



Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine

STUDY



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Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine

This report analyses the options under international law for the confiscation of Russian state assets to support Ukraine's reconstruction. It focuses on Russian Central Bank assets, US\$300 billion of which are frozen in various jurisdictions. The report considers four avenues for overcoming Russia's immunity from enforcement: avoidance of immunity through purely executive or legislative action; justification for the breach of international law on the grounds that it is a countermeasure; evolution of international law to lift immunity from enforcement upon, for example, a finding of aggression by a United Nations principal organ; and an exception in international law for the enforcement of international judgments. The report addresses proposals based on third-party countermeasures and collective self-defence. It assesses six options under current review: enforcement of European Court of Human Rights judgments; an international treaty setting up a compensation commission; taxing windfall contributions; placing Russian state assets into an escrow account as collateral; identifying Russia as a state sponsor of terrorism; and the establishment of an investment 'common fund'. In conclusion, the report presents a risk assessment of each option, noting that (i) confiscation based on third-party countermeasures with a conditional element and (ii) confiscation based on the enforcement of international judgments against Russia are most likely to comply with international law.

AUTHOR

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Executive summary

Under customary international law, a state bears responsibility for its internationally wrongful acts, which in turn gives rise to a reciprocal duty to provide reparation. In its aggression against Ukraine, Russia has acted in violation of its international obligations, including those arising from the United Nations (UN) Charter. This has been recognised by the UN General Assembly on a number of occasions.

States are immune from the enforcement jurisdiction of domestic courts, which means that measures of constraint may not be taken against their property (including central bank assets) unless the state has consented to the measure, or one of the limited exceptions applies. This rule has been confirmed by the International Court of Justice and included in international agreements as well as a wide selection of domestic laws, such that the rule is customary international law.

Proposals for the confiscation of Russian state assets therefore give rise to complex legal issues. The most obvious legal hurdle is immunity, which will bar judicial action taken against Russian state assets, but which may be overcome by:

- 1 Avoidance of immunity through purely executive or legislative action;
- 2 Justification for the breach of international law on the grounds that it is a countermeasure;
- 3 Evolution of international law to lift immunity from enforcement upon, for example, a finding of aggression by a UN principal organ; or
- 4 Exception in international law for the enforcement of international judgments.

Other legal complexities include a lack of a basis under domestic law (requiring states to adopt or amend domestic legislation); due process concerns (where the assets belong to private individuals); international rules on the protection of private investors (where central banks are included in this category); as well as rules relating to non-intervention (where coercive action affecting another state is taken).

A number of possible options for using Russian assets to generate compensation for Ukraine have been proposed. The options discussed in this report include:

- 1 Justifying any breach of Russia's immunity as a third-party countermeasure that precludes responsibility for those states in breach. This would require showing that there is a basis for such measures under international law, that the proposed confiscation would be temporary and reversible, and that the confiscation would be for the purpose of inducing compliance with an international obligation.
- 2 Invoking collective self-defence, which requires a degree of temporality; it is uncertain whether non-forcible measures, such as sanctions, may be taken in self-defence.
- 3 Enforcing judgments of international courts against Russia in domestic courts. This relies on an exception to Russia's immunity, supported by existing state practice and Russia's consent to the jurisdiction of these courts. It is unlikely to be sufficient to cover the material damage suffered by Ukraine.
- 4 Establishing an international claims commission for Ukrainian victims, with Russia's liability pre-established. The proposal goes beyond past practice regarding claims commissions when the target state had been defeated or the UN Security Council had made a determination of liability.
- 5 Placing a windfall tax on frozen Russian state assets, which depends on what the relevant contracts provide as to Russia's ownership of the taxed funds (i.e. interest gained on invested assets).

- 6 Placing Russian state assets in an escrow account and to be used by Ukraine as collateral for new bonds and loans. If a temporary and reversible measure, this could constitute a lawful countermeasure.
- 7 Applying an exception to immunity on the basis that Russia has financed terrorism within the meaning of the Warsaw Convention 2005 and/or is a state sponsor of terrorism. This has a limited basis in state practice and the treaty does not expressly waive Russia's immunity.

Allowing the European Commission to transfer frozen Russian state assets to an investment 'common fund', whose generated resources would be used to finance the reconstruction of Ukraine. This raises issues as to Russia's right to the returns generated by investing the principal and the change of ownership implicated by the transfer of the assets to the fund.

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List of abbreviations

ARSIWA	ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries
BIT	Bilateral Investment Treaty
CSD	Central Securities Depositories
ECSI	European Convention on State Immunity
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
NFK	National Fund of Kazakhstan
PCIJ	Permanent Court of International Justice
RCB	Russian Central Bank
RDIF	Russian Direct Investment Fund
REPO Act	Rebuilding Economic Prosperity and Opportunity for Ukraine Act (US)
RNWF	Russian National Wealth Fund
UK	United Kingdom
UN	United Nations
UNCC	United Nations Compensation Commission
UNCIS	UN Convention on Jurisdictional Immunities of States and their Property
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States
VCLT	Vienna Convention on the Law of Treaties

NOTE ON TERMINOLOGY

This report focuses on legal options for the *confiscation* of Russian state assets, which are distinct from proposals relating to freezing, seizing, or immobilising such assets. The terms are understood as follows:

- *Confiscation* is a measure which leads to an actual change in ownership, applicable to any type of asset.¹ Persons or entities that hold an interest in the funds or other property at the time of the confiscation lose all rights to those funds or assets,² without adequate compensation.³
- *Freezing* refers to measures imposed on liquid assets such as bank accounts and other financial assets, preventing the nominative owner of such products from moving, accessing, transferring, or converting these assets. This measure does not involve a change in ownership.⁴ Where the relevant asset produces a benefit (e.g., dividends or interest), this benefit is also frozen.⁵
- *Seizing* refers to the same measure applicable to movable or immovable property that prevents the nominative owner of such property from selling or transferring it for the duration it has been seized, without changing ownership. Seizing is a temporary measure, distinct from the permanent nature of confiscation.⁶ Interest accrued by the asset is also seized.
- *Immobilisation* is similar to freezing (i.e. without changing ownership), but distinct in that it would be unlawful for others to have dealings with assets that are immobilised.⁷ Interest accrued by the asset is also immobilised.⁸

Confiscation, as the focus of this report, is separate from proposals to freeze Russia's assets until compensation is paid.⁹ Such proposals do not refer to a permanent change in the ownership of property, but rather to temporary retention of property, to be returned when Russia's reparation obligations are fulfilled. Confiscation is also distinct from the exploitation of proceeds of assets, since this also does not involve a change in ownership. The presumption is that the assets from which proceeds arise will eventually be returned to the owner.¹⁰

¹ Open Society Foundations, Expert roundtable on Confiscation of Sovereign Assets: Internal Report, June 2023.

² [Glossary](#) of Asset Recovery Terms, World Bank Stolen Asset Recovery Initiative website.

³ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 2009, p. 324.

⁴ Open Society Foundations, Expert roundtable on Confiscation of Sovereign Assets, June 2023 (Internal Report); [Asset Freeze: Explanation of Terms](#), United Nations Al-Qaeda Sanctions Committee, 2015; [Confiscation and Freezing of Assets](#), European Commission website.

⁵ Al Qaeda Sanctions Committee, Asset Freeze: [Explanation of Terms](#), United Nations, 2015.

⁶ Open Society Foundations, Expert roundtable on Confiscation of Sovereign Assets: Internal Report, June 2023.

⁷ [Council Regulation 833/2014 of 31 July 2014](#) on restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Art. 5a(4); [Options paper](#) by the European Commission on the use of frozen assets to support Ukraine's reconstruction, November 2022, p. 1.

⁸ Maria Demertzis, ['Bank of Russia's immobilised assets: What happens next?'](#), Bruegel, May 2023.

⁹ See, for example, Evan J Criddle, ['Turning Sanctions into Reparations: Lessons for Russia/Ukraine'](#), William and Mary Law School, 2023.

¹⁰ Menno T Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?', *Netherlands International Law Review*, Vol. 70(1), TMC Asser Press, April 2023, pp. 1-17.

1. Russia's international responsibility for damage caused to Ukraine

1.1. Russia's responsibility for its act of aggression towards Ukraine

Under customary international law, 'every internationally wrongful act of a state entails the international responsibility of that state'.¹¹ This responsibility attaches to the state by reason of its status as an international person.¹² The term 'international responsibility' refers to relations which arise between the wrongdoing state and other international actors in light of the fact that the state is obliged to account for its violation of international law.¹³ Accountability may be achieved through the injured state invoking the responsibility of the wrongdoing state, where the relevant obligation is owed to that state individually,¹⁴ or through invocation of responsibility by a group of states, or the international community, where the obligation breached is either: (i) an obligation *erga omnes* (owed to the international community as a whole);¹⁵ or (ii) an obligation *erga omnes partes* (owed to other states parties to a treaty).¹⁶ The obligation to provide reparation is an obligation *erga omnes*, but is not recognised as an obligation of a *jus cogens* nature.¹⁷

Russia has engaged in an act of aggression in clear violation of international law, giving rise to its international responsibility. Article 1 of the UN Charter sets out as a purpose of the UN the 'suppression of acts of aggression or other breaches of the peace'.¹⁸ The prohibition on the use of force is in Article 2(4) of the UN Charter:

*'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'*¹⁹

¹¹ ILC, [Articles](#) on Responsibility of States for Internationally Wrongful Acts, with commentaries (ARSIWA), 2001, Art. 1; Permanent Court of International Justice, *Phosphates in Morocco (Italy v France)*, [Preliminary Objections](#), PCIJ Series A/B 1938, No 74, p. 28; International Court of Justice, *Corfu Channel (UK v Albania)*, [Judgment](#), ICJ Rep 1949, p. 4, p. 23; International Court of Justice, *Reparation of Injuries Suffered in the Service of the United Nations*, [Advisory Opinion](#), ICJ Rep 1949, p. 174, p. 184; International Court of Justice, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, [Advisory Opinion](#), Second Phase, ICJ Rep 1950, p. 221, p. 228; International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, Judgment, ICJ Rep 1986, p. 14, para. 283, 292; International Court of Justice *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [Judgment](#), ICJ Rep 1997, p. 7, para. 47; Robert Jennings and Arthur Watts, *Oppenheim's International Law* 9th edition, Volume 1, Oxford University Press, 2008, p. 500.

¹² Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th edition, Volume 1, Oxford University Press, 2008, p. 50.

¹³ ARSIWA, Art. 1, para. 5.

¹⁴ ARSIWA, Art. 1, para. 42.

¹⁵ International Court of Justice, *Barcelona Traction (Belgium v Spain)*, [Preliminary Objections](#), Second Phase, ICJ Rep 1970, p. 3, paras 33-34.

¹⁶ International Court of Justice, *Application of the Convention for the Prevention and Repression of the Crime of Genocide (The Gambia v Myanmar)*, [Preliminary Objections](#), ICJ Rep 2022, p. 477, 516.

¹⁷ International Law Commission, [Draft conclusions](#) on peremptory norms of general international law, A/77/10, 2022, conclusion 3. ILC draft conclusion 3 defines a *jus cogens* norm as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

¹⁸ [Charter of the United Nations 1945](#), 1 UNTS XVI, Art. 1(1).

¹⁹ *ibid.*, Art. 2(4).

On 2 March 2022, the United Nations General Assembly (UNGA) deplored 'in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter', demanded 'that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member state', and demanded 'that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine'.²⁰ On 24 March 2022, the UNGA further demanded 'an immediate cessation of the hostilities by the Russian Federation against Ukraine, in particular of any attacks against civilians and civilian objects', and condemned 'all violations of international humanitarian law and violations and abuses of human rights'.²¹

Significantly, on 14 November 2022, the UNGA:

*'Recognize[d] that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law, and that it must bear the legal consequences of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.'*²²

The UNGA emphasised Russia's accountability in 2023, when it 'reiterate[d] its demand that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine', called for a cessation of hostilities, and 'emphasize[d] the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine'.²³

Another principal UN organ, the International Court of Justice (ICJ), has determined the wrongfulness of Russia's conduct for the purpose of issuing provisional measures. On 16 March 2022, the ICJ granted measures in favour of Ukraine, ordering Russia to 'immediately suspend the military operations that it commenced on 24 February' and noting that the provisional measures 'create[d] international legal obligations' for Russia.²⁴

Russia has also been subject to multiple legal and political sanctions,²⁵ including expulsion from the Council of Europe,²⁶ expulsion from the UN Human Rights Council,²⁷ and the freezing of Russian state assets in multiple jurisdictions. Russia has yet to comply with demands for cessation, let alone reparation.

At a glance:

Russia is responsible for violations of international law, including aggression and violations of international humanitarian law and human rights law. The legal basis is customary international law and the UN Charter.

²⁰ [UNGA Resolution ES/11/1](#) on aggression against Ukraine, 2 March 2022, paras. 2-4.

²¹ [UNGA Resolution ES/11/2](#) on humanitarian consequences of the aggression against Ukraine, 24 March 2022, paras. 2, 9.

²² [UNGA Resolution ES/11/5](#) on furtherance of remedy and reparation for aggression against Ukraine, 14 November 2022, para. 2 (emphasis added).

²³ [UNGA Resolution ES/11/6](#) on principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine, 23 February 2023, paras. 5, 8, and 9.

²⁴ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention of the Crime of Genocide (Ukraine v Russia)*, [Order of 16 March 2022](#), ICJ Rep 2022, p. 211, para. 86(1), para. 84.

²⁵ New Lines Institute, [Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine](#), June 2023, p. 12-13.

²⁶ [Council resolution CM/Res\(2022\)2](#) on the cessation of the membership of the Russian Federation to the Council of Europe, March 2022.

²⁷ [UNGA Resolution ES/11/3](#) on suspension of the rights of membership of the Russian Federation in the Human Rights Council, 7 April 2022.

1.2. Russia's obligation to make reparation

States have an obligation under international law to make reparation for internationally wrongful acts. The Permanent Court of International Justice (PCIJ) held that 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'²⁸ The Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) of the UN International Law Commission (ILC) provide that 'the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.'²⁹ Such 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed',³⁰ and includes reparation for both material and moral damage.³¹

The obligation to provide reparation can be invoked by any state under international law.³² For example, after Iraq's unlawful invasion and occupation of Kuwait, the UN Security Council (UNSC) reaffirmed the general duty to make reparation, finding that Iraq was 'liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.'³³ The UNSC established the UN Compensation Commission to manage a Fund, through which compensation for Iraq's wrongful acts could be satisfied.³⁴

The UNGA has already recognised that Russia 'must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts'.³⁵ The UNGA has also 'recognize[d] the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation or against Ukraine.'³⁶ As Russia's aggression is ongoing, it is challenging to estimate the sum of the reparations due to Ukraine and its people. The most recent World Bank estimate places the sum at US\$411 billion.³⁷ There is a significant gap between the funds Ukraine requires and what it is currently receiving. As of May 2023, donor countries have committed €73.49 billion (billion equals 1 000 million) (around US\$85 billion) as financial assistance.³⁸

²⁸ Permanent Court of International Justice, *Factory at Chorzów (Germany v Poland)*, [Jurisdiction](#), PCIJ Series A 1927, No 9, p. 21.

²⁹ ARSIWA, Art. 31.

³⁰ Permanent Court of International Justice, *Factory at Chorzów (Germany v Poland)*, [Jurisdiction](#), PCIJ Series A 1927, No 9, p. 47.

³¹ ARSIWA, Art. 31 para. 5.

³² *ibid.*, Art. 31 para. 4.

³³ [UNSC Resolution 687](#), 3 April 1991, para. 16.

