessity (including cases when it is urgently required by military necessity)",³⁵ it applies only to the property of the legal entities incorporated in Ukraine but owned directly or indirectly by the Russian Federation³⁶ and is carried out without any compensation (reimbursement)³⁷. The decision prescribing compulsory asset confiscation is taken by the National Security and Defense Council of Ukraine and enacted by the President's decree.³⁸ As it becomes evident the procedure prescribed by the law provides the executive branch with the power to authorize asset confiscation without any judicial oversight, raising a question of consistency with Ukraine's obligations under

32 UNSC Res 1483 (UN Doc S/RES/1483, 22 May 2003).

33 Закон України № 2116-IX Про основні засади примусового вилучення в Україні об'єктів права власності Російської Федерації та її резидентів від 03.03.2022 (hereinafter: Law of Ukraine № 2116-IX).

34 The Convention and its annex prohibit "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war" and prescribes rules on the treatment of enemy property on the occupied territory. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land from 18 October 1907 (hereinafter: Convention (IV) and its annex).

35 "Проведення примусового вилучення в Україні об'єктів права власності Російської Федерації та її резидентів здійснюється з мотивів суспільної необхідності (включаючи випадки, за яких це настійно вимагається військовою необхідністю) [...]". Article 2(1), Law of Ukraine № 2116-IX (n 33).

36 Article 1, *ibid*.

37 Article 2(2), *ibid*.

38 Article 3(1), *ibid*.

the European Convention on Human Rights (ECHR), a point to which we will return later.

Following this, in May 2022, Ukraine's law "On Sanctions" was amended to allow confiscation of the assets of sanctioned private individuals and legal entities if certain preconditions are fulfilled.³⁹ To be more specific, Article 4 of the law reads: "The types of sanctions under this Law are as follows: [...] 1¹) confiscation of assets belonging to an individual or legal entity, as well as assets in respect of which such a person may directly or indirectly (through other individuals or legal entities) perform actions identical in content to the exercise of the right to dispose of them, into the state's revenue".⁴⁰ During the period of martial law, frozen assets⁴¹ can be confiscated if they are owned by an individual or legal entity that either (i) caused significant damage to the national security, sovereignty or territorial integrity of Ukraine, or (ii) provided substantial assistance in performing actions that caused significant damage to the national security, sovereignty or territorial integrity of Ukraine.⁴² According to the law, the Ministry of Justice has to submit an application to the High Anti-Corruption Court,⁴³ that may permit confiscation of the frozen assets.⁴⁴ The persons whose assets might be confiscated have a right to submit their arguments before the court, and the court is obligated to rule in favour of the party whose evidence is more convincing than that of the other party.⁴⁵ In September 2023, the Deputy Minister of Justice reported that the Ministry filed 29 applications and the court authorized confiscation in 28 cases.⁴⁶

39 Закон України № 2257-ІХ Про внесення змін до деяких законодавчих актів України щодо підвищення ефективності санкцій, пов'язаних з активами окремих осіб від 12.05.2022 (hereinafter: Law of Ukraine № 2257-ІХ).

40 "1. Видами санкцій згідно з цим Законом є: [...] 1¹) стягнення в дохід держави активів, що належать фізичній або юридичній особі, а також активів, щодо яких така особа може прямо чи опосередковано (через інших фізичних або юридичних осіб) вчиняти дії, тотожні за змістом здійсненню права розпорядження ними". Закон України № 1644-VII Про санкції від 14.08.2014 (hereinafter: Law of Ukraine № 1644-VII).

41 The assets should have been frozen after May 12, 2022, when the law "On Sanctions" was amended, to allow their confiscation in exceptional circumstances. Article 6(3), *ibid*.

42 Article 5¹, *ibid*

43 Article 5(1), *ibid*.

44 Article 5(3) and Article 5¹, *ibid*.

45 Article 283¹, Кодекс адміністративного судочинства України № 2747-IV від 06.07.2005 (Code of Administrative Procedure of Ukraine).

46 Анастасія Жарикова, 'Рік з першої конфіскації активів підсанкційного росіянина: в Мін'юсті прозвітували про роботу Економічна права (7 вересня 2023), <www.epravda.com.ua/news/2023/09/7/704071/> accessed 17 October 2023.