³⁴ *ibid.*, para. 18.

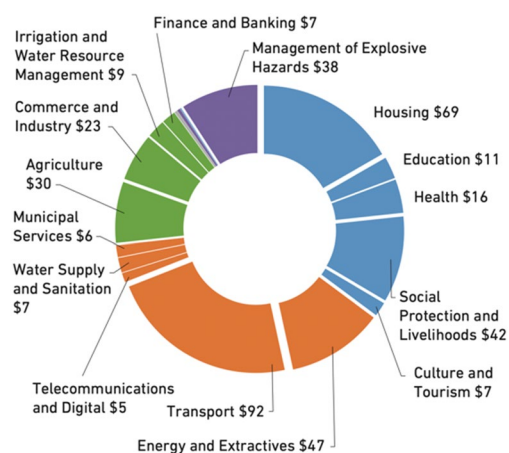
³⁵ [UNGA Res ES/11/5](#), para. 2.

³⁶ [UNGA Res ES/11/5](#), para. 3.

³⁷ [Ukraine Rapid Damage and Needs Assessment](#), World Bank, March 2023, p. 9.

³⁸ [Background information](#) for the BUDG exchange of views with the parliamentary committee on budgets of the Ukrainian Parliament, European Parliament Briefing, August 2023, p. 2. This excludes military aid and is not necessarily allocated to reparation.

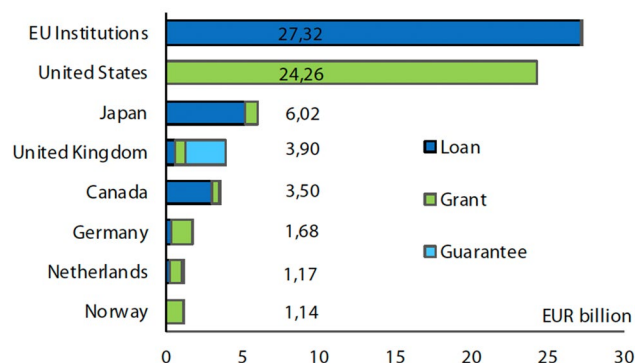
Figure 1 – Total recovery and reconstruction needs (US\$ billion): US\$411 billion



Source: World Bank, [Ukraine Rapid Damage and Needs Assessment](#), February 2023.

Figure 2 – Financial assistance by donor and type (€ billion)

Figure 2 - financial assistance by donor and type



Source: European Parliament Briefing: [Background Information](#) for the BUDG exchange of views with the parliamentary committee on budgets of the Ukrainian Parliament.

Russia's non-compliance with international dispute settlement procedures, including the interim and provisional measures issued by the ICJ and ECtHR, casts doubt on when, and if, Russia will meet its reparations obligation.³⁹ Its status as permanent member of the UNSC presents an additional hurdle since it can veto any Security Council resolutions on reparations.

At a glance:

Russia is obliged to make full reparation for the injury caused to Ukraine. Such reparation must, as far as possible, wipe out all the consequences of the illegal acts and re-establish the situation in Ukraine that would have existed prior to the invasion.

³⁹ New Lines Institute, [Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine](#), June 2023, p. 13.

2. The international rules applicable to Russia's foreign sovereign immunity and their application to Russia-related assets in foreign jurisdictions

2.1. State immunity over sovereign assets under international law

With a reported US\$300 billion in foreign Russian Central Bank (RCB) reserves having now been frozen for over a year,⁴⁰ and with states increasingly taking action⁴¹ against Russian-owned property,⁴¹ much of the discussion on Russia's accountability has been centred on the application of immunity rules to certain categories of assets.⁴² Two forms of immunity are in issue: immunity for jurisdiction and immunity from enforcement (understood here to encompass immunity from execution).⁴³ Under international law, state-owned property situated on foreign territory is immune from measures of constraint imposed as part of a judicial process. Immunity from enforcement is a procedural bar based on the sovereign equality of states.⁴⁴

There are two relevant treaties, which are also (to a significant extent) part of customary international law and therefore also binding on non-parties to the treaties. The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (UNCISJ)⁴⁵ provides in Article 18 that no pre-judgment measures of constraint, such as attachment or arrest, can be taken against a State unless that state has expressly consented or 'allocated or earmarked the property for the satisfaction of the claim' in question. Article 19, on post-judgment measures of constraint, adds an additional exception to immunity: if 'it has been established that the property is specifically in use

⁴⁰ Henry Foy and Laura Dubois, '[Russian frozen assets 'ought to' be used to rebuild Ukraine, says US special envoy](#)', *Financial Times*, September 2023.

⁴¹ Canada has reportedly seized a Russian-owned cargo aircraft and is apparently making plans to forfeit it to Ukraine to assist in rebuilding efforts. Ukraine has also confiscated Russian state-owned assets in its takeover of Prominvestbank (officially, the Joint Commercial Industrial-Investment Bank) and that of the International Reserve Bank, owned by Sperbank, the Russian Government-run savings bank. Ukraine has reportedly confiscated US\$460 million from these banks. See '[Canada seizes Russia-owned AN-124 aircraft to hand it over to Ukraine, says Trudeau](#)', TASS, June 2023; and Maksym Savchuk, Heorhiy Shabayev, and Nadia Burdyey, '[Ukraine's Confiscation of Russian Assets Stymied By Bureaucracy, Investigation Finds](#)', Radio Free Europe, March 2023.

⁴² See for example, Philippa Webb, '[Ukraine Symposium – Building Momentum: Next Steps Towards Justice for Ukraine](#)', Lieber Institute, May 2022; Anton Moiseienko, '[Frozen Russian Assets and the Reconstruction of Ukraine, Legal Options](#)', World Refugee & Migration Council, July 2022; Moiseienko A., '[Sanctions, Confiscation, and the Rule of Law](#)' groupe d'études géopolitiques, June 2023.; Scott R Anderson and Chimène Keitner, '[The Legal Challenges Presented by Seizing Frozen Russian Assets](#)', Lawfare, May 2022; Daniel Franchini, '[Ukraine Symposium – Seizure of Russian State Assets: State Immunity and Countermeasures](#)', Lieber Institute, March 2023; Chimène Keitner, '[Expert Q&A on Asset Seizure in Russia's War in Ukraine](#)', Just Security, April 2023; Markus Jaeger, '[The Implications of Using Frozen Russian Assets to Rebuild Ukraine](#)', RANE, August 2023; Ingrid Brunk Wuerth, '[Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?](#)', Lawfare, March 2022.

⁴³ Enforcement jurisdiction refers to a state's exercise of measures of constraint with a view of enforcing a judgment. It relates to the 'making and execution of mandatory orders or injunctions against the State in respect of, for example, restitution, damages, penalties, production of documents or witnesses and accounts.' See Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd edition, Oxford University Press, 2015, p. 23.

⁴⁴ International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99, para. 57: 'The rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States'.

⁴⁵ 23 parties as of 31 October 2023. It needs 30 parties to enter into force. The ICJ in *Jurisdictional Immunities* found that the UNCISJ was 'relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law' (at para 66), and then cited in full Articles 12 (at para. 69), 19 (at para. 116), and 6(2) (at para. 129) UNCISJ in support of its rulings. See International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99.

or intended for use by the state for other than government non-commercial purposes and is in the territory of the state of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.¹⁴⁶

The ILC explained that immunity from enforcement is needed 'in view of the trend in certain jurisdictions to attach or freeze assets of foreign states, especially bank accounts, assets of the central bank, or other [instrumentalities] and specific categories of property which equally deserve protection.'¹⁴⁷

The 1972 European Convention on State Immunity (ECI) provides for immunity from 'execution or preventive measures' unless the state has expressly consented in writing.⁴⁸

The strict rules on immunity from enforcement are based on the rationale that interference with a state's property constitutes an interference with that state's freedom to manage its own affairs and to pursue its public purposes. States are increasingly maintaining some of their national wealth in foreign reserves, and discretion as to their disposal is seen as an element of their exercise of sovereign authority.⁴⁹ The ICJ has explained:⁵⁰

'The immunity from enforcement enjoyed by states in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same states before foreign courts. Even if a judgment has been lawfully rendered against a foreign state, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the state against which judgment has been given can be the subject of measures of constraint on the territory of the forum state or on that of a third state, with a view to enforcing the judgment in question.'

In general, immunity from enforcement attaches only to property in use or intended for use for public (rather than private) purposes. Whether property is in use for commercial purposes can be difficult to determine, as 'some activities combine in an inseparable way aspects of both public and private character either in parallel or in sequence, and others lack either aspect as a distinguishing factor.'⁵¹ As will be discussed below (see section 3.2.2), because of their essential economic role, and the sovereign functions that they perform,⁵² central bank assets are given heightened protection under the law of immunity. There is generally a presumption that they are assets held for non-commercial purposes.⁵³

⁴⁶ [UNCSI 2004](#), Art. 19.

⁴⁷ ILC, [Draft articles](#) on Jurisdictional Immunities of States and Their Property, with commentaries, 1991, Art. 19, para. 2.

⁴⁸ [European Convention on State Immunity 1972](#). In force since 1976, eight parties.

⁴⁹ Fox and Webb, *The Law of State Immunity*, p. 486.

⁵⁰ International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99, para. 113.

⁵¹ Fox and Webb, *The Law of State Immunity*, p. 415.

⁵² Azadeh Mizani, ['The Need for Greater Immunity from Execution for Central Banks: The Case of Da Afghanistan Bank'](#), Transnational Litigation Blog, April 2023.

⁵³ This presumption is rebuttable in certain states. For example, Australia, Canada, and Israel do not provide immunity from enforcement for central bank assets if they are used for commercial activities. For a summary of the different approaches to the immunity of central bank assets, see Ingrid Brunk Wuerth, 'Immunity from Execution of Central Bank Assets' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019.

At a glance:

Rules on immunity from enforcement are stricter than those governing immunity from jurisdiction. There are three exceptions to immunity from enforcement: express consent, allocation of property, and property in use or intended for use for commercial purposes. Central bank assets are usually presumed to be in use or intended for non-commercial purposes and are therefore immune from enforcement.

2.2. Application of international rules on state immunity to Russia-related assets in foreign jurisdictions

The application of the rules of immunity depends on the type of property in question. The overarching requirement is that immunity will only attach to property *belonging to a state* – the property of separate entities (defined under English law as entities 'distinct from' the executive organs of the Government)⁵⁴ may not enjoy immunity from enforcement.⁵⁵

Four categories of Russia-related property have arisen in the discussion of potential routes to reparation for Ukraine: (i) Russian state-owned property; (ii) RCB assets; (iii) Russia's sovereign wealth funds; and (iv) oligarch assets.

The present study surveys the four categories, but focuses on RCB assets.

2.2.1. Russian state-owned property

Russian property located abroad will enjoy immunity from enforcement, unless it can be shown that Russia has consented to enforcement, has earmarked the property for enforcement of a claim, or that the property is in use and intended for use for commercial purposes. Military and cultural property will be immune from enforcement as it is presumed to be in use for government non-commercial purposes.⁵⁶

2.2.2. Russian central bank assets

Central banks enjoy a high level of protection under the law of state immunity from enforcement.⁵⁷ Article 21(1)(c) UNCSI, for example, provides that the 'property of the central bank or other monetary authority of the state' is deemed to be immune from all measures of constraint, unless the state has expressly consented or allocated central bank assets to satisfy a claim. It is widely accepted that assets belonging to central banks are immune regardless of whether the bank is a governmental

⁵⁴ UK State Immunity Act 1978, Section 14(1).

⁵⁵ *Boru Hatlari ile Petrol Tasima AS (also known as Botas Petroleum Pipeline Corp) v Tepe Insaat Sanayii AS* [2018] UKPC 31, para. 21.

⁵⁶ International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99, para. 119; UNCSI, Art. 21.

⁵⁷ The UNCSI provides no definition of a Central Bank, but it has been described as follows: 'fundamentally, a central bank is set up by a State with the duty of being the guardian and regulator of the monetary system and currency of that State both internally and internationally'. See *AIG Capital Partners v Kazakhstan* [2005] EWHC 2239 (Comm); [2006] 1 All ER (Comm) 1, para. 38.

department or separate entity⁵⁸ and there is a widespread presumption that central bank assets are used for non-commercial or public purposes.⁵⁹

What constitutes 'property' of a central bank for the purposes of immunity? Under English law, a central bank must have at least some interest – either in the form of a 'property' or 'contractual' interest in the asset in question.⁶⁰ Foreign currency reserves 'unquestionably serve a monetary purpose, and states have agreed that such assets should be protected by immunity from execution.'⁶¹ There are no cases in which foreign currency reserves of foreign central banks have been subject to enforcement measures.⁶²

At a glance:

Without prejudice to the legal options discussed below (see section 4.1), confiscation of RCB assets is prima facie incompatible with the law of state immunity, which provides them with a heightened level of protection due to their assumed sovereign purpose.

2.2.3. Russia's sovereign wealth funds

Many states have expanded the work of their central banks to include the administration of sovereign wealth funds. These funds are distinct from traditional central bank assets; they are 'investment funds owned or controlled by a state' and are often funded through the sale of natural resources such as oil. They serve a number of purposes, such as 'the furtherance of state monetary policies or the maximization of returns with the same objectives, methods, and time-horizons as private investments.'⁶³

The status of such funds under the law of state immunity is uncertain. There is a recent Swedish Supreme Court decision that held that the property of the National Fund of Kazakhstan (NFK), a

⁵⁸ See, e.g., UK State Immunity Act 1978, Section 14(4).

⁵⁹ A 'growing number of States provide near-absolute immunity for the property of foreign central banks'. Art. 21 UNCSI designates certain property as not falling within the 'commercial purposes' exception to immunity from post-judgment measures of constraint, including 'property of the central bank or other monetary authority of the State.' This approach is followed by the UK (State Immunity Act 1978, Section 14(4)); and Hungary (Act on Private International Law 2017, Section 85(4)(c)), as well as a growing number of non-EU States including Argentina (Jurisdiction Immunity of Foreign Central Banks 2014, Law No 26.961); China (with Hong Kong) (Law of the People's Republic of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central Banks (2005), Art. 1); Japan (Act on the Civil Jurisdiction of Japan with respect to a Foreign State, 2009); Pakistan (State Immunity Ordinance 1981); South Africa (Foreign States Immunity Act 1981); and Singapore (State Immunity Act 1979). German case law, though providing special protection to central bank assets, still uses a 'sovereign purpose' test, though it is unclear whether this applies to protect all assets of the central bank or only those designated as foreign reserves. Switzerland (Federal Act of 11 April 1998 on the Debt Enforcement and Bankruptcy); France (French Monetary and Financial Code – Legislative Section, 2010, Art. L.153-1.); Belgium (Judicial Code, Art. 1421 quater) and Russia (Law on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation 2015, Art. 16(5)) take a similar approach. The ECSI, though 'highly protective' of all state property, does not provide special protection for central bank assets, but it has been argued that it could be interpreted as applying almost-absolute immunity to central bank assets. See Ingrid Brunk Wuerth, 'Immunity from Execution of Central Bank Assets'.

⁶⁰ *Thai-Lao Lignite Thailand Co. Ltd, Hongsa Lignite (Lao Pdr) Co. Ltd v Government of the Lao People's Democratic Republic*, [2013] EWHC 2466 (Comm), para. 25; *AIG Capital Partners Inc. and Another v Republic of Kazakhstan*, [2005] EWHC 2239 (Comm), para. 92. Cited in Ingrid Brunk Wuerth, 'Immunity from Execution of Central Bank Assets', pp. 279-280. See also *Boru Hatlari Ite Petrol Tasima AS (also known as Botas Petroleum Pipeline Corp) v Tepe Insaat Sanayii AS* [2018] UKPC 31, paras. 17-18.