2.3 *Legality of Enemy's Property Confiscations during Times of War*

Now we are turning to the question of legality of the wartime confiscation. International humanitarian law and human rights law govern the status of enemy property in international armed conflicts.⁴⁷ It is noteworthy to recall that the International Court of Justice (ICJ) remains firm on the relationship between international humanitarian law and international human rights law and the applicability of the latter during armed conflicts:⁴⁸

[...] the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

Having said that, the ICJ explicitly pronounced that international humanitarian law is *lex specialis* for the legal questions arising in the context of armed conflicts.⁴⁹

In international humanitarian law, several treaty and customary international law provisions regulate the taking of enemy property during armed conflicts. Rules on the destruction or seizure/appropriation of enemy property, which usually allow these actions only if they are taken as a result of military necessity, are well-established and acknowledged as reflective of customary international law.⁵⁰ Furthermore, rules regulating the behaviour of an occupy-

47 Dederer (n 17).

48 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, I.C.J. Reports 2004) para 106 citing the court's findings in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. The view was later confirmed in International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment, I.C.J. Reports 2005) para 216.

49 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 48) para 106.

50 Under Article 23(g) of the 1907 Hague Regulations, it is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". Convention (IV) and its annex (n 34). At the same time, under Article 8(2)(b)(xiii) of the Rome Statute of the International Criminal Court, "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively

ing party with respect to enemy property also exist.⁵¹ However, the legality of a permanent confiscation of the enemy's public and private property located on the territory of a belligerent state remains unsettled as to the ambit of such confiscation and the precise legal grounds for this.

Some legal scholars argue that confiscation of the enemy's public property is permitted under international law.⁵² This being said, the legal justification for belligerent property confiscation is not unequivocally established in international law.⁵³ Professor James Thuo Gathii in his seminal work *War, Commerce, and International Law* describes several possible justifications: first and foremost, confiscation during wartime "is traceable to absolutist notion of sovereignty", a view which is corroborated by the historians as well;⁵⁴ and second, military necessity doctrine might also be used to uphold the legality of such a move.⁵⁵ Eritrea-Ethiopia Claims Commission justifies such a course of action by the right "to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State."⁵⁶ In this regard, it is worth quoting the Commission at length:⁵⁷

Throughout the twentieth century, important States including France, Germany, the United Kingdom, and the United States have frozen "enemy" property, including property of civilians, sometimes vesting it for the vesting State's benefit.... Such control measures have been judged necessary to deny the enemy access to economic resources otherwise potentially available to support its conduct of the war.

demanding by the necessities of war" is a war crime in international armed conflicts. Statute of the International Criminal Court (UN Doc A/CONF.183/9, 17 July 1998).

51 Articles 46, 47 and 53, Convention (IV) and its annex (n 34); Article 33, Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).

52 Anton Moiseienko, 'Trading with a Friend's Enemy' (2022) 116(4) *American Journal of International Law* 720.

53 "[...] it is widely accepted in international law that the confiscation of the belligerent's public property is permitted, although the precise legal basis for this position has never been articulated with clarity." Ibid.

54 Reflecting upon the divergence between the existing international law prohibiting the confiscation of enemy-owned property and the state practice, historians observe that "[t]he apparent contradiction between theory and practice was normally settled by resorting to sovereignty." Caglioti (n 24) 526.

55 James Thuo Gathii, *War, Commerce, and International Law* (Oxford University Press 2010) 2-3.

56 *Eritrea-Ethiopia Claims Commission, Civilians Claims, Eritrea's Claim, Partial Award*, (17 December 2004) para 127.

57 Ibid paras 127-128.

States have not consistently frozen and vested enemy private property. In practice, States vesting the assets of enemy nationals have done so under controlled conditions, and for reasons directly tied to higher State interests; commentators emphasize these limitations. The post-war disposition of controlled property has often been the subject of agreements between the former belligerents.

Consistent with this line of argument, Ukrainian law which allows confiscation of the Russian assets explicitly refers to Ukraine's inherent right to protect its sovereignty and territorial integrity against the backdrop of the Russian full-scale invasion.⁵⁸ The application of this law resulted in the confiscation of the assets owned by the subsidiaries of two major state-owned Russian banks, the move which instigated threats of initiating investment arbitration in order to claim damages based on the Russia-Ukraine bilateral investment treaty (1998).⁵⁹ Thus, even if wartime confiscation of the enemy property is presumed to be legal, it remains to be seen if it can shield the state authorizing such confiscation from other potential claims under the existing international law obligations, for example, claims of illegal expropriation.

The confiscation of the enemy's property during times of war might also encroach upon various obligations under the human rights conventions. For example, some commentators have already expressed concerns that Ukrainian law that allows confiscation of Russian assets without any court or administrative proceedings might breach the ECHR, in particular, the right to property (Article 1 of Protocol No. 1), right to a fair trial (Article 6 ECHR) and right to an effective remedy (Article 13 ECHR).⁶⁰ In this regard, it should be noted that Article 15 of the ECHR permits derogation from the abovementioned obligations under the convention "[i]n time of war or other public emergency threatening the life of the nation".⁶¹

⁵⁸ Preamble, Law of Ukraine № 2116-IX (n 33).

⁵⁹ Vladislav Djanic, 'Two Russian Banks Threaten Treaty Arbitration Against Ukraine Following Seizure of Their Assets in the Context of the Ongoing Russia-Ukraine War' (*IAREporter*, 12 May 2022) <www.iareporter.com/articles/two-russian-banks-threaten-treaty-arbitration-against-ukraine-following-seizure-of-their-assets-in-the-context-of-the-ongoing-russia-ukraine-war/> accessed 17 October 2023.

⁶⁰ Nataliia Sichevliuk, 'Guilty! What was confiscated from aggressor in 500 days of war and how' (*Ukrainska Pravda*, 11 July 2023) <www.pravda.com.ua/eng/columns/2023/07/11/7410784/> accessed 17 October 2023.

⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 (hereinafter: European Convention on Human Rights).

3 Confiscation of Frozen Assets as a Response to Sanctions Violations (Conviction-Based Confiscation)

Traditionally, domestic laws of many countries follow a cornerstone principle of criminal justice that a perpetrator should not profit from his crime and allow confiscation of the assets that are ‘proceeds of crime’.⁶² In some jurisdictions, non-conviction based confiscation – confiscation of criminal proceeds in a civil or administrative process – is also permitted.⁶³ Aside from this, several states adopted laws authorizing them to confiscate assets if the owner of assets cannot prove that they are derived from legal activities (unexplained wealth laws).⁶⁴ In this section, legislation and practice of asset confiscation as a continuation of previously imposed sanctions are analysed. Thus, the discussion here focuses on the European Union’s initiative to add violation of EU restrictive measures (sanctions) to the list of EU crimes and allow confiscation of the assets implicated in such violations.

Contrary to the decision to impose EU restrictive measures (sanctions), the implementation and enforcement of these measures have been de-centralized. Besides the general obligations to take measures necessary to ensure compliance⁶⁵ and to provide “effective, proportionate and dissuasive” penalties for sanctions violations,⁶⁶ the implementation and enforcement were left in the hands of the Member States. Unsurprisingly, this caused significant differences

62 For example, the UK’s Proceeds of Crime Act.

63 Johan Boucht writes about four generations of confiscation rules in his analysis of asset confiscation in Europe. These generations are regular criminal confiscation, extended criminal confiscation, non-conviction based confiscation, and unexplained wealth mechanisms. Johan Boucht, ‘Asset Confiscation in Europe – Past, Present, and Future Challenge’ (2019) 26(2) *Journal of Financial Crime* 526.

64 Andrew Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (Basel Institute on Governance 2021).

65 “Member States should take appropriate measures to ensure that restrictive measures are complied with.” Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy* (Sanctions Guidelines) (Doc. 5664/18, 4 May 2018) <data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> accessed 17 October 2023.

66 The EU Sanctions Guidelines note that the majority of the regulations imposing restrictive measures contain the following provision: “The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.” *Ibid.*

in the national laws and practices,⁶⁷ often undermining the effectiveness of the undertaken measures.

Economic sanctions against the Russian Federation and their enforcement instigated a major revision of the sanctions' enforcement at the EU level.⁶⁸ As a stepping stone of the process, it was agreed that a violation of EU restrictive measures (sanctions) would be added to the list of EU crimes as a "particularly serious crime with a cross-border dimension".⁶⁹ This decision paves the way for the introduction of minimum rules concerning the definition of and penalties for the violation of EU restrictive measures.⁷⁰ Following this, in December 2022, the European Commission announced a proposal for a directive on the definition of criminal offences and penalties for the violation of EU restrictive measures.⁷¹

The proposed directive recommends criminalising and setting minimum rules on penalties for three types of conduct: (i) violations of the prohibitions and restrictions contained in EU restrictive measures; (ii) conduct intended to circumvent EU restrictive measures; and (iii) breaching conditions under authorisations granted by competent authorities to conduct certain activities otherwise prohibited by EU restrictive measures.⁷² According to the draft directive, a violation of EU sanctions would transform a frozen asset into

67 The European Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes and Eurojust, 'Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis' (2021) <www.eurojust.europa.eu/publication/expert-report-prosecution-sanctions-restrictive-measures-violations-national-jurisdictions#> accessed 17 October 2023.

68 "[...] it has been Russia's war against Ukraine which prompted a sense of urgency and increased interest by the Member States and the Commission in improving sanctions enforcement, in order to ensure the credibility and effectiveness of the sanctions regime instituted against Russia." Carmen-Cristina Cîrlig, 'Proposal for a Directive on the Violation of Union Restrictive Measures' (Briefing EU Legislation in Progress, 2023) <[www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)751409](http://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)751409)> accessed 17 October 2023.