⁶¹ Ingrid Brunk Wuerth, 'Immunity from Execution of Central Bank Assets', p. 281.

⁶² *ibid*, p. 282.

⁶³ Ingrid Brunk Wuerth, '[Central Bank Immunity, Sanctions, and Sovereign Wealth Funds](#)', *George Washington Law Review*, 2023, pp. 1-40, p. 2.

sovereign wealth fund managed by the Kazakh central bank, was *not* immune.⁶⁴ The savings portfolio was managed like 'other active and long-term asset management on the international capital market.'⁶⁵ A Belgian court similarly held that assets belonging to the NFK were used for commercial purposes and not entitled to immunity.⁶⁶

Based on the Swedish approach – which only represents one instance of state practice – it may be possible to take measures against assets belonging to the Russian National Wealth Fund (RNWF) which are *not* used for central banking purposes, without violating immunity from enforcement. According to Russia's Finance Ministry, as of October 2023, the RNWF had the equivalent of US\$140 000 billion.⁶⁷ The RNWF's activities involve receiving funds from investment returns and any excess funds from oil and gas revenues.⁶⁸ Its existence stems from Russia splitting its previous petrodollar stabilisation fund in 2008 into two distinct sovereign wealth funds with separate mandates – the Reserve Fund is a stabilisation fund intended to cover budget deficits arising from drops in oil prices, whilst the RNWF seeks long-term returns.⁶⁹ Another option is the Russian Direct Investment Fund (RDIF),⁷⁰ which has in the past served as a 'political tool for Putin'. For example, in 2015, the RDIF funnelled US\$1.75 billion of Russian pension money from the National Wealth Fund to Sibur, a petrochemical giant owned by Russian oligarchs, in the form of a low-interest rate bond.⁷¹ Both of these funds have assets located abroad, some of which are already immobilised and sanctioned.⁷²

At a glance:

According to a recent instance of state practice, if a sovereign wealth fund managed by a central bank is managed like any other active and long-term asset held by a private investor, then the asset may not be held for 'central banking' or non-commercial purposes and may therefore not be immune.

2.2.4. Oligarch assets

Another potential target for confiscation is assets belonging to Russian oligarchs because they are traceable to President Putin's corrupt exploitation of Russia's public resources.⁷³ The EU Foreign Affairs Minister has stated that he is 'very much in favour' of using oligarch funds given the 'incredible amount of money involved'.⁷⁴ Some states have taken action against oligarch assets – in the United Kingdom, an agreement was reached between the UK Office of Financial Sanctions

⁶⁴ [Ascom v Kazakhstan](#) (2021) 2021-11-18 Ö 3828-20, Supreme Court of Sweden. Cited and discussed in Ingrid Brunk Wuerth, '[Central Bank Immunity, Sanctions, and Sovereign Wealth Funds](#)', p. 2.

⁶⁵ [Ascom v Kazakhstan](#) (2021) 2021-11-18 Ö 3828-20, Supreme Court of Sweden, para 41, cited and discussed in Ingrid Brunk Wuerth, '[Central Bank Immunity, Sanctions, and Sovereign Wealth Funds](#)', p. 4.

⁶⁶ *Republic of Kazakhstan v Stati*, 29 June 2021, 2018/AR/1209 & 2018/AR/1214, Belgian Court of Appeal, cited and discussed in Ingrid Brunk Wuerth, '[Central Bank Immunity, Sanctions, and Sovereign Wealth Funds](#)', p. 4.

⁶⁷ '[Russia's National Wealth Fund down 55.3 bln rubles to 13.65 trln rubles in Sept, liquid assets 4.8% of GDP](#)', Interfax, October 2023.

⁶⁸ '[Ukraine bailout could derail Putin's drive to boost Russian economy](#)', Financial Times, 2013.

⁶⁹ '[Investor Profile: NWF \(Russia\)](#)', GlobalSwf website.

⁷⁰ The RDIF is a US\$10 billion sovereign wealth fund, with over RUB2.1 trillion (one million million) invested in the Russian economy. See [Overview](#), RDIF website.

⁷¹ John Hyatt, '[How Putin Used Russia's Sovereign Wealth Fund to Create a 'State-Sponsored Oligarchy](#)', Forbes, March 2022.

⁷² Joint [Statement](#) from the REPO Task Force, US Department of the Treasury, March 2023; '[US, EU and UK maintain pressure through Russia sanctions](#)', Shearman & Sterling, September 2023.

⁷³ Chimène Keitner, '[Expert Q&A on Asset Seizure in Russia's War in Ukraine](#)', Just Security, April 2023.

⁷⁴ Philip Zelikow, '[A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine](#)', Lawfare, May 2022.

Implementation and Roman Abramovich, which saw Chelsea Football Club being sold for GBP2.5 billion in May 2022, and the proceeds of the sale being deposited in a frozen bank account, to be later redirected to victims of the war in Ukraine.⁷⁵ The United States (US) has seized a superyacht owned by Viktor Vekselberg (a political ally of Putin),⁷⁶ ordered a Russian oligarch to forfeit US\$5.4 million, with the possibility that Ukraine may receive the funds,⁷⁷ and indicated it is planning to proceed with further seizures of private assets.⁷⁸ In Ukraine, four Russian oligarchs have had their assets confiscated.⁷⁹ Canada has also started a process to seize and pursue claims for forfeiture of assets belonging to Abramovich.⁸⁰

Since oligarch assets are not state-owned, immunity does not attach to them. This does not, however, necessarily mean that the confiscation of oligarch assets is legal. Due process is required in actions against private assets. These issues are discussed below (see section 4). In practical terms, even if such measures are legal, they are unlikely to raise sufficient funds substantially to assist Ukraine's reconstruction.

At a glance:

Confiscation of Russian oligarch assets does not raise immunity issues, but it does require a causal nexus with the Russian war effort and respect for due process.

⁷⁵ Tariq Panja and Rory Smith, '[Inside the Chelsea Sale: Deep Pockets, Private Promises and Side Deals](#)', New York Times, May 2022.

⁷⁶ Johanna Chisholm, '[US seizes its first Russian oligarch mega yacht worth \\$90m in Putin crackdown](#)', Independent, April 2022.

⁷⁷ Luc Cohen, '[Russian oligarch ordered to forfeit \\$5.4 ml to U.S., Ukraine may get funds](#)', Reuters, February 2023.

⁷⁸ The US Government has launched Task Force KleptoCapture, with an aim of 'using civil and criminal asset forfeiture authorities to seize assets belonging to sanctioned individuals or assets identified as the proceeds of unlawful conduct'. See, Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture, [Press Release](#), US Office of Public Affairs, 2 March 2022.

⁷⁹ Maksym Savchuk, Heorhiy Shabayev, and Nadia Burdyey, '[Ukraine's Confiscation of Russian Assets Stymied By Bureaucracy. Investigation Finds](#)', Radio Free Europe, March 2023.

⁸⁰ [Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch](#), Government of Canada website, 19 December 2022.

3. The legal issues raised by confiscation of Russian Central Bank assets and avenues to address them

3.1. State immunity

Under international law, state property is immune from measures of constraint. A measure of constraint is a coercive or enforcement measure taken by the forum state to 'restrain the foreign state in the disposition of its property'.⁸¹ The ILC has confirmed that it chose the 'generic term' rather than a 'technical one in use in any particular law':

*'Since measures of constraint vary considerably in the practice of states, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. Suffice it, therefore, to mention by way of example the more notable and readily understood measures, such as attachment, arrest and execution.'*⁸²

According to the ICJ, the key factor is the 'constraining' nature of any act.⁸³ The confiscation of a state's assets clearly qualifies as a measure of constraint taken against a state.⁸⁴ This is true even of 'interlocutory and all other prejudgement conservatory measures, intended sometimes merely to freeze the assets in the hands of the defendant.'⁸⁵ Confiscating RCB assets, which enjoy heightened protection, would be in violation of the law of state immunity.

This section will address four ways, aside from justifications under international law (i.e. countermeasures and self-defence, which will be discussed below in section 5), in which RCB assets may lose their protection under current state immunity rules. There are four potential avenues: (i) avoidance, (ii) justification, (iii) evolution, and (iv) exception.

3.1.1. Avoidance

Avoidance of immunity involves making the process of confiscation a solely executive or legislative process, rather than a judicial one. State immunity only applies to acts by a court or a body exercising judicial functions. This is evident from:

- 1 International case law: In *Jurisdictional Immunities*, the ICJ found that a 'state against which judgment has been given can[not] be the subject of measures of constraint on the territory of the forum state or on that of a third state, *with a view to enforcing the judgment in question*.'⁸⁶

⁸¹ Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press, 2012, p. 343.

⁸² LC Draft articles on Jurisdictional Immunities with commentaries, 1991, Art. 19, para. 2; Part IV, p. 55, commentary para. 2.

⁸³ In *Djibouti v France*, the ICJ held (in the context of head of state immunity) that 'the determining factor in assessing whether or not there has been an attack on the immunity of the head of State lies in the subjection of the latter to a constraining act of authority.' International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, [Judgment](#), ICJ Rep 2007, p. 117, para. 170.

⁸⁴ 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.

⁸⁵ ARSIWA, Part IV, p. 56, para. 3.

⁸⁶ International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99, para. 113 (emphasis added). Note also that the Greek claimants, pursuant to a decision by the Florence Court of Appeal, registered with the provincial office of the Italian Land Registry (an executive body), a 'legal charge on Villa Vigoni, a property of the German State near Lake Como.' Although the Court found that the entry of the charge itself was a violation of Germany's immunity, the Court did not discuss whether an action by the Land Registry (as an executive body) may itself violate state immunity.

- 2 International instruments: In the UNCSI, immunity from execution is framed in terms of measures 'in connection with *proceedings before the court*'.⁸⁷ 'Proceedings before a court' is to be interpreted flexibly.⁸⁸ Article 2(1)(a) UNCSI defines a 'court' as 'any organ of a state, however named, entitled to exercise *judicial functions*'. The ILC Commentary confirms that the meaning of judicial functions 'should be understood to cover such functions whether *exercised by courts or by administrative organs*', but 'in relation to a judicial proceeding'.⁸⁹ While executive action *may* infringe state immunity rules, it can only do so where the action is linked to a judicial proceeding. The ILC Commentary to Draft Article 18 states that the provision 'concerns immunity from measures of constraint *only to the extent that they are linked to a judicial proceeding*'.⁹⁰ ECSI refers to 'immunity from the *jurisdiction of a court* of another Contracting state', and notes in its Preamble the desire of states 'to establish in their mutual relations common rules relating to the scope of the immunity of one State *from the jurisdiction of the courts* of another state'.⁹¹ Its explanatory report also states that the ECSI applies only to the jurisdiction of the courts and not to 'the treatment of Contracting States by the administrative authorities of other Contracting States'.⁹²
- 3 Domestic legislation: State immunity legislation in the following states refers to judicial, rather than executive, action: Argentina,⁹³ Australia,⁹⁴ Canada,⁹⁵ Hungary,⁹⁶ Israel,⁹⁷ Japan,⁹⁸ Pakistan,⁹⁹ Russia,¹⁰⁰ Singapore,¹⁰¹ Spain,¹⁰² South Africa,¹⁰³ UK,¹⁰⁴ US.¹⁰⁵
- 4 State practice: There have been no apparent objections based on immunity to the freezing of RCB assets as a result of sanctions. Domestic proposals for legislation allowing Russian asset seizure, such as the UK Seizure of Russian Assets and Support for Ukraine Bill, foresee asset confiscation being an executive act.¹⁰⁶ In the past,

⁸⁷ Part IV UNCSI (emphasis added). See also 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, p. 677.

⁸⁸ See also Hazel Fox, 'Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm Evans (ed.), *International Law*, 4th edition, Oxford University Press 2014, p. 338: a court includes 'any tribunal exercising judicial or quasi-judicial powers, whether in criminal, civil, family or other matters, including administrative tribunals.

⁸⁹ ILC Draft Articles on Jurisdictional Immunities, Art. 2, para. 3; Art. 1, para. 2.

⁹⁰ *ibid.*, Art. 18, para. 1.

⁹¹ Emphasis added.

⁹² [Explanatory report](#) to the European Convention on State Immunity, ETS No. 74, Council of Europe, 1972, para. 8.

⁹³ [Law No 24.488](#) on Jurisdictional Immunity of Foreign States Before Argentine Courts 1995.

⁹⁴ [Australia Foreign States Immunities Act](#) 1985.

⁹⁵ [Canada State Immunity Act](#) 1985.

⁹⁶ Act on Private International Law ([Act XXVIII](#)) 2017, Title 34.

⁹⁷ [Israel Foreign States Immunity Law](#) 5769-2008, 2008.

⁹⁸ [Act No 24](#) on the Civil Jurisdiction of Japan with respect to a Foreign State 2009.

⁹⁹ [Pakistan State Immunity Ordinance](#) 1981.

¹⁰⁰ [Federal Law 297-FZ](#) on Jurisdictional Immunities of Foreign States and the Property of Foreign States in the Russian Federation 2015.

¹⁰¹ [Singapore State Immunity Act](#) 1979.

¹⁰² Spanish Organic Law 16/2015, 2015.

¹⁰³ [South Africa Foreign States Immunities Act](#) 1985.

¹⁰⁴ [UK State Immunity Act](#) 1978.

¹⁰⁵ [US Foreign States Immunities Act](#) 1976.

¹⁰⁶ See [UK Seizure of Russian State Assets and Support for Ukraine Bill](#), February 2023.

states have typically not raised immunity concerns with respect to executive actions, particularly during wartime.¹⁰⁷

In the (now terminated) case before the ICJ in *Questions relating to the seizure and detention of certain documents and data*, between Timor-Leste and Australia, a related question arose. The case concerned Australia's seizure of documents, data, and other property, taken from the business premises of an Australian lawyer acting as legal adviser for Timor-Leste in a then pending arbitration. Rejecting Timor-Leste's argument that the seizure gave rise to a breach of immunity under customary international law, Australia referred to the 'three essential elements' that must be met before immunity may apply: (1) there must be a 'proceeding'; (2) before a 'court' of the forum state; (3) against a foreign state or its agent, or with the state as an 'indispensable party'.¹⁰⁸

The ICJ did not have the opportunity to comment on this argument due to the termination of the case. However, the issue has arisen in the new case instituted by Iran against Canada, concerning a 'series of legislative, executive, and judicial measures adopted by Canada against Iran and its property since 2012 in violation of Iran's jurisdictional immunity and immunity from measures of constraint under international law'.¹⁰⁹

Some commentators have said that it is 'paradoxical' to suggest that state immunity cannot be infringed by actions of the executive, but can be violated by judicial acts.¹¹⁰ However, the proposed distinction between executive and judicial action is a reflection of the **overarching purpose of state immunity to prevent one state from 'sitting in judgment' on the acts of another state**.¹¹¹ The law of immunity 'was not created to curtail the foreign policy powers of States' executive or legislative branches' so it makes sense that it is restricted to the judicial domain.¹¹²

¹⁰⁷ See examples given in Anton Moiseienko, ['The Freezing and Confiscation of Foreign Central Bank Assets: How Far Can Sanctions Go?'](#), SSRN, October 2023; See also T Ruys, 'Immunity, inviolability and countermeasures – a closer look at non-UN targeted sanctions', pp. 677-680, 709. Note also the decision of the New Zealand Court of Appeal in *Controller and Auditor-General v Sir Ronald Dawson*, concerning the powers of the Commissioner of Inquiry in relation to the Cook Islands. The Court was required to consider immunity from an exercise of sovereign authority by an executive organ, rather than immunities applicable in court proceedings. The Court found that immunity was not applicable in the circumstances, though also partly relied on the exception for 'commercial transactions'. See Michael Bvers, 'New Zealand Court of Appeal: Judgment in *Controller and Auditor-General v Sir Ronald Dawson*', *International Legal Materials*, Vol. 36, Cambridge University Press, 2017, pp. 721-743.

¹⁰⁸ International Court of Justice, *Certain Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, [Counter-Memorial of Australia](#), 2014, para. 5.104.

¹⁰⁹ International Court of Justice, *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)*, [Application Instituting Proceedings](#), 2023, para. 1.

¹¹⁰ This argument was put forward by Timor-Leste in its *Questions Relating to Seizure and Detention* written submissions. See International Court of Justice, *Certain Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, [Memorial of Timor-Leste](#), 2014, para. 5.18. See also Jean-Marc Thouvenin, 'Gel des fonds des banques centrales et immunité d'exécution', in Anne Peters et al (eds.), *Immunities in the Age of Global Constitutionalism*, Brill Nijhoff, 2014; Jean-Marc Thouvenin and Victor Grandaubert, 'The Material Scope of State Immunity from Execution', in Tom Ruys, Nicolas Angelet and Luca Ferro (eds.), *Cambridge Handbook on Immunities and International Law*, Cambridge University Press, 2020, pp. 250-51, cited in Anton Moiseienko, ['The Freezing and Confiscation of Foreign Central Bank Assets: How Far Can Sanctions Go?'](#), SSRN, October 2023, p. 35.

¹¹¹ In 1848, the UK House of Lords found that 'the courts of this country cannot sit in judgment upon an act of sovereign, effected by virtue of his sovereign authority abroad': *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1, 17. The US Supreme Court similarly held 'every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory', *Underhill v Hernandez* (1897) 168 US 250, 252. The ICJ has therefore found that state immunity 'derives from the principle of sovereign equality of States' and the principle that 'each state enjoys sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the state over events and persons within their territory', International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [Judgment](#), ICJ Rep 2012, p. 99, para. 57.

¹¹² Ruys, 'Immunity, inviolability and countermeasures – a closer look at non-UN targeted sanctions', p. 706.

Executive actions that are unrelated to judicial proceedings may not infringe this principle, though they may infringe broader international obligations such as sovereign equality and protections accorded to foreign-owned property.¹¹³

3.1.2. Justification

A second avenue is for a state to admit that confiscation of RCB assets violates Russia's immunity from enforcement, but to *justify* the confiscation as a countermeasure. Violations may be justified if the action is 'taken in response to a previous internationally wrongful act of another state and ... directed against that state',¹¹⁴ so long as certain requirements are met including the object of inducing compliance with an international obligation, temporariness, and reversibility.¹¹⁵ Specific issues relating to the suitability of a countermeasure as a justification for confiscation are discussed in section 5.1.3.

3.1.3. Evolution

International law is not static. Sufficient state practice and *opinio juris* can lead to changes in customary rules.

This may happen in a number of ways, which are not mutually exclusive:

- 1 The UNGA has already recognised that Russia is obliged to provide full reparations to Ukraine. The next step would be a UNGA resolution recognising an exception to immunity¹¹⁶ from judicial enforcement in narrowly defined circumstances. The ICJ has recognised that UNGA resolutions can crystallise customary international law.¹¹⁷
- 2 States could generate practice through a multilateral agreement giving effect to the exception.¹¹⁸ The ability of the treaty to change international law would depend on a large number of ratifications.
- 3 There could be an evolution in *regional* practice – whether in Europe or the Americas – to permit confiscation of RCB assets in narrowly defined situations.
- 4 An exception may also arise if a number of 'specially affected states' decide that Russia's immunities should be lifted.¹¹⁹ Such states could include (i) Ukraine; (ii) states that have frozen RCB assets; and (iii) states whose security is adversely impacted by Russia's war in Ukraine, such as EU Member States.¹²⁰

The new narrowly defined exception to immunity from judicial enforcement could include some or all of the following elements:

¹¹³ Cf. where an executive order must first be authorised by a court or subject to judicial review: See, for example, [Canada Special Economic Powers Act](#) 1992, Section 5.1(a).

¹¹⁴ International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, [Judgment](#), ICJ Rep 1997, p. 7, para. 83.

¹¹⁵ ARSIWA, Ch. II.

¹¹⁶ International Court of Justice, *Legality of the Threat of the Use of Nuclear Weapons*, [Advisory Opinion](#), ICJ Rep 1996, p. 226, para. 70.

¹¹⁷ International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, [Advisory Opinion](#), ICJ Rep 2019, p. 95, para 152, finding that the resolution had 'a declaratory character with regard to the right to self-determination as a customary norm'. In *Nicaragua*, the Court found that *opinio juris* (the belief that customary practice is legally binding) can be deduced from the attitude of States towards General Assembly resolutions: *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, [Judgment](#), ICJ Rep 1986, p. 14, para. 188.

¹¹⁸ Moiseienko, '[Frozen Russian Assets and the Reconstruction of Ukraine, Legal Options](#)', p. 27.

¹¹⁹ International Court of Justice, *North Sea Continental Shelf (Germany v Denmark)*, [Judgment](#), ICJ Rep 1969, p. 3, paras. 73-74.

¹²⁰ Moiseienko, '[Frozen Russian Assets and the Reconstruction of Ukraine, Legal Options](#)', pp. 28-29.

- 1 When there is a **large-scale armed aggression** involving the violation of international humanitarian law and human rights law recognised by a principal organ of the UN (eg UNGA or ICJ).
- 2 When **armed activities violate rulings by the ICJ or another international court**, such as the European Court of Human Rights (ECtHR).¹²¹ The principle underlying this exception is that, by accepting the relevant court's constitutive agreement, states have agreed to abide by that court's decisions,¹²² and violate their treaty obligations by not doing so.¹²³
- 3 When a state engages in armed aggression¹²⁴ that, in the absence of action by the UNSC due to a permanent member's veto, has **been denounced by a majority of the General Assembly members** acting under the 'Uniting for Peace' procedure.¹²⁵ This exception is based on the legal obligation for states to restore international peace and security.¹²⁶
- 4 When a state has been **designated a state-sponsor of terrorism** that is not entitled to immunity. This exception currently exists in the laws of the US and Canada only.¹²⁷

As regards (d), the European Parliament has already called upon EU Member States to designate Russia a state sponsor of terrorism and to 'put in place the proper legal framework [for accountability] and consider adding Russia to that list'.¹²⁸ However, **the ICJ has confirmed that this exception has not reached the status of customary international law**,¹²⁹ so this option would

¹²¹ *ibid.*, p. 27.

¹²² [Charter of the United Nations 1945](#), 1 UNTS 16, Art. 95(1): 'Each Member of the United Nations undertakes to comply with the decision of the International Court in any case to which it is a party'; [European Convention on Human Rights 1950](#), Art.46(1): 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

¹²³ See also arguments that, where states are declared at war, respect for immunities is generally reduced. See Paul Stephan, '[Giving Russian Assets to Ukraine: Freezing Is Not Seizing](#)', Lawfare, April 2022; '[\\$100 Billion. Russia's Treasure in the US Should be Turned Against Putin](#)', New York Times, April 2022; Edmund L Andrews, '[A Nation at War: Iraqi Assets; Bush asks Seizure of \\$1.7 billion held in the US](#)', New York Times, 2003; Scott R Anderson and Chimène Keitner, '[The Legal Challenges Presented by Seizing Frozen Russian Assets](#)', Lawfare, May 2022; Andrew Boyle, '[Why Proposals for US to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable](#)', Just Security, April 2022.

¹²⁴ In violation of Arts 1(1) and 2(4) of the UN Charter.

¹²⁵ Moiseienko, '[Frozen Russian Assets and the Reconstruction of Ukraine. Legal Options](#)', p. 27.

¹²⁶ [Charter of the United Nations 1945](#), 1 UNTS 16, Arts 1, 11.

¹²⁷ [US Foreign States Immunities Act 1976, §1605A](#); [Canada State Immunity Act 1985](#), Section 6.1. Members of the US Congress have called on the Secretary of State to designate Russia a state-sponsor of terrorism. See [Resolution](#) Calling on the Secretary of State to designate Russia a State-sponsor of terrorism, H.Res.1113, US Congress, 12 May 2022. President Zelensky has also requested that Russia be designated a state-sponsor of terrorism. See John Hudson and Jeff Stein, '[Zelensky asks Biden to designate Russia a state sponsor of terrorism](#)', The Washington Post, 15 April 2022.

¹²⁸ European Parliament declares Russia to be a state sponsor of terrorism, [Press Release](#), European Parliament, 23 November 2022. Members of the European Parliament have also called upon the Council to include the Russian paramilitary organisation, 'the Wagner Group' and other Russian-funded armed groups, militias and proxies, on the EU's terrorist list.

¹²⁹ In *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99, para 88, the ICJ confirmed that the US practice is *sui generis*: 'The Court notes that this amendment has no counterpart in the legislation of other states. None of the states which has enacted legislation on the subject of state immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged'. The legality of the terrorism exception in the US legislation was challenged by Iran in: International Court of Justice, *Certain Iranian Assets (Iran v US)*, [Preliminary Objections](#), ICJ Rep 2019, p. 7, but the Court found that it did not have jurisdiction to make a finding on this point (para. 80). The issue has been brought before the Court again in the *Iran v Canada* case, in which Iran has alleged that, after Canada designated Iran a state sponsor of terrorism, a 'series of legislative, executive and judicial measures adopted by Canada against Iran and its property since 2012' violated Iran's 'jurisdictional immunity and immunity from measures of constraint under customary international law.' See International Court of Justice, *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)*, [Application Instituting Proceedings](#), 2023, para. 1.

have a limited legal basis.¹³⁰ Further, in the context of the US legislation, only a 'very limited group' of plaintiffs (consisting of US nationals and government employees) would be able to sue Russia for a broad range of potential claims.¹³¹ As the law stands, this 'group' could contain representatives of American nationals killed in Libya, Sudan and Syria, but not Ukrainians.¹³²

To bring a new exception into domestic effect, states would likely need to introduce legislation recognising the exception to the immunity of RCB assets.¹³³

3.1.4. Exception

A fourth avenue to confiscation is to rely on an existing exception to immunity for the enforcement of a ruling by an international court. The law of immunity ensures a horizontal equality between states. When an international or supranational entity orders enforcement against the assets of a state, the relationship is a *vertical* one and enforcement will not undermine the principle of sovereign equality. This is **particularly true where the wrongdoing state has consented to the exercise of the Court's jurisdiction**, as Russia has in respect of the ECtHR through being a state party to the European Convention on Human Rights at the relevant time. This option presupposes the existence of a prior judgment of an international court awarding compensation to Ukraine or its people. It is discussed in greater detail below (see section 6.1).

At a glance:

The four avenues to overcoming immunity from enforcement:

AVOIDANCE: Free-standing legislative or executive action, such as the decision to confiscate assets belonging to a state, likely does not infringe state immunity where this action does not require involvement by a court. This is because the action avoids engaging the law of immunity. This may lead to a 'paradox' because confiscation of sovereign assets (including, but not limited to, central bank property) would be permissible in terms of immunity if imposed by the executive or legislature, but contrary to the law of immunity if ordered by the courts. But such a distinction is justified by the nature and function of immunity.

JUSTIFICATION: The breach of international law caused by the confiscation of RCB assets can be justified as a countermeasure provided that it satisfies the conditions of inducing compliance with Russia's obligation to make full reparation, temporariness and reversibility. See section 5 below.

EVOLUTION: A new exception to immunity could evolve through UNGA resolutions, regional state practice, a multilateral treaty, or the practice of 'specially affected' states. It could be narrowly defined to limit its application to exceptional cases where there is large-scale aggression that has been recognised by a principal organ of a UN, an international court or under the 'Uniting for Peace' procedure. The option of designating Russia as a 'state-sponsor' of terrorism in order to lift its immunity is not yet recognised as a customary exception to immunity and, under US law, would not benefit Ukrainian victims.

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EXCEPTION: There is an exception to immunity for the enforcement of an international judgment, particularly where the wrongdoing state has consented to the exercise of the court's jurisdiction. See section 6 below.

¹³⁰ Note, however, the [International Convention for the Suppression of the Financing of Terrorism](#) 1999.

¹³¹ In the US, 'the private right of action against a state sponsor of terrorism is limited to certain plaintiffs: namely, nationals of the United States, members of the U.S. armed forces, and U.S. government employees'. See Ingrid Brunk Wuerth, '[Russia Should not be Designated a State Sponsor of Terrorism](#)', Transnational Litigation Blog, July 2022.

¹³² *ibid.*

¹³³ Moiseienko, '[Frozen Russian Assets and the Reconstruction of Ukraine. Legal Options](#)', p. 23.

3.2. Legality under domestic law

3.2.1. The basis under domestic law, and the potential for the introduction of, or amendment to, domestic legislation

Domestic laws do not generally permit the executive branch to confiscate RCB assets. Although States including the US,¹³⁴ Canada,¹³⁵ Italy,¹³⁶ Spain,¹³⁷ the Netherlands,¹³⁸ and France¹³⁹ have been using criminal and civil forfeiture laws to seize or confiscate the assets of sanctioned Russian nationals and private companies,¹⁴⁰ similar actions have not yet been taken under domestic law against property belonging to the RCB.

Domestic laws generally permit the freezing of foreign assets, but not their confiscation. In the US, for example, the International Emergency Economic Powers Act allows the executive to freeze foreign-owned assets, including the property of foreign states, but does not permit the changing of ownership unless the US is engaged in armed hostilities with the state concerned.¹⁴¹ This limitation prevents the US from confiscating Russian assets, since the US has not declared itself at war with Russia. In Switzerland, the Federal Act on the Implementation of International Sanctions does not provide a basis for the confiscation of foreign state-owned assets,¹⁴² and the confiscation of Russian assets has otherwise been found unconstitutional.¹⁴³

In order to overcome domestic challenges to confiscation, **states would need to adopt, or amend, legislation to give effect to the confiscation measures.**¹⁴⁴ This legislation should be framed narrowly.¹⁴⁵ As noted by Anton Moiseienko, while in 'ordinary circumstances, one would rightly be suspicious of legal changes allowing the government to take one's possessions, especially without judicial oversight', here 'one is concerned with state assets, and it is therefore impossible to isolate the domestic issue from the broader international law context, including the need to support Ukraine in resisting armed aggression and rebuilding itself.'¹⁴⁶

¹³⁴ Johanna Chisholm, '[US seizes its first Russian oligarch mega yacht worth \\$90m in Putin crackdown](#)', Independent, April 2022.

¹³⁵ [Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch](#), Government of Canada website, 19 December 2022.

¹³⁶ [Italy seizes yachts and villas from Russian oligarchs, say state sources](#), The Guardian, March 2022.

¹³⁷ Alyssa McMurty, '[Spain seizes 12 bank accounts, 3 yachts, 23 properties belonging to Russians](#)', AA, April 2022.

¹³⁸ '[Netherlands seizes 14 yachts as Russia faces yet more sanctions over brutal war in Ukraine](#)', CBS News, April 2022.

¹³⁹ Abdelhak El Idrissi, '[One villa seized and multiple investigations opened: French sanctions against Russian oligarchs begin to bear fruit](#)', Le Monde, March 2023.

¹⁴⁰ Paul R Williams and Alexandra Koch, '[Invoicing Russia for Ukraine's Recovery: The Complexities of Repurposing Frozen Russian Assets](#)', Opinio Juris, May 2023.