69 On November 28, 2022, the Council of the European Union unanimously decided to add the violation of EU restrictive measures to the areas of 'particularly serious crime with a cross-border dimension' set out in Article 83(1) of the Treaty on the Functioning of the European Union. Council Decision (EU) 2022/2332 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union (2022) OJ L308/18.

70 Ibid.

71 European Commission, *Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures* (COM(2022)684 final, 2 December 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0684>> accessed 17 October 2023.

72 Cîrlig (n 68) 8.

proceeds of crime, meaning that the Member States could confiscate such assets:

Article 10

Member States shall take the necessary measures to ensure that funds or economic resources subject to Union restrictive measures in respect of which the designated person, entity or body commits or participates in an offence referred to in Article 3(2), points (h)(i) or (ii), are considered as ‘proceeds’ of crime for the purposes of Directive (EU) [.../...] [Directive on asset recovery and confiscation].⁷³

Concurrently, the EU is in the process of adopting a new directive on asset recovery and confiscation, and the current proposal includes provisions enabling the confiscation of the assets implicated in EU sanctions violations.⁷⁴ Also, the proposal to earmark assets confiscated as a result of a violation of EU sanctions imposed against Russia to compensate Ukraine has been voiced.⁷⁵

To sum it up, to enable confiscation of the frozen assets as a penalty for EU sanctions violation, the European Union has to undertake the following three steps: (i) recognize the violation of EU restrictive measures as a serious crime under Article 83 TFEU; (ii) harmonise the definitions and penalties for violation of EU restrictive measures; and (iii) amend asset recovery rules to allow confiscation of the assets implicated in violations of EU restrictive measures.

In the context of the debate on financing Ukraine’s reconstruction, some commentators have been arguing that the preferred option for the confiscation of Russian assets is to confiscate those assets that are involved in sanctions violations.⁷⁶ To maximize the amount of assets obtained in such a way, it is proposed to broaden the scope of the relevant sanctions offences and to

⁷³ Proposal for a Directive of the European Parliament and of the Council (n 71).

⁷⁴ European Commission, *Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation* (COM(2022)245 final, 25 May 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0245>> accessed 17 October 2023.

⁷⁵ European Parliament Committee on Budgets, *Draft Opinion on the proposal for a directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures* (2022/0398(COD), 19 April 2023) <www.europarl.europa.eu/doceo/document/BUDG-PA-746791_EN.pdf> accessed 17 October 2023.

⁷⁶ Andrew Dornbierer, *From Sanctions to Confiscation while Upholding the Rule of Law* (Working Paper 42, Basel Institute on Governance 2023); James Patrick Sexton and David Kinnecome, ‘Enforcing Sanctions Violations to Fund the Reconstruction of Ukraine’ (*EJIL:Talk! Blog of the European Journal of International Law*, 8 June 2023) <www.ejiltalk

extend the application of such laws to individuals and entities outside of the state's jurisdiction if they are involved in sanctions circumvention within that jurisdiction.⁷⁷

Procedural safeguards apply to all types of asset confiscation procedures (i.e., conviction-based and non-conviction based).⁷⁸ In other words, even when asset confiscation is undertaken as a result of a criminal conviction, certain procedural guarantees apply, as is the case with Article 6 (right to a fair trial) of the ECHR.⁷⁹ In this regard, Johan Boucht observes: "Case law from the ECtHR's [European Court of Human Rights] suggests that it [is] essential from the point of view of Art. 6 that it is reasonably possible for the individual to exonerate himself from a claim made against him, and that such a rebuttal should not amount to his bearing an individual and excessive burden."⁸⁰ In light of this, if the abovementioned changes to EU legislation are adopted, thus obligating Member States to implement them, states must ensure fundamental procedural rights, including due process rights, for any person accused of a violation of EU sanctions. Otherwise, Member States might breach their human rights obligations.

4 Non-Conviction based Confiscation of Frozen Assets

Non-conviction based confiscation is permitted in some jurisdictions. This being said, Canadian new legislation allowing the confiscation of assets of sanctioned persons is unique because it does not relate to previous or future criminal conduct occurring on Canadian soil.

Canada has been exploring the possibility of confiscating assets of sanctioned individuals at least since 2019. These early efforts were related to the so-called Magnitsky sanctions – sanctions targeting perpetrators of grave human rights violations abroad, which have been adopted by a number of states.⁸¹ For example, in December 2019, the prime minister of Canada, Jus-

.org/enforcing-sanctions-violations-to-fund-the-reconstruction-of-ukraine/> accessed 17 October 2023.