¹⁴¹ [International Emergency Economic Powers Act 1977](#), §1702(a)(1)(C).

¹⁴² Tomoko Muth, '[Could Switzerland seize Russian assets to rebuild Ukraine?](#)', Swissinfo, June 2022.

¹⁴³ '[Swiss government: confiscation of Russian assets found unconstitutional](#)', Reuters, 2023.

¹⁴⁴ Whilst the European Commission has shown an interest in confiscating Russian assets, the European Central Bank and various EU Member States have shown hesitancy and concerns about the potential global consequences of weakening the rule of law to permit confiscation in the present circumstances. See Jaeger, 'The Implications of Using Frozen Russian Assets'.

¹⁴⁵ Germany, for example, has already expressed concerns that if the weakening of sovereign immunity by allowing confiscation of foreign assets were to become a 'general trend', it might be subject to World War II-related disputes. Jaeger, 'The Implications of Using Frozen Russian Assets'.

¹⁴⁶ Anton Moiseienko, '[Sanctions, Confiscation, and the Rule of Law](#)', Revue Européenne du Droit, June 2023.

Some states have shown a willingness to amend or introduce new legislation to hold Russia accountable:

- In the US, the Rebuilding Economic Prosperity and Opportunity for Ukrainians (REPO) Act, introduced in Congress on 15 June 2023, seeks to give the President authority to confiscate **Russian sovereign assets, including RCB assets**, that have been frozen in the US and transfer them to assist in Ukraine's reconstruction.¹⁴⁷ The Act prohibits the release of funds to sanctioned Russian entities until Russia has withdrawn from Ukraine and agrees to provide compensation for the harm it has caused, and instructs the President to work with allies and partners to establish an international compensation mechanism to transfer confiscated or frozen Russian sovereign assets to assist Ukraine.¹⁴⁸ The Asset Seizure for Ukraine Reconstruction Act¹⁴⁹ would additionally allow the President to authorise the confiscation of property **belonging to Russian oligarchs** (valued in excess of US\$2 000 000) and to use that property to benefit Ukraine. This Act was challenged as violating the Due Process Clause of the Fifth Amendment, because it would not afford foreign asset holders an opportunity to challenge confiscations in court. A different version was then put before the House of Representatives, which does not purport to expand the President's confiscation authority and instead expresses the 'sense of Congress' that 'the President should take all constitutional steps to seize and confiscate assets.... **of foreign persons whose wealth** is derived in part through corruption linked to or political support for the refine of Russian President Vladimir Putin.¹⁵⁰ At the time of writing, this version is awaiting consideration by the US Congress.¹⁵¹
- In Canada, the Special Economic Measures Act 1992 was amended after Russia's aggression to assign the executive power to order seizure of property located in Canada which is owned by a **foreign government or any person or entity from that country**, as well as any citizen of a **given country which is not a resident of Canada**.¹⁵² The **Act contains due process protections**. The current scheme under the Special Economic Measures Act allows for seizure and repurposing through Courts (i.e. reallocated to another owner), such that state immunity would apply. As a result, a Canadian Bill allowing more for an (executive) legal mechanism to seize and repurpose **assets belonging to states** that have breached international peace and security has been put forward and has received a second reading in the Canadian Senate.¹⁵³
- In the UK, the Seizure of Russian Assets and Support for Ukraine Bill was introduced as a Private Members Bill to Parliament in February 2023. The primary objective is to

¹⁴⁷ Risch, Whitehouse, McCaul, Kaptur Introduce Legislation to Repurpose Sovereign Russian Assets for Ukraine, [Press Release](#), US Foreign Relations Committee, June 2023. See also Lee C Buchheit and Paul Stephan, '[The REPO Act: Confiscating Russian State Assets and Ukrainian Reparations](#)', Lawfare, July 2023; '[Legislation Reintroduced In U.S. Congress Aims to Use Frozen Russian Assets to Assist Ukraine](#)', Radio Free Europe, June 2023.

¹⁴⁸ [REPO Act](#), §§103, 105.

¹⁴⁹ [Asset Seizure for Ukraine Reconstruction Act](#), US 118th Congress, 2023-2024.

¹⁵⁰ Criddle, '[Turning Sanctions into Reparations](#)' (emphasis added).

¹⁵¹ '[US Congress supports bill to transfer frozen Russian assets to Ukraine](#)', Ukraine Pravda, November 2023.

¹⁵² [Canada Special Economic Measures Act](#) 1992, Section 4(1); Ivan Timofeev, '[Sanctions and the Confiscation of Russian Property: The First Experience](#)', Modern Diplomacy, January 2023.

¹⁵³ [Senator Omidvar – Bill S-278 – Amends SEMA to Allow for a Legal Mechanism to Seize and Repurpose the State Assets of Perpetrators who Breach International Peace and Security](#), Ratna Omidvar, 18 October 2023; Maya Lester, '[Proposed Canada bill to allow for repurposing of frozen state assets](#)' Sanctions, 27 October 2023. The Bill must have a third reading in the Senate before being debated in the House of Commons.

seize Russian assets¹⁵⁴ as a means to aid Ukraine. This includes RCB assets.¹⁵⁵ The bill was initially blocked by the government, though the reasoning not to be related to any illegality under international law.¹⁵⁶ A second reading is pending at the time of writing.¹⁵⁷

- In Estonia, the Constitutional Commission of the Parliament approved a bill prepared by the government that would allow frozen Russian assets belonging to individuals to be used to rebuild Ukraine. The application of the bill will require an international agreement with Ukraine or an international compensation mechanism.¹⁵⁸ Estonia, as well as other European Union states such as the Baltic countries and Slovakia, and the EU High Representative of the Union for Foreign Affairs and Security Policy Josep Borrell, have all expressed support for confiscating Russian assets.¹⁵⁹

At a glance:

Domestic laws generally permit the freezing of foreign assets, but not their confiscation. There have however been legislative initiatives in the US, Canada and the UK to amend laws to permit the confiscation of Russian assets, including in some cases RCB assets.

3.2.2. Due process concerns

While due process concerns are stronger when confiscation is focused on Russian oligarch assets, measures taken against RCB assets may give rise to similar concerns, especially where confiscation impacts private individuals, such as through disruptions in domestic monetary policy or impacting the bank's interest rates for borrowers.¹⁶⁰

The EU Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy state that restrictive measures must 'respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy.'¹⁶¹ Due process and property rights are part of the domestic laws of most states, as well as the international framework (e.g. Article 6 and Protocol 1 of the European Convention on Human Rights).

It is unclear whether due process concerns arise in the context of property of foreign states as compared to individuals. Some argue that due process guarantees in US law should extend to

¹⁵⁴ The Bill defines 'assets' as: money market instruments (including cheques, bills and certificates of deposit); foreign exchange and currency; derivative products (including futures and options); exchange rate and interest rate instruments (including products such as swaps and forward rate agreements); transferable securities (including shares and bonds); other negotiable instruments and financial assets (including bullion); special drawing rights. See [UK Seizure of Russian State Assets and Support for Ukraine Bill](#), February 2023, Section 2(4).

¹⁵⁵ [UK Seizure of Russian State Assets and Support for Ukraine Bill](#), February 2023, Section 4.

¹⁵⁶ Soroya Ebrahimi, '[Plan to use frozen Russian cash to rebuild Ukraine blocked by UK government](#)' National News, 24 February 2023.

¹⁵⁷ [UK Seizure of Russian State Assets and Support for Ukraine Bill](#), February 2023.

¹⁵⁸ '[Estonian government approves draft law on use of frozen Russian assets](#)', Ukraine Pravda, October 2023.

¹⁵⁹ See Sam Fleming, 'EU should seize Russian reserves to rebuild Ukraine, top diplomat says', Financial Times, May 2022; [Joint statement](#) by Estonia, Latvia Lithuania, and Slovakia calling to sue the frozen Russian assets for rebuilding Ukraine, Politico, May 2022.

¹⁶⁰ Andrew Dornbierer, [Working Paper 42: From confiscation to sanctions while upholding the rule of law](#), Basel Institute on Governance, February 2023, p. 17.

¹⁶¹ [EU Guidelines](#) on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Sanctions Update, Council of the European Union, Doc. 5664/18, 2018.

foreign states and their property.¹⁶² There are, however, doubts as to whether a state can be considered a 'person' in this sense,¹⁶³ and US courts have held that foreign states are not afforded due process protections.¹⁶⁴ In any event, the ECtHR has found that states have a wide margin of appreciation in addressing problems that affect the public interest.¹⁶⁵ The abrogation of due process rights could be offset by the public interest in confiscation.¹⁶⁶

3.3. International protection of private investors

With the exception of the United States, each of the states holding the most significant value of frozen RCB assets have entered into Bilateral Investment Treaties (BITs) with Russia (see Figure 3). This list includes France,¹⁶⁷ Japan,¹⁶⁸ Germany,¹⁶⁹ the UK,¹⁷⁰ Austria,¹⁷¹ and Canada.¹⁷² It is not clear that RCB foreign exchange reserves or private assets would fall within the scope of these agreements.¹⁷³ Where such an agreement is not in place, the customary international law minimum standard of treatment applies, an essential component of which is the prohibition of expropriation without prompt, adequate, and effective compensation.¹⁷⁴

¹⁶² Ingrid Brunk Wuerth, '[The Due Process Rights and Other Constitutional Rights of States](#)', *Fordham Law Review*, Vol. 88, 2019, pp. 633-690. Some argue that due process rights should apply to the property of foreign states to ensure that the executive acts within the clear limits set out by the legislature of a state. See e.g., Stephan, '[Giving Russian Assets to Ukraine: Freezing Is Not Seizing](#)': 'U.S. commentators should not want the government to acquire a taste for lawlessness, however disgusting its target may be'.

¹⁶³ Laurence H Tribe, '[Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?](#)', *Lawfare*, May 2022.

¹⁶⁴ [Proposals to Seize Russian Assets to Rebuild Ukraine](#), Session 22 of the Congressional Study Group, Brookings, December 2022.

¹⁶⁵ Judgment in [Raimondo v Italy](#), Application No 12954/87, European Court of Human Rights, February 1994, para. 30, concerning Italy's Anti-Mafia Code, which allows prosecutors to bring a claim before the District Court for the administrative seizure and confiscation of assets controlled by persons involved in mafia-type of criminal associations. The Code does not require proof that the assets were proceeds of criminal conduct and reverses the burden of proof so that defendants are required to prove that their assets are lawfully acquired but the ECtHR held that the Code does not violate the right to property, nor the right to fair trial under the ECHR. [Sanction. Confiscate. Compensate.](#): Briefing: Comparative Laws for Confiscating and Repurposing Russian Oligarch Assets, REDRESS, September 2022.

¹⁶⁶ One other way to overcome due process concerns is to ensure that they are taken into account when drafting domestic legislation, or when making the necessary amendments to existing legislation. REDRESS has made a number of recommendations for the content of new domestic legislation in the context of proposals for allowing states to confiscate and repurpose Russian *oligarch* property. These include the need to (i) ensure compliance with the rule of law; (ii) ensure compliance with human rights principles, including the rights to property and due process; (iii) draft legislation that can be applicable to serious violations of human rights and humanitarian law across the world, and not just to Russia's invasion of Ukraine; and (iv) enable confiscated assets to be repurposed for victims of human rights and humanitarian law across the globe. In the context of central bank assets in particular, these needs can be facilitated by governments considering: (i) administrative confiscation powers; (ii) judicial oversight of a decision to confiscate assets; and (iii) appeal rights. [Sanction. Confiscate. Compensate.](#): Briefing: Comparative Laws for Confiscating and Repurposing Russian Oligarch Assets, REDRESS, September 2022, p. 3.

¹⁶⁷ [France-Russian Federation BIT](#) 1989.

¹⁶⁸ [Japan-Russian Federation BIT](#) 1998.

¹⁶⁹ [Germany-Russian Federation BIT](#) 1989.

¹⁷⁰ [Russian Federation-United Kingdom BIT](#) 1989.

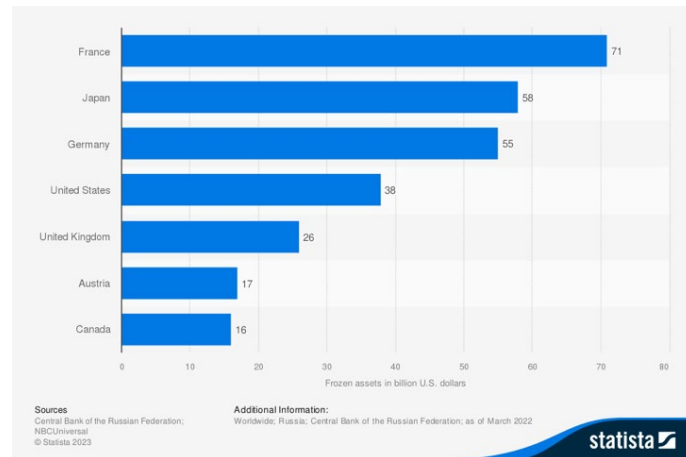
¹⁷¹ [Austria-Russian Federation BIT](#) 1990.

¹⁷² [Canada-Russian Federation BIT](#) 1989. For the full list of BITs to which Russia is a party, see '[Russian Federation](#)', Unctad Investment Policy Hub website.

¹⁷³ Moiseienko, '[Frozen Russian Assets and the Reconstruction of Ukraine. Legal Options](#)'.

¹⁷⁴ Jennings and Watts, *Oppenheim's International Law*, pp. 911-927

Figure 3 – Value of assets of the RCB frozen due to sanctions due to the war in Ukraine as of March 2022, by country (in US\$ billion)



Source: [Statista](#), 2023.

The ICJ in *Certain Iranian Assets* suggested that a taking of property does not amount to an expropriation unless there is a 'specific element of illegality' (in the context of a judicial decision):

*'The Court considers that a judicial decision ordering the attachment and execution of property or interests in property does not per se constitute a taking or expropriation of that property. A specific element of illegality related to that decision is required to turn it into a compensable expropriation. Such an element of illegality is present, in certain situations, when a deprivation of property results from a denial of justice, or when a judicial organ applies legislative or executive measures that infringe international law and thereby causes a deprivation of property.'*¹⁷⁵

Arbitrary or discriminatory interference with foreign property can fall short of the minimum standard of treatment. However, it is unlikely that a possible confiscation of the RCB's assets would breach that standard because, as the ICJ stated in *ELSI*,¹⁷⁶ arbitrariness imposes a high standard: 'not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.'

In any event, the rules protecting foreign property are unlikely to apply to RCB assets because the RCB is unlikely to be a qualifying 'investor' that has made an 'investment'.¹⁷⁷ Some investment tribunals have interpreted BIT protections as only applying to government-controlled entities when

¹⁷⁵ International Court of Justice, *Certain Iranian Assets (Iran v USA)*, [Judgment](#), General List No 164, 2023, para. 84.

¹⁷⁶ International Court of Justice, *Elettronica Sicula S.p.A. (ELSI) (USA v Italy)*, [Judgment](#), ICJ Rep 1989, p. 15.

¹⁷⁷ Ursula Kriebaum, Christoph Schreuer & Rudolf Dolzer, *Principles of International Investment Law*, 3rd edition, Oxford University Press, January 2022, pp. 186-240; Moiseienko, '[Sovereign Immunities, Sanctions, and Confiscation: The Case of Central Bank Assets](#)', p. 27.

they act in a commercial (rather than in a governmental) capacity.¹⁷⁸ Although such an interpretation is not binding, it would be consistent with the ICJ's reasoning in *Certain Iranian Assets*.