77 Dornbierer (76) 28.

78 Boucht (n 63).

79 European Convention on Human Rights (n 61).

80 Boucht (n 63) 546.

81 Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (Brill | Nijhoff 2022) 38–40.

tin Trudeau, published a letter to Canada's foreign minister, Francois-Philippe Champagne, with a request to "build on the Magnitsky sanctions regime to ensure increased support for victims of human rights violations by developing a framework to transfer seized assets from those who commit grave human rights abuses to their victims, with appropriate judicial oversight."⁸² The pioneering initiative towards this end came from Senator Ratna Omidvar, who has been advocating in favour of repurposing frozen assets.⁸³ In particular, the Frozen Assets Repurposing Act (FARA) or Bill S-217 was tabled in the Senate of Canada.⁸⁴ This bill allows assets of individuals responsible for or complicit in gross human rights violations⁸⁵ to be "repurposed".⁸⁶ The same destiny awaits frozen assets of the persons engaged in the acts of significant corruption.⁸⁷ According to the FARA, the authority to seize assets and further distribute them has been vested in courts, yet the purposes for which such assets can be used have been defined in the bill.⁸⁸

In spring 2022, in response to Russia's unprovoked military attack against Ukraine, provisions amending Canadian economic sanctions laws and allowing confiscation of frozen assets were incorporated in the Act to implement certain provisions of the budget (Bill C-19).⁸⁹ At the same time, Canada was actively engaged in reaching a consensus among the G7 members on whether and how to use frozen Russian assets. With this in mind, before the G7 financial ministers meeting in May 2022, Canadian Deputy Prime Minister and Finance Minister Chrystia Freeland tabled a proposal to allow Russian rich

82 Prime Minister of Canada Justin Trudeau, 'Minister of Foreign Affairs Mandate Letter' (13 December 2019) <pm.gc.ca/en/mandate-letters/2019/12/13/archived-minister-foreign-affairs-mandate-letter> accessed 17 October 2023.

83 Senator Ratna Omidvar, 'Bill S-278, An Act to amend the Special Economic Measures Act (disposal of foreign state assets)' (*Ratna Omidvar*, 19 March 2019) <www.ratnaomidvar.ca/senate-business/in-the-chamber/frozen-assets-bill/> accessed 17 October 2023.

84 Bill S-217 An Act respecting the repurposing of certain seized, frozen or sequestrated assets (Frozen Assets Repurposing Act) <www.parl.ca/legisinfo/en/bill/44-1/s-217> accessed 17 October 2023.

85 Such violations are extrajudicial killings, torture or other gross violations of internationally recognized human rights, the forced displacement of peoples, and violations of human rights standards that are based on customary international law and international human rights conventions to which Canada is a party.

86 Bill S-217 (n 84).

87 Ibid.

88 Ibid.

89 Bill C-19 An Act to implement certain provisions of the budget tabled in Parliament on 7 April 2022 and other measures <www.parl.ca/DocumentViewer/en/44-1/bill/C-19/first-reading> accessed 17 October 2023.

individuals – oligarchs – “to buy their way out of sanctions” by contributing part of their wealth to Ukraine’s reconstruction.⁹⁰ This proposal did not find its way into the Communiqué issued after the G7 Finance Ministers and Central Bank Governors Meeting.⁹¹

In June 2022, Canada adopted a law, which allows the confiscation of sanctioned private and state-owned assets regardless of whether such assets were acquired legally or illegally.⁹² To be more specific, certain provisions of the Special Economic Measures Act and Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), two laws which regulate the imposition of unilateral economic sanctions by Canada, were amended.⁹³ According to these amendments, a property owned or controlled by (i) a foreign state, (ii) any person in that foreign state, or (iii) a national of that foreign state who does not ordinarily reside in Canada can be confiscated.⁹⁴ These confiscated assets can be used for the following purposes: “(a) the reconstruction of a foreign state adversely affected by a grave breach of international peace and security; (b) the restoration of international peace and security; and (c) the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption.”⁹⁵ The Minister of Foreign Affairs may, with the approval of the Governor in Council, enter into an agreement with a foreign government regarding the use of such confiscated assets to achieve any of the enumerated objectives.⁹⁶ Any such confiscation is a subject of judicial oversight. However it should be noted that the judge should determine only if: “the property (a) is described in an order made under paragraph 4(1)(b); and (b) is owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person.”⁹⁷ This low standard of judicial oversight has been already criticized as “a rubber stamp dressed up as the rule of law.”⁹⁸

90 The Associated Press, ‘Western Countries Considering Whether to Let Russian Oligarchs Buy Relief from Sanctions’ (*CBC*, 26 May 2022, updated 27 May 2022) <www.cbc.ca/news/politics/western-nations-sanctions-russia-oligarchs-money-1.6467318> accessed 17 October 2023.