At a glance:

The rules protecting private investors are unlikely to apply to the confiscation of RCB assets because such rules are unlikely to apply to the RCB as an 'investor' and the confiscation would not constitute an expropriation unless a specific element of illegality related to a judicial decision was present. The legal basis is BITs, when applicable, and customary international law.

3.4. The principle of non-intervention

Under international law, states are obliged to refrain from interfering in the domestic affairs of foreign states. Article 2(4) of the UN Charter protects the territorial and political independence of every state:

'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'

This obligation has become the basis of the principle of non-intervention. Article 8 of the Montevideo Convention, for example, expressly provides 'no state has the right to intervene in the internal or external affairs of another.'¹⁷⁹ The 1957 UNGA Resolution on peaceful and neighbourly relations among states refers to the need to 'develop peaceful and tolerant relations among states, in conformity with the Charter, based on mutual respect and benefit ... and non-intervention in one another's internal affairs.'¹⁸⁰ The Friendly Relations Declaration provides that 'no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'¹⁸¹ In the *Nicaragua* case, the ICJ recognised the principle of non-intervention as part of customary international law.¹⁸²

It may be argued that confiscation of RCB assets violates the principle of non-intervention. It has been that 'when host states freeze foreign assets to incapacitate a target state, coerce a target state to change its policies, *direct the allocation of a target state's resources*, or punish a target state or its nationals for human rights violations abroad, they assert dictatorial control over 'matters which are essentially within [the other state's] domestic jurisdiction'.¹⁸³

The standard is a high one: 'dictatorial interference by a state in the affairs of another state.'¹⁸⁴ Examples include 'intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another state'.¹⁸⁵ It is not

¹⁷⁸ [CSOB v Slovakia](#), Decision on Jurisdiction, ICSID Reports, Vol. 5, 1999, p. 335, paras. 16-27.

¹⁷⁹ [Montevideo Convention on the Rights and Duties of States](#) 1934.

¹⁸⁰ [UNGA Resolution 1236](#) (XII) on peaceful and neighbourly relations among States, 14 December 1957.

¹⁸¹ [UNGA Resolution 2625](#) (XXV) on the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, p. 123.

¹⁸² International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, [Judgment](#), ICJ Rep 1986, p. 14, paras 246, 250.

¹⁸³ Evan J Criddle, 'Humanitarian Financial Intervention', *European Journal of International Law*, Vol. 24, Oxford University Press, 2013, pp. 583-615, p. 591 (emphasis added).

¹⁸⁴ Lassa Oppenheim, *International Law: A Treatise*, Longmans, 1905, pp.181-182.

¹⁸⁵ International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)* [Judgment](#), ICJ Rep 1986, p. 14, para. 205.

clear that an international tribunal would find that the coercive element required for a violation of the principle of non-intervention has been met in the case of confiscation.

At a glance:

The customary principle of non-intervention in a state's internal affairs may be engaged by the confiscation of RCB. It will only be breached if the confiscation is found to constitute 'dictatorial interference' in Russia's affairs.

4. Legal avenues to seize Russian state assets: Countermeasures and Self-defence

As noted above in section 4.1.2, when a state violates international law, it may rely on a *justification* to preclude responsibility for the wrongful act. In the context of confiscating RCB assets, two justifications have been discussed: (i) countermeasures, and (ii) self-defence.

4.1. Countermeasures

Countermeasures are measures taken in response to an internationally wrongful act by a foreign state 'that would otherwise be contrary to the international obligations of an injured state *vis-à-vis* the responsible state, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.'¹⁸⁶ International law imposes a number of requirements that must be met in order for a countermeasure to be legitimate.

4.1.1. Third-party countermeasures

States aiming to take collective action against Russia for its aggression on Ukraine must demonstrate a legal basis allowing them to do so. Under Article 42, ARSIWA, a state is entitled, as an 'injured state', to invoke the responsibility of another state if the obligation breached is owed to (a) that state individually; or (b) a group of states including that state, or the international community as a whole, *and* if the breach of the obligation either (i) specially affects that state; or (ii) is of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation. It is challenging to characterise all states as 'specially affected' by Russia's breach of its obligation to make full reparation. The examples include the case of pollution of the high seas in breach of Article 194 of the UN Convention on the Law of the Sea, which would affect 'one or several states whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed'.¹⁸⁷ This is not like the present situation.

Alternatively, instead of direct countermeasures, states could invoke third-party countermeasures, which do not require showing that they are directly injured or specially affected. Article 1 of the UN Charter refers to the need to 'take collective measures for the prevention and removal of threats to the peace'. More specifically, the basis for third-party countermeasures in international law is reflected in Article 54 ARSIWA:

'This chapter does not prejudice the right of any state, entitled under article 48, paragraph 1, to invoke the responsibility of another state, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached.'

Third-party countermeasures can be taken by *any* state and Article 54 expressly refers to measures directed to 'reparation in the interest of the injured state', which fits the objective of using frozen Russian state assets to provide Ukraine with resources for reconstruction. Although the obligation to provide reparation is not a *jus cogens* norm, it is an *erga omnes* norm, such that states are entitled to claim performance of that obligation 'in the interest of the injured state or the beneficiaries of the obligation breached', under Article 48(2)(b) ARSIWA.

¹⁸⁶ ARSIWA, Chapter II, para. 1.

¹⁸⁷ ARSIWA, Art. 42, para. 12.

Some commentators argue that Article 54 ought not to provide a basis for action, relying the ILC's comment in 2001 that the practice regarding countermeasures in response to *erga omnes* obligations was 'limited and rather embryonic':¹⁸⁸

*'the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest.'*¹⁸⁹

In the context of RCB assets, commentators point out that there are 'apparently no examples of explicit countermeasures with respect to immunity at all, much less central bank immunity'.¹⁹⁰ This has led to the conclusion that 'the absence of state practice of third-party countermeasures against central bank immunity suggests, in this context, that such measures are not permissible'.¹⁹¹

With respect, this view is too rigid. Since 2001, many states have taken a number of measures that can only be justified on the basis that they constitute third-party countermeasures, such that there is now 'virtually uniform' practice in support of the permissibility of third-party countermeasures.¹⁹² A 2017 study found that states have used third-party countermeasures repeatedly, even if cautiously.¹⁹³ This practice has developed in the last few years, and some consider it as customary international law.¹⁹⁴

The mass freezing of Russian state assets since 2022 is best viewed as a third-party countermeasure, even if states do not label it as such.¹⁹⁵ There is therefore a growing practice of states of imposing third-party countermeasures, even if the safeguards governing their use may take more time to crystallise based on *opinio juris*¹⁹⁶ (i.e. the requirement that the practice must be undertaken with a sense of legal right or obligation).¹⁹⁷

Finally, specific state practice on central bank immunity is not needed to justify third-party countermeasures that confiscate RCB assets. The law on countermeasures is concerned with internationally wrongful acts, and the specific nature of the act is generally not relevant. Further, the ILC, when discussing its Articles on State Responsibility, found that 'countermeasures shall not affect' certain obligations, including: '(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law'. The ILC did not, however, exclude state

¹⁸⁸ ARSIWA, Art. 54, para. 3.

¹⁸⁹ ARSIWA, Art. 54, para. 6.

¹⁹⁰ Ingrid Brunk Wuerth, '[Central Bank Immunity, Sanctions, and Sovereign Wealth Funds](#)', p. 32.

¹⁹¹ *ibid.*

¹⁹² Martin Dawidowicz, 'Permissibility of Third-Party Countermeasures: Evaluation' in *Third-Party Countermeasures in International Law*, Cambridge University Press, 2017, p. 250.

¹⁹³ *ibid.*, p. 384: 'the adoption of third-party countermeasures ... on the whole ... preceded by credible evidence of wrongful conduct'.

¹⁹⁴ Kamminga, 'Confiscating Russia's Frozen Central Bank Assets'.

¹⁹⁵ Dapo Akande, Shatoro Hamamoto, Pierre Klein, Paul Reichler, Philippe Sands, Nico Schrijver, Christian Tams and Philip Zelikow, 'Legal Memorandum on Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine', November 2023, paras 57-59. See also Ruys, 'Immunity, inviolability and countermeasures', p. 704; Kamminga, 'Confiscating Russia's Frozen Central Bank Assets', pp. 6-9.

¹⁹⁶ Dawidowicz, 'Permissibility of Third-Party Countermeasures: Evaluation', p. 253.

¹⁹⁷ International Law Commission, '[Draft conclusions](#) on identification of customary international law 2018, A/73/10, conclusion 9.

immunity from the scope of countermeasures.¹⁹⁸ The ILC did at one point consider whether the confiscation of foreign *private property* could qualify as an 'obligation of a humanitarian character prohibiting reprisals' under Article 50(1)(c), but found that it did not, and the issue of state-owned property never arose in its discussions.¹⁹⁹ The final provision – Article 50(2)(b) ARSIWA – requires a state taking countermeasures to fulfil the obligation to respect the 'inviolability of diplomatic or consular agents, premises, archives and documents', but it does not impose a requirement to fulfil obligations to respect central bank assets.²⁰⁰

4.1.2. Countermeasures must aim to induce compliance

Article 49(1) ARSIWA explicitly provides that countermeasures may 'only' be taken with the purpose of inducing the state that is responsible for the underlying internationally wrongful act to 'comply with its obligations...'. Complying with those obligations includes 'ceas[ing] the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured states. Countermeasures are not intended as a form of punishment for wrongful conduct...'²⁰¹

Any strategy aimed at inducing compliance must therefore give Russia an incentive to make reparation.²⁰² Some say the confiscation of RCB assets could be seen as removing Russia's incentive to comply with its reparation obligation or even be perceived as punishing Russia.²⁰³ However, Russia's obligation to make reparation has been recognised by the vast majority of the international community – and it has been understood as a duty, not a punishment. The incentive on Russia to fulfil its duty would be made even clearer by the potential reversibility of the measure, which is discussed in section 5.1.3 below.

4.1.3. Temporary and reversible nature of countermeasures

i. Temporariness

Article 49(2) ARSIWA provides that lawful countermeasures are limited to 'the non-performance for *the time being* of international obligations of the state taking the measures towards the responsible

¹⁹⁸ ARSIWA, Art. 50. In respect of diplomatic immunities, the ILC said: 'measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (b), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.' See ARSIWA, Art. 50, para 14. See also the practice of the UN Committee against Torture: [Summary Record of the Second Part \(Public\) of the 646th Meeting](#), Committee Against Torture, CAT/C/SR.646/Add 1, 6 May 2005, para 6.7. See further Marco Longobardo 'State Immunity and Judicial Countermeasures', *European Journal of International Law*, Vol. 32, Oxford University Press, 2021, pp. 457- 484, p. 460.

¹⁹⁹ [Third Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, ILC](#), U.N. Doc. A/CN.4/440 and Add.1, 1991, p. 33.

²⁰⁰ [Third Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur](#), ILC, U.N. Doc. A/CN.4/440 and Add.1, 1991, p. 33. See also the justification for excluding acts violating diplomatic immunities from the scope of countermeasures in ARSIWA, Art. 50, para. 15: 'If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds.'

²⁰¹ ARSIWA, Art. 49, para. 1.

²⁰² Zelikow, '[A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine](#)'.

²⁰³ Dornbierer, '[Working Paper 42](#)'; Kamminga, 'Confiscating Russia's Frozen Central Bank Assets'; Artem Ripenko, '[Should Third States Follow Ukraine's Lead and Confiscate Russian State assets?](#)', *Völkerrechtsblog*, June 2023.

state'.²⁰⁴ The ILC envisioned a strict requirement of temporality, aiming to ensure that countermeasures remain coercive not punitive. This contrasts with greater flexibility accorded to the requirement of reversibility. Brunk Wuerth notes that this may reflect the fact that 'some countermeasures unavoidably inflict harm that is not reversible, but even if so, the measures must nevertheless be temporary and designed to induce the target to bring their conduct in compliance with international law.'²⁰⁵

States therefore cannot use countermeasures as a basis for the *permanent* confiscation of RCB assets. When a state deals with a foreign property as a countermeasure, it must ensure that it can be returned intact (including interest and contractually agreed profit) when the countermeasures end.²⁰⁶

ii. Reversibility

To prevent countermeasures from being used for punitive purposes, Article 49(3) ARSIWA provides that countermeasures shall '*as far as possible* be taken in such a way as to permit the resumption of performance of the obligations in question.'²⁰⁷ The reversibility requirement is therefore not absolute.²⁰⁸

RCB assets are financial and fungible. The ILC Rapporteur for ARSIWA, James Crawford (later judge at the ICJ), noted that '[d]amage of a financial character (e.g. loss of profits or interest) is rarely irreversible.'²⁰⁹ The PCIJ and the ICJ have both accepted that financial damages are not 'irreparable' and are therefore 'reversible' in orders on provisional measures.²¹⁰ The requirement of reversibility, therefore, does not prevent a state from using countermeasures to justify confiscating RCB assets, so long as Russia will be entitled to its assets once it fulfils its reparation obligation.²¹¹

The requirements of inducement, temporariness and reversibility would all be satisfied if the RCB assets (the full amount of assets, not just the interest) are allocated to Ukraine as a loan *conditional* on Russia's fulfilment of its obligation to make full reparation. When transferring the assets to Ukraine, states could specify that the assets are to be transferred back if and when Russia complies with its obligation of reparation. A variation on this is that states could transfer the assets to a compensation mechanism with rules providing that 'Russia would be credited with any reparations

²⁰⁴ Emphasis added.

²⁰⁵ Discussed in Ingrid Brunk Wuerth, '[Central Bank Immunity, Sanctions, and Sovereign Wealth Funds](#)', pp. 33-4.

²⁰⁶ Criddle, '[Turning Sanctions into Reparations: Lessons for Russia/Ukraine](#)'.

²⁰⁷ Emphasis added.

²⁰⁸ Ingrid Brunk Wuerth, '[Countermeasures and the Confiscation of Russian Central Bank Assets](#)'.

²⁰⁹ James Crawford, '[Counter-Measures as Interim Measures](#)', *European Journal of International Law*, Vol. 5, Oxford University Press, 1994, pp. 65-76, p. 68.

²¹⁰ Permanent Court of International Justice, *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v China)*, [Order of 8 January 1927](#), PCIJ Series A 1927, No 8, p. 7; International Court of Justice, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v USA)*, [Order of 3 October 2018](#), ICJ Rep 2018, p. 623 (in which the Court did not order the provisional measure requested by Iran regarding 'the full implementation of transactions already licensed, generally or specifically, particularly for the sale or leasing of passenger aircraft, aircraft spare parts and equipment' but did order the United States to remove impediments to the free exportation of medicines, foodstuffs and spare parts and equivalent for the safety of civil aviation, noting in para. 91 that '*a prejudice can be considered irreparable when the persons concerned are exposed to danger to health and life*' (emphasis added)).

²¹¹ Some commentators add that since the underlying act to which the countermeasure would apply is the suspension of Russia's immunity, rather than measures taken against the assets themselves, the reversibility requirement only applies to the suspension of immunity, which can be restored once Russia comes into compliance with its obligations: New Lines Institute, '[Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine](#)', June 2023, pp. 20-21; Kristina Hook and Yonah Diamond, '[The case for seizing Putin regime assets](#)', Atlantic Council, August 2023.

actually paid by the mechanism, and its remaining obligation (if any) would be correspondingly reduced. In the event the value of its transferred assets were to exceed the amount of reparations owed, the excess could be transferred back to Russia.²¹² The loan would be between the state that has immobilised or frozen the RCB assets and Ukraine; it would involve a loss of ownership for Russia that could be restored if and when Russia's obligation to provide reparation was discharged.

4.1.4. Obligation to notify

States planning on taking countermeasures are obliged to (i) 'call upon' the responsible state to fulfil its international obligations; and (ii) notify the responsible state of any decision to take countermeasures and offer to negotiate with that state.²¹³

The international community has already complied with this requirement by providing Russia with numerous opportunities to negotiate. Article 52 ARSIWA, does not require that a state has exhausted all channels to notify Russia of the intention to take countermeasures. In fact, the ILC has recognised that, in practice, 'there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases, the injured state will already have notified the responsible state of its claim in accordance with Article 43, and it will not have to do it again in order to comply with paragraph 1(a).'²¹⁴ States have already entered negotiations over the dispute between Ukraine and Russia, such that this requirement has been fulfilled:

- On 26 February 2022, Ukraine instituted ICJ proceedings against Russia, in which it challenged Russia's basis for launching its 'special military operation' in Ukraine.²¹⁵
- Russia was additionally put on notice of the claims against it when the UNGA issued its November 2022 resolution, which confirmed that 'Russia must be held to account for any violations of international law in or against Ukraine'.²¹⁶

4.1.5. Countermeasures and pending disputes

Article 52(3) provides countermeasures may not be taken if:

- 1 the internationally wrongful act has ceased; and
- 2 the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

This rule does not affect the application of countermeasures in the case of the war in Ukraine for two reasons. First, the requirement in Article 52(3)(b) 'does not apply if the responsible state fails to implement dispute settlement procedures in good faith', or where 'the responsible state is not cooperating in the [dispute settlement] process.'²¹⁷ Russia has failed to implement the ICJ's Order for provisional measures, which called on it to 'immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine'.²¹⁸ Second, and most importantly, Articles 52(3)(a) and (b) are cumulative, as the ILC commentary confirms:

²¹² Akande et al, Legal Memorandum, para. 38.

²¹³ ARSIWA, Art. 52(1)(a)-(b).

²¹⁴ *ibid.*

²¹⁵ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention of the Crime of Genocide (Ukraine v Russia)*, [Application Instituting Proceedings](#), General List No 182, 2022.

²¹⁶ [UNGA Res ES/11/5](#), para. 2.

²¹⁷ ARSIWA, Art. 52, para. 1.

²¹⁸ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention of the Crime of Genocide (Ukraine v Russia)*, [Order of 16 March 2022](#), ICJ Rep 2022, p. 211, para. 86(1).

*'Paragraph 3 deals with the case in which the wrongful act has ceased **and** the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified.'*²¹⁹

Given that Russia's military action is ongoing, with reparation still not given, the internationally wrongful act has not ceased and the rule in Article 52(3)(b) cannot be invoked.

4.1.6. Relationship with UNSC Chapter VII processes

Some say the use of third-party countermeasures could threaten the collective security system based on Chapter VII²²⁰ of the UN Charter by creating overlapping enforcement regimes that could limit the power of the UN Security Council. The UN Security Council taking action under Chapter VII would, therefore, end any entitlement to take third-party countermeasures.²²¹

However, given Russia's possession of a veto power on the UNSC, action against Russia under Chapter VII is not a possibility.²²² In any event, there is state practice supporting the view that third-party countermeasures can be taken in parallel with Chapter VII action where they concern matters 'of a serious concern for the international community as a whole'.²²³

4.1.7. Other legal arguments to consider

There are three other issues which arise in relation to – but do not prevent – using countermeasures to justify confiscating RCB assets.

First, Article 51 ARSIWA provides that countermeasures 'must be proportionate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. Given the scale of Russia's aggression, and the massive damage suffered by Ukraine (the costs of which are likely to be greater than the sum of frozen Russian state assets), for which Russia must bear the legal consequences, the confiscation of Russian state assets is proportionate to the injury suffered by Ukraine.²²⁴

Second, countermeasures that risk impacting private investors (such as by impacting interest rates for borrowers or causing a government policy response, such as currency restrictions) could create a problem. However, ARSIWA recognises that countermeasures may 'incidentally affect the position of third states or indeed other third parties',²²⁵ and private investors may fall into this category as those having individual rights and a legal relationship with the host state.²²⁶

²¹⁹ ARSIWA, Art. 52, para. 7.

²²⁰ Chapter VII of the UN Charter sets out the powers and procedure of the UNSC in relation to 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. See [Charter of the United Nations 1945](#), 1 UNTS 16, Ch. VII.

²²¹ Dawidowicz, p. 257.

²²² Pavel Doubek, '[War in Ukraine: Time for a Collective Self-Defence?](#)', *Opinio Juris*, March 2022.

²²³ Dawidowicz, pp. 257-8.

²²⁴ New Lines Institute, '[Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine](#)', June 2023, p. 24.

²²⁵ ARSIWA, Art. 59, para. 5.

²²⁶ Weihang Zhou, '[Sanctions Imposed on Private Investors by the US and UK in the Russian-Ukrainian Conflict: Justifiable as Countermeasures in the Law of International Responsibility](#)', *EJIL:Talk!*, August 2023.

Third, determining the sum that Russia owes is a difficult task during an ongoing conflict. It may make it challenging to justify taking collective countermeasures in relation to an undetermined sum. However, given the scale of Russia's attacks and extensive damage suffered by Ukraine, the amount of RCB assets is very unlikely to exceed the reparation due. There is no reason to delay until the end of the conflict to determine the sum of reparation owed.²²⁷

At a glance:

States can justify confiscation of RCB assets as a third-party countermeasure, which does not require showing that the confiscating state is directly injured or specially affected by Russia's conduct. There is widespread state practice supporting the availability of third-party countermeasures in international law, including in relation to securing reparation in the interest of the injured state. Even if states have not labelled the freezing of Russia's assets since 2022 as a countermeasure, in practice this is what it is.

The use of countermeasures must comply with several requirements, including the purpose of inducing compliance, temporariness, reversibility and proportionality. Confiscation of RCB assets would satisfy the conditions of inducement and proportionality. The requirements of temporariness and reversibility would be best met if the RCB assets are allocated to Ukraine as a loan conditional on Russia's fulfilment of its obligation to make full reparation. When transferring the assets to Ukraine, states could specify that the assets are to be transferred back if and when Russia complies with its obligation of reparation. A variation on this is that states could transfer the assets to a compensation mechanism with rules providing that 'Russia would be credited with any reparations actually paid by the mechanism, and its remaining obligation (if any) would be correspondingly reduced. In the event the value of its transferred assets were to exceed the amount of reparation owed, the excess could be transferred back to Russia.'

4.2. Self-defence

Under Article 51 of the UN Charter, states have a right of individual or collective self-defence when an armed attack occurs against a UN Member State. This rule has crystallised into customary international law.²²⁸ Self-defence is an additional justification for an internationally wrongful act, recognised by the ILC in Article 21 ARSIWA, which provides that 'the wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.' The inherent right of states to engage in collective self-defence may justify non-performance of certain obligations other than those contained Article 2(4) of the UN Charter, such that it could be used to justify confiscation of Russian-related assets,²²⁹ subject to the below requirements. The obligation in issue here is the obligation not to use force/engage in aggression rather than the obligation to provide reparation.

4.2.1. Basis for exercising self-defence

International law permits self-defence where there has been an 'armed attack', which is 'the most grave form of the use of force', including aggression.²³⁰ Russia's actions undoubtedly constitute an 'armed attack' warranting collective action to be taken.

²²⁷ Cf. Franchini; International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [Reparations](#), ICJ Rep 2022, p. 13.

²²⁸ International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, [Judgment](#), ICJ Rep 1986, p. 14, para. 193.

²²⁹ ARSIWA, Art. 21, para. 2.

²³⁰ International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, [Judgment](#), ICJ Rep 1986, p. 14, para. 191.

The state subject to an armed attack must call upon other states to exercise their right to take measures.²³¹ Ukraine has repeatedly called upon the international community to exercise self-defence and has specifically called on states to impose sanctions.²³²

4.2.2. Temporal element of self-defence

Self-defence may only be exercised while the armed attack is ongoing.²³³ This limits the extent to which the right to self-defence may be invoked to confiscate RCB assets, since confiscatory action may only be taken while Russia's armed attack continues. If confiscation is a judicial process, this will require delivery and enforcement of the judgment during the ongoing armed conflict. If confiscation is conducted via executive or legislative action, then immunity will not be a bar as explained above. The temporal element would however remain the same.

4.2.3. Other Legal Arguments to Consider

Measures taken in self-defence must be necessary and proportionate. As set out above, these requirements are readily met.

One question is whether non-forcible measures against a state can actually constitute measures taken in self-defence. Measures are forcible when they involve the threat or use of violence,²³⁴ meaning where they cause (or threaten to cause) 'destruction to life and property'.²³⁵ Non-forcible measures, then, are those which do not reach this threshold, such as economic sanctions, security barriers, cyber operations,²³⁶ or, in this case, confiscation. In her separate opinion in the ICJ's *Wall* advisory opinion, Judge Higgins reasoned, 'I remain unconvinced that non-forcible measures [(such as the building of a wall)] fall within self-defence under Article 51 of the Charter as that provision is normally understood.'²³⁷ Others argue that self-defence, with its origins in the natural duty of self-preservation (that states must take all steps necessary to protect their natural interests),²³⁸ must not be limited to forcible measures, and should instead extend to any measure aimed at protecting the state's interests.

At a glance:

It is unlikely that confiscation of RCB assets can be justified as a measure of collective self-defence given that the measure can only be exercised while the attack is ongoing and it is unclear whether it applies to non-forcible measures.

²³¹ International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, [Judgment](#), ICJ Rep 1986, p. 14, para. 195.

²³² Self-defence may, therefore, be more suitable for non-compliance with a court decision.

²³³ ARSIWA, Art. 21.

²³⁴ Yoram Dinstein, *War, Aggression, and Self-Defence*, Cambridge University Press, 2017, p. 90, cited in Russell Buchan, 'Non-forcible measures and the law of self-defence', *International and Comparative Quarterly Law Review*, Vol. 72(1), Cambridge University Press, December 2022, pp. 1-33, p. 2.

²³⁵ Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1963, p. 362, cited in Russell Buchan, 'Non-forcible measures and the law of self-defence', *International and Comparative Quarterly Law Review*, Vol. 72(1), Cambridge University Press, December 2022, pp. 1-33, p. 2.

²³⁶ Russell Buchan, 'Non-forcible measures and the law of self-defence', *International and Comparative Quarterly Law Review*, Vol. 72(1), Cambridge University Press, December 2022, pp. 1-33, p. 2.

²³⁷ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [Advisory Opinion](#), Separate Opinion of Judge Higgins, ICJ Rep 2004, p. 207.

²³⁸ Russell Buchan, 'Non-forcible measures and the law of self-defence', *International and Comparative Quarterly Law Review*, Vol. 72(1), Cambridge University Press, December 2022, pp. 1-33, pp. 7-12.

5. Other potentially viable legal venues to confiscate or otherwise use Russian state assets

5.1. Option 1: Enforcement of ECtHR judgments domestically

Where a judgment has been rendered against Russia by an international court, such as the European Court of Human Rights (ECtHR), domestic courts should be entitled to enforce that judgment against Russian state assets. This argument stems from the legal theory developed by the UK representative Sir Gerald Fitzmaurice in the *Monetary Gold* proceedings, that 'the judgments of the highest court, as indeed of all tribunals, should be respected and carried out'. He continued to state that 'it would be right to say, I think, that not only must such an occurrence be a matter of concern to all members of the international community, but also all countries are, if not bound, at any rate entitled to take all such reasonable and legitimate steps as may be open to them to prevent such an occurrence'.²³⁹ States are, therefore, at the very least entitled to assist the injured state in securing the execution of international judgments, given that the international community has a general interest in ensuring compliance with the judgments of international courts.

The overarching problem with this option is that a judgment in favour of Ukraine will take time to be determined (two years or more), and international courts rarely hand down large damages awards – the ICJ's largest award was US\$325 million,²⁴⁰ and the ECtHR's largest just satisfaction award was €1.9 billion.²⁴¹

As a result of the resolutions adopted by the Committee of Ministers on 16 March and 22 March 2022,²⁴² Russia is no longer a Contracting Party to the European Convention on Human Rights (ECHR) and is therefore not a state party to the ECtHR. In June 2022, the Russian Parliament passed a bill ending ECtHR jurisdiction from 15 March 2022.²⁴³ However, the ECtHR has confirmed that, notwithstanding Article 58 ECHR, it may examine Russia's alleged violations of the Convention occurring prior to 16 September 2022.²⁴⁴ As of December 2023, there are approximately 2 312 pending cases before the ECtHR against Russia, including 5 inter-state applications brought by Ukraine.²⁴⁵ It is not known what percentage of these pending applications concern the situation in Ukraine, but the court saw a general increase in pending cases against Russia in 2022, the year that Russia launched its military action against Ukraine.²⁴⁶ Under Article 46(1), ECHR, Russia has 'undertake[n] to abide by the final judgment of the Court in any case in which' it is a party. The Committee of Ministers has stressed that Russia has an international obligation to provide just

²³⁹ International Court of Justice, *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Pleadings, ICJ Rep 1954, p 98. p. 126.

²⁴⁰ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [Reparations](#), ICJ Rep 2022, p. 13.

²⁴¹ Judgment in [Yukos v Russia](#), App No 14902/04, European Court of Human Rights, July 2014.

²⁴² [Council Resolution CM/Res\(2022\)2](#) on the cessation of the membership of the Russian Federation to the Council of Europe, 16 March 2022; [Council Resolution CM/Res\(2022\)3](#) on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, 23 March 2022.

²⁴³ '[Russian parliament votes to break with European Court of Human Rights](#)', Reuters, June 2023.

²⁴⁴ [Resolution of the European Court of Human Rights](#) on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022.

²⁴⁵ [Russian Federation](#), Department for the Execution of Judgments of the European Court of Human Rights website; [Inter-state applications](#), European Court of Human Rights website.

²⁴⁶ [Russian Federation](#), Department for the Execution of Judgments of the European Court of Human Rights website.

satisfaction,²⁴⁷ and called upon Member States to exhaust all possible strategies to ensure the effective implementation of cases issued against Russia, emphasising that it 'continues to supervise the execution of judgments and friendly settlements concerned and that the Russian Federation is obliged to implement them'.²⁴⁸ The Secretariat has also created and published a public register of just satisfaction owing in all inter-state cases against Russia.²⁴⁹ Because the ECtHR remains competent to hear complaints against Russia filed before 16 September 2022, the supervisory enforcement role and the powers of the Committee of Ministers under Article 46(2) ECHR, remain intact.²⁵⁰

5.1.1. Applicable framework under private international law

Whilst domestic courts often readily enforce *foreign* judgments, it is unclear whether similar rules are applicable to judgments rendered by international courts. Ordinarily, the domestic enforcement procedure relating to foreign judgments requires that a judgment is first recognised, then enforced and executed:

- 'Recognition' refers to the domestic court's acknowledgement that the foreign judgment is to be treated as binding. This may involve a consideration of the foreign court's jurisdiction, the nature of the judgment itself, and any factors which may render the judgment impeachable.²⁵¹
- 'Enforcement' refers to the legal process by which a foreign judgment is reduced to a judgment of a court in the enforcing state. Enforcement can often only be achieved once recognition has taken place.
- 'Execution' refers to the means by which that judgment is subsequently enforced.²⁵²

The procedure through which each step is carried out differs from state to state – in France and Spain, for example, the first two steps of recognition and enforcement are combined in the process of *exequatur*, which involves recognition *and* the process of granting a foreign judgment the force of a judgment by a domestic court.²⁵³ In some states, treaties such as the 2005 Hague Convention on Choice of Court Agreements make the process of enforcement much simpler. Common law regimes, or civil law regimes where case law is persuasive over lower courts (such as France),²⁵⁴ can also impose their own rules through judgments rather than by statute and/or convention. In the UK, for example, enforcement of a foreign judgment has been sought under common law on the basis of (i) the so-called 'doctrine of obligation' (that the judgment of a court with jurisdiction over the defendant imposes an obligation on the defendant to pay the sum required, which foreign courts

²⁴⁷ [Council Interim Resolution CM/ResDH\(2022\)254](#) on the execution of the judgments of the European Court of Human Rights: *Georgia v Russia* (I), 22 September 2022.