91 U.S. Department of the Treasury, ‘G7 Finance Ministers and Central Bank Governors Meeting Communiqué’ (Press release, 20 May 2022) <home.treasury.gov/news/press-releases/jy0797> accessed 17 October 2023.

92 Bill C-19 (n 89).

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

97 Article 5.4(1), Special Economic Measures Act s.c. 1992, c. 17.

98 Dornbierer (n 76) 18.

The bill leaves many unanswered questions. To illustrate this, it is worth quoting Senator Ratna Omidvar's speech endorsing the bill: "Big questions need to be asked, such as: Who should receive the assets? Should it be the countries of origin or a country that is seeking restitution, such as Ukraine? Or would it be individual victims as opposed to communities or nation states? How would the assets be distributed? What accountability mechanisms are needed?"⁹⁹

While media reports alleging the illegality of such a move emerged,¹⁰⁰ Professor Robert J. Currie endorsed the new bill as "creative" and "by no means obviously illegal."¹⁰¹ Despite this, it remains to be seen how the power to confiscate frozen assets will be reconciled with the due process guarantees and the right to property as well as other applicable procedural guarantees.

In December 2022, Canada initiated the first process to seize and pursue the forfeiture of assets of Granite Capital Holdings Ltd., a company owned by sanctioned Russian oligarch Roman Abramovich.¹⁰² It is expected that these assets will be used for the reconstruction of the war-ravaged Ukraine and payment of compensation to the victims.¹⁰³

Other countries also have laws that allow the confiscation of assets frozen as a result of economic sanctions. For example, Article 13(1) of the Swiss Federal Act on the Implementation of International Sanctions (Embargogesetz) stipulates that: "Property and assets that are subject to compulsory [restrictive] measures shall be forfeited irrespective of the criminal liability of any particular person in the event that their continued lawful use is not guaranteed."¹⁰⁴ However, it should be noted that the confiscation of the previously frozen

99 Senator Ratna Omidvar, Bill C-19: *The Frozen Assets Repurposing Act and the Effective and Accountable Charities Act are Included in the BIA* <www.ratnaomidvar.ca/bill-c19-the-frozen-assets-repurposing-act-and-the-effective-and-accountable-charities-act-are-included-in-the-bia-2/> accessed 17 October 2023.

100 Janyce McGregor, 'Proposed Powers to Sell, Redistribute Russian Assets May Violate International Law, Says Legal Expert' (*CBC News*, 6 June 2022) <www.cbc.ca/news/politics/c19-russia-sanctions-un-articles-violation-1.6478115> accessed 17 October 2023.

101 Robert J Currie, 'Seizing Russian Assets: Canada has the Spirit of International Law on its Side' (*Polycymagazine*, 27 June 2022) <www.policymagazine.ca/seizing-russian-assets-canada-has-the-spirit-of-international-law-on-its-side/> accessed 17 October 2023.

102 Global Affairs Canada, 'Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch' (News release, 19 December 2022) <www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html> accessed 17 October 2023.

103 Ibid.

104 Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA) of 22 March 2002 <www.fedlex.admin.ch/eli/cc/2002/564/en> accessed 17 October 2023.

assets has not been used often by Switzerland: if examples of such Swiss practice based on Article 13(1) of the abovementioned law exist, they have escaped this writer's attention.

In the context of the recent discussions on the use of frozen Russian assets for Ukraine's reconstruction, a working group led by the Swiss Federal Office of Justice concluded that: "The confiscation of frozen private assets is inconsistent with the Federal Constitution and the prevailing legal order and violates Switzerland's international commitments."¹⁰⁵

5 **Proposals on the Use of Immobilized¹⁰⁶ Assets to Generate Profit for Subsequent Confiscation (Partial Asset Confiscation)**

While achieving a peace agreement with the Russian Federation does not reside in the realm of near or mid-term possibility, the discussions on finding legal ways to use frozen and immobilized Russian assets to rebuild Ukraine have been flourishing. In this regard, the EU 'idea' – that is the correct term to use, as there are no official documents yet, at least in public knowledge – is to explore the possibility of using Russian immobilized assets to generate income for Ukraine. In November 2022, the European Commission presented options for using Russian assets for Ukraine's reconstruction.¹⁰⁷ The official press release presents the short-term and long-term solutions.¹⁰⁸ In the short term, the EU intends to set up a structure to manage the frozen public funds, invest them and use the proceeds in favour of Ukraine.¹⁰⁹ In the long term, it is expected that once the sanctions are lifted, the Russian central bank assets will be returned.¹¹⁰ However, such a return would need to be considered in the context of any future peace agreement and reparation claims.¹¹¹

¹⁰⁵ Federal Council, 'Federal Council has Received Legal Clarifications on Frozen Russian Assets' (Press release, 15 February 2023) <www.admin.ch/gov/en/start/documentation/media-releases.msg-id-93089.html> accessed 17 October 2023.

¹⁰⁶ "Immobilisation" of the assets of the Russian central bank and entities under its control took place on 28 February 2022 when the EU in coordination with other states imposed a ban on transactions related to the management of reserves and their assets.

¹⁰⁷ European Commission, 'Ukraine: Commission Presents Options to Make Sure that Russia Pays for its Crimes' (Press release, 30 November 2022) <ec.europa.eu/commission/presscorner/detail/en/ip_22_7311> accessed 17 October 2023.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

A paper presented by the Ad hoc Working Party on Frozen Assets earlier this year further elaborates on this approach of cautious balance. It outlines the option of temporary active management – through ‘sound investment’ – of immobilized assets of the Central Bank of Russia and entities under its control.¹¹² It is explicitly focused on the possibility of using liquid assets.¹¹³ From the legal perspective, the paper discusses the relationship between the proposed ‘active management’ and state immunity as well as the legal basis under the European Union law that could be used to introduce the principle of active management.¹¹⁴

The idea was met with strong opposition expressed by some EU Member States and the European Central Bank prompting further discussions among the EU Member States.¹¹⁵ As of the time of writing, a new proposal that is being deliberated puts forward an idea of taxing proceeds generated from the immobilized Russian assets with the subsequent transfer of such tax profits to Ukraine.¹¹⁶

The fundamental legal questions which arise in this context are: does confiscation of the proceeds generated by the immobilized central bank assets go against customary international law of state immunity? If yes, can such a violation be justified as permissible countermeasures under the law of state responsibility?

The main legal obstacle to the temporary use of the immobilized Russian central bank assets stems from the principle of state immunity. It originates in customary international law and embodies jurisdictional immunity (immunity from adjudication) and enforcement immunity (immunity from execution).¹¹⁷ While the former embodiment of state immunity does not apply to out-of-court proceedings, the application of the latter to the freezing of central bank assets, and their potential temporary management, is debatable. For example, Jean-Marc Thouvenin and Victor Grandaubert hold the view that immunity

112 Council of the European Union, *Non-paper on the Generation of Resources to Support Ukraine from Immobilised Russian Assets* (Doc WK 3926/2023 INIT, 21 March 2023). The leaked version was published by POLITICO <www.politico.eu/article/eu-looks-at-investing-vladimir-putin-russia-state-assets-to-raise-cash-for-ukraine/> accessed 17 October 2023.

113 Ibid.

114 Ibid.

115 Paola Tamma, ‘EU Plays for Time on Plans to Use Russian Frozen Assets to Rebuild Ukraine’ (*POLITICO*, 6 September 2023) <www.politico.eu/article/commission-charts-cautious-way-forward-on-russian-frozen-assets/> accessed 17 October 2023.

116 Ibid.

117 Peter-Tobias Stoll, ‘State Immunity’ (*Max Planck Encyclopedia of Public International Law*, April 2011) <opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-en06> accessed 17 October 2023.

from execution is equal to immunity from any type of constraint,¹¹⁸ in contrast, Tom Ruys contends that immunity from execution is applicable only in the context of court proceedings.¹¹⁹

Discussion of Russia's accountability sparked a new wave of heated debate on whether central bank assets are shielded from any measures of constraint. Philippa Webb, citing the ICJ's findings in *Jurisdictional Immunities of the State* (*Germany v. Italy*) on the procedural nature of state immunities, asserts that an executive or legislative action that is not linked to any judicial proceeding might enable a state to "freeze, seize, and repurpose frozen assets".¹²⁰ Agreeing with this, Anton Moiseienko adds that such confiscation can be justified either as third-party countermeasures in response to Russia's breach of *jus cogens* or as collective self-defence against Russia's unlawful armed attack.¹²¹ Both scholars also argue in favour of introducing a narrowly defined exception to the state immunity guarantees. This being said, Ingrid Brunk argues that confiscation of the central bank assets "would almost certainly violate foreign sovereign immunity" and that such a move would most probably not be justified as third-party countermeasures, yet acknowledging that a new practice might emerge.¹²²

Against this backdrop, the Ad hoc Working Party on Frozen Assets contends the following on the relations between the temporary active management of immobilized assets and state immunity entitlements: "[...] given that the UN Convention [United Nations Convention on Jurisdictional Immunities of States and Their Property] covers only immunity from jurisdiction and enforcement in the narrow sense, as regards assets owned, held or controlled by the Russian State such as those of the CBR [Central Bank of Russia], the principle of State immunity, does not prohibit proportionate administrative restrictive measures

118 Jean-Marc Thouvenin and Victor Grandaubert, 'The Material Scope of State Immunity from Execution' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

119 Tom Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

120 Philippa Webb, 'Ukraine Symposium – Building Momentum: Next Steps Towards Justice for Ukraine' (*Lieber Institute*, 2 May 2022) <lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/> accessed 17 October 2023.