²⁴⁸ [Decision of 1451st meeting](#) on preparation of the next Human Rights meeting, Committee of Ministers, December 2022. See also [Strategy paper](#) regarding the supervision of the execution of cases pending against the Russian Federation, Council of Europe, 8 December 2022; [3rd Strategy paper](#) regarding the means to ensure implementation of the Court with respect to the Russian Federation, Council of Europe, 26 September 2023.

²⁴⁹ [Register of just satisfaction concerning the Russian Federation](#), Council of Europe website.

²⁵⁰ Under Art. 46(2), ECHR, 'the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'. See [Council Resolution CM/Res\(2022\)3](#) on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, 23 March 2022; [Russian Law No 180](#), 11 June 2022; [Russian Law No 183](#) (11 June 2022).

²⁵¹ 'Recognition' is therefore often sought to prevent parties from bringing further litigation abroad, on the basis of *res judicata*. It is also a prerequisite to enforcement.

²⁵² [Kingdom of Spain v Infrastructure Services Luxembourg](#) [2023] HCA 11, pp. 21-23.

²⁵³ [Kingdom of Spain v Infrastructure Services Luxembourg](#) [2023] HCA 11, para 62.

²⁵⁴ Civil law regimes can also make the necessary changes to their legislation on recognition and enforcement of foreign judgments.

are bound to enforce);²⁵⁵ (ii) acquired rights (the idea that a judgment has created specific expectations for parties who may, in good faith, have relied on it);²⁵⁶ or international comity (which requires that courts should recognise the validity of decisions of foreign tribunals that were competent to hear the dispute).²⁵⁷

There are also requirements that must be met before a foreign judgment can be enforced. For example, in some cases, foreign judgments are only enforced when they are monetary, such that injunctions and declaratory judgments are not enforceable.²⁵⁸ Judgments ordinarily must also be on the merits and be final and conclusive in their jurisdiction of origin – provisional measures orders cannot be enforced.²⁵⁹ The original court must also have exercised competent jurisdiction.²⁶⁰

It is not clear whether this procedure applies to attempts to enforce international judgments due to the limited practice. There is currently no authority on whether, to be enforced at the domestic level, an international judgment must go through the same process as foreign judgments, nor whether the same requirements apply. In Greece, the Court of Salonika has held that a decision by the Commission set up by Greece and Turkey under the Lausanne Peace Treaty²⁶¹ could be enforced against the Bank of Greece because the 'award' adopted by the Commission derive[d] its value not in the will of the contracting states, but in the international conventions [which established the Commission], which ma[de] them comparable to judgments'.²⁶² In South Africa, it has been held that an international judgment (of the South African Development Community (SADC) Tribunal) could be treated as a foreign judgment for the purposes of enforcement, though in circumstances where the SADC Protocol explicitly foresaw that its judgments would be enforceable domestically.²⁶³ There

²⁵⁵ Lawrence Collins and Jonathon Harris, *Dicey, Morris and Collins on the Conflict of Laws*, 16th edition, Sweet and Maxwell, September 2022, paras. 14-002 – 14-006; Gilles Cuniberti, 'The Basis for the Effect of Foreign Judgments' in Hague Academy of International Law, *Recueil des cours*, Vol. 394, Brill Nijhoff, 2019, p. 151.

²⁵⁶ *ibid.*, pp. 111-116 (translated).

²⁵⁷ *Dallal v Bank Mellat* [1986] 1 QB 441 (HC), 460-462; *R v Lyons* [2002] UKHL 44.

²⁵⁸ Gilles Cuniberti, 'The Basis for the Effect of Foreign Judgments' in Hague Academy of International Law, *Recueil des cours*, Vol. 394, Brill, 2019, p. 151, para. 89 (translated). See Oliver Browne, Tom Watret, and Georgie Blears, '[Enforcement of Foreign Judgments 2022](#)' Latham and Watkins LLP, 2022. Note also, that in any case, the enforcement of foreign monetary judgments in the UK will be possible if different proceedings are brought. See Adrian Briggs, *Private International Law in English Courts*, 1st edition, Oxford University Press, 2014, paras. 6.218-6.220.

²⁵⁹ Judgments are likely to be final and conclusive when the only way for the judgment to be contested would be to appeal it to a higher court. See *Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky* [2014] EWCA Civ 20, para. 2.

²⁶⁰ Lawrence Collins and Jonathon Harris, *Dicey, Morris and Collins on the Conflict of Laws*, 16th edition, Sweet and Maxwell, September 2022, para. 14R-054; *Rubin v Eurofinance* [2012] UKSC 46, para. 10.

²⁶¹ [Treaty of Lausanne](#) 1923.

²⁶² Order of the President of the Court of Salonika, Greece, JDI Clunet, vol. 65, 1938, pp. 908-910 (translated online). See also Giuliana Marino, '[L'execution des jugements internationaux par les juges internes](#)', Université Panthéon-Sorbonne, May 2023, p. 159.

²⁶³ In *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22, the Constitutional Court held that a decision by the Tribunal for the Southern African Development Community was enforceable against Zimbabwe in domestic courts. The Constitutional Court held that the Tribunal's order could be enforced at common law as if it were a judgment of a foreign court. The SADC Protocol provided under Article 32 that 'States and Institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.' The Constitutional Court found that this provision 'imposed a legal obligation on South Africa to take all steps necessary to facilitate the execution of the decisions of the Tribunal created in terms of the Treaty that [the] Parliament ha[d] approved.' This required the development of the South African common law requirements on recognition and enforcement, which was possible given the underlying principles and constitutional requirements. There is not yet a similar finding on this point elsewhere. Transposing this reasoning into other jurisdictions would be difficult given different constitutional norms and requirements. However, the ECHR contains an equivalent provision on compliance, even if it is given in weaker terms. Article 46 provides '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'. The existence of this provision should not be ignored, and though the obligation on

has not yet been a similar finding elsewhere, and Article 46 ECHR does not contain an identical provision. However, if it is found that international judgments are to be recognised before they may be enforced, in the same manner as foreign judgments, states should adopt similar reasoning to *Bank Mellat*²⁶⁴ and recognise the decisions of international tribunals on the basis of comity. If this principle applies to decisions of the Iran-US Claims Tribunal, there are no principled reasons why decisions in inter-state proceedings, or decisions by the ECtHR, should not be recognised on the same basis.

There is an additional argument that ICJ judgments, by nature, should receive different treatment from, and be subject to different rules to, domestic judgments. For example, it has been argued that 'treating ICJ judgments as domestic foreign judgments while considering other sorts of international judgments at face value, e.g., arbitral decisions rendered between two states, such as the Iran-US Claims Tribunal, amounts to an inexplicable disparity. Similarly, subjecting ICJ judgments to the treatment due to foreign awards will in some cases lead municipal/domestic courts to re-examine the decisions.'²⁶⁵

On the other hand, and as will be seen below (see section 6.1.2), requiring that international judgments are to be recognised before they are enforced creates an additional hurdle in terms of sovereign immunity. Since recognition is a judicial procedure, it engages a state's immunity from adjudicatory jurisdiction (rather than state immunity from enforcement), such that the party seeking enforcement must first show that one of the customary international law exceptions to jurisdictional immunity applies.²⁶⁶ It may be preferable, therefore, for states to establish a presumption (through domestic legal reform), that an international judgment can be recognised and therefore enforced. States may base this approach on the distinctions between foreign and international judgments: states parties to the international court have already accepted its jurisdiction in principle and undertaken to recognise its authority to make binding decisions, such that the international court was competent to determine the dispute in question.²⁶⁷

5.1.2. Application of rules on sovereign immunity to international judgments

Guidance on how ECtHR judgments may be enforced in domestic jurisdictions against Russian state assets may be gained from the limited practice in the context of PCIJ and ICJ judgments. There have been two cases in which attempts have been made to enforce such judgments in domestic courts

UK courts might not be as strong as that in South Africa (or even an 'obligation') per se, it ought to bear effects for third states where a party to a judgment refuses to comply.

²⁶⁴ *Dallal v Bank Mellat* [1986] 1 QB 441 (HC), 460–462.

²⁶⁵ Mary Ellen O'Connell, [The Prospect for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States](#), *Virginia Journal of International Law*, Vol. 30, Virginia Journal of International Law Association, 1990, pp. 891–940, p. 916–7.

²⁶⁶ Under customary international law, states are not immune in proceedings where, *inter alia*, the state has expressly consented to the exercise jurisdiction before the court of another state (waiver exception), or in proceedings arising out of commercial transactions, or where the state has agreed to submit to arbitration a dispute arising out of a commercial transaction. See UNCSI, Art. 7 (waiver), Art. 10 (commercial transactions), Art. 17 (arbitration). See generally, International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99.

²⁶⁷ See eg., ECHR Art. 32 (Jurisdiction of the Court), Art. 46 (Binding force and execution of judgments); [Statute of the International Court of Justice](#) 1945, Art. 36 (Jurisdiction), Art. 59 (Binding nature of judgments on the parties).

against state assets. In both cases, the immunity of the respective state property has not prevented enforcement from taking place.²⁶⁸

In *Corfu Channel (UK v Albania)*,²⁶⁹ the ICJ awarded GBP844 000 compensation to the UK against Albania for damage caused to warships and the loss of life occurring from explosions in Albanian waters. Albania refused to pay, and the UK attempted to enforce the judgment debt against Albanian property, first by seizing Albanian property, but Albania had no property in the UK. The UK then sought an attachment of the Albanian share in certain monetary gold, which had been looted by the Nazis from Italy during the Second World War, and was in control of the US, France and the UK. These states agreed that any interest that Albania had in the gold was to be transferred to the UK in satisfaction of the ICJ judgment debt. As mentioned above (section 6.1), the Legal Adviser to the UK, Sir Gerald Fitzmaurice, explained why the transfer would be justified: when an international judgment has been disregarded '... all countries are, if not bound, at any rate entitled to take all such reasonable and legitimate steps as may be open to them to prevent such an occurrence, and either individually or by common action to do what they can to ensure that judgments, particularly of [the ICJ], are duly implemented and carried out – at any rate, so long as the rights of third countries are respected...'²⁷⁰

In *Socobel v Greece*,²⁷¹ the Société Commerciale de Belgique ('Socobel') had made a commercial agreement with the Greek Government to construct railways in Greece. The contract provided for part of the consideration to Socobel to be made by the issuance of Greek government bonds to the company, which were to form part of the external debt to Greece. Greece defaulted on the bonds. Socobel brought arbitration proceedings against Greece and obtained an award for compensation. After Greece failed to pay the sums due under the award, Belgium instituted proceedings in the PCIJ. The PCIJ declared that the award was definitive and created obligations for Greece.²⁷² Socobel obtained garnishee orders over debts owed to Greece which were located in Belgium. Greece sought to have the garnishee orders set aside on the basis that it was entitled to immunity from execution. The Belgian court held that Greece was not entitled to immunity because the compensation award concerned its private assets. Its reasoning, however, can be read to have a broader application:

*'The fundamental relationship between states is not their mutual independence, but the recognition and respect of their sovereignty. ... The principle[is] that the sovereignty of a state is not absolute, towards which other states could only adopt an attitude of unconditional acceptance. Such a view, ... would be contrary to the very idea of an orderly international society. It is wrong, therefore, that the defendant claims – on the basis of the equality of States or even of the independence of states in the international society – immunity from execution in respect of judgments passed by Belgian courts which are likely to affect its private interests.'*²⁷³

In the *Corfu Channel* case, while the UK did not succeed in enforcing the ICJ's judgment against the monetary gold for technical reasons (namely whether Albania had any interest in the gold), this

²⁶⁸ See, in general, Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *American Journal of International Law*, Vol. 54, Cambridge University Press, 1960, pp. 1-24; Philippa Webb, 'Enforcement of International Judgments and Awards against State Property' (forthcoming).

²⁶⁹ International Court of Justice, *Corfu Channel (UK v Albania)*, [Compensation](#), ICJ Rep 1949, p. 244.

²⁷⁰ Philippa Webb, 'Enforcement of International Judgments and Awards against State Property' (forthcoming).

²⁷¹ *Société commerciale de Belgique v Etat hellénique et Banque de Grèce*, Brussels Civil Tribunal (1951), 1953 Recueil Sirey Jurisprudence I, IV, 1.

²⁷² Permanent Court of International Justice, *Société Commerciale de Belgique (Belgium v Greece)*, [Judgment](#), (1939) PCIJ Series A./B. 1939, No 77.

²⁷³ *Socobel v Greece* [1951] ILR 3, 7-8.

should not affect the principle at stake.²⁷⁴ As the eminent scholar Oscar Schachter explained, '[a]lthough the British did not succeed in effecting an attachment, the case will probably be considered a precedent for any future efforts to satisfy a judgment debt through the seizure of assets under the control of a third person'.²⁷⁵ Schachter contended that the obligation to carry out the judgments of the ICJ or other international courts generally prevails over immunity.²⁷⁶

As has been noted above (see section 3.1), sovereign immunity stems from a need to prevent states from sitting in judgment on the conduct of another, ensuring that horizontal equality between states is maintained. There is no reason why this principle ought to be applicable on a vertical basis where an international or supranational entity is ordering an enforcement against the sovereign assets of one state. An international court, such as the ICJ or ECtHR, is unlike a national court, in that its adjudication of a dispute concerning a member state will not jeopardise the sovereign equality of that state. This is particularly true where the wrongdoing state is a member of the international court, having consented to the exercise of the Court's jurisdiction.

5.1.3. Standing to bring a claim for the enforcement of international judgments

A further issue is whether a domestic party seeking enforcement of an international judgment will have a sufficient cause of action to bring a claim in domestic courts. This situation will be different depending on whether it is a judgment of the ICJ, ECtHR, or even the International Criminal Court (ICC) being enforced. This issue has, for example, arisen in the US, with courts finding that judgments of a court created by governments (such as the ICJ, ECtHR, and ICC), and international agreements in general,²⁷⁷ do not provide a valid cause of action for private individuals or organisations. For example, when US citizens living in Nicaragua, and representative organisations, brought proceedings against the US government seeking to enforce the ICJ's *Military and Parliamentary Activities* judgment, the Court of Appeals for the DC Circuit found that private parties do not have a cause of action to enforce an ICJ decision:

*'Neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments. The ICJ is a creation of national governments, working through the U.N.; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated—in this case, a claim brought by the government of Nicaragua.'*²⁷⁸

This is only one state's practice, and there is also a distinction to be made between the ICJ, ICC, and the ECtHR, given that the latter is also a court where individual applications can be heard. For judgments of the ECtHR, therefore, it may be possible to show that individuals have a more concrete 'relation to the claim that the [ECtHR] has adjudicated'.²⁷⁹

²⁷⁴ Philippa Webb, 'Enforcement of International Judgments and Awards against State Property' (forthcoming).

²⁷⁵ Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *American Journal of International Law*, Vol. 54, Cambridge University Press, 