121 Anton Moiseienko, 'Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets' (*Just Security*, 17 August 2022) <www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets/> accessed 17 October 2023.

122 Ingrid (Wuerth) Brunk, 'Countermeasures and the Confiscation of Russian Central Bank Assets' (*Lawfare blog*, 3 May 2023) <www.lawfaremedia.org/article/countermeasures-and-the-confiscation-of-russian-central-bank-assets> accessed 17 October 2023.

which are temporary, reversible and not confiscatory in nature and which pursue the legitimate objectives of the Union's external action (hence the legality of the current restrictive measures adopted in respect of assets held, owned or controlled by the Russian state and its entities)."¹²³

Confiscation of the proceeds generated by the immobilized central bank assets would need a justification as countermeasures only if they violate some international obligation of a state taking them, for example, an obligation to grant immunity to such assets. This might be the case if confiscation of the proceeds is incompatible with customary international law of state immunity. To be justified as countermeasures, a measure – in this case, denial of state immunity guarantees – should comply with a number of substantive and procedural preconditions codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The substantive prerequisites are enumerated in Articles 49–51 of the ARSIWA,¹²⁴ while the procedural ones are listed in Article 52.¹²⁵

There are two characteristics of permissible countermeasures, that the EU Member States might find hard to fulfil if they decide to confiscate proceeds generated by the immobilized Russian central bank assets. The first is the unsettled legal status of the countermeasures taken by indirectly injured states (third-party countermeasures).¹²⁶ Specifically, ARSIWA distinguishes between injured and non-injured states, and the entitlement to impose countermeasures is explicitly granted only to injured states, thus leaving the question of the legality of third-party countermeasures undecided.¹²⁷ The second is the temporary nature of countermeasures. Article 53 of the ARSIWA requires that:

¹²³ Council of the European Union (n 112).

¹²⁴ Among the most important preconditions are: countermeasures can be taken only against a state which is responsible for an internationally wrongful act (Article 49), there is a defined group of international obligations that cannot be affected by countermeasures (Article 50), and countermeasures must be proportional (Article 51).

¹²⁵ Procedural preconditions include a duty to call upon the responsible state to fulfil its obligations, a duty to notify the responsible state of a decision to take countermeasures, a duty to suspend countermeasures either if the wrongful act has ceased or if there is a pending dispute before the tribunal.

¹²⁶ Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017).

¹²⁷ Article 42 of ARSIWA lays out the definition of an injured state for the purposes of invoking state responsibility of another state. This definition is narrow and excludes states that are not directly affected by the violation. Article 48 stipulates the rules for an invocation of responsibility by a state other than an injured state. According to this article, non-injured states are not allowed to resort to countermeasures. For different legal views on the legality of third-party countermeasures, see Bogdanova (n 81) 63–66.

“[c]ountermeasures shall be terminated as soon as the responsible State has complied with its obligations”. It is debatable if a temporary denial of state immunity guarantees that results in permanent confiscation of the proceeds generated by the immobilized central bank assets can be considered as temporary countermeasures. Those international legal scholars who oppose any actions with the immobilized Russian Central Bank assets particularly emphasize the requirement of temporality as an insurmountable obstacle to any attempts to justify such measures as permissible countermeasures.¹²⁸ Other legal commentators contend that confiscation of the Russian Central Bank assets meets the prerequisites for being permissible countermeasures, the view which is further supported by Russia’s undeniable obligation to pay reparations.¹²⁹

6 Concluding Remarks

This chapter demonstrates that the state practice of asset confiscation as a continuation of targeted financial sanctions is rare and that domestic laws permit such actions only in very special circumstances. This being said, the unprovoked aggression against Ukraine instigated major changes in the laws and state practices, as well as inspired new proposals on how to finance Ukraine’s reconstruction from the frozen Russian assets. While political discussions have abounded in claims that the frozen funds should be used as reparations, this might be a thorny legal path to follow. Yet given the twists and turns of the last year and a half, it would be difficult to rule anything out.

¹²⁸ Brunk (n 18).

¹²⁹ Anton Moiseienko, International Lawyers Project and Spotlight on Corruption, ‘Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options’ (Research Paper, June 2022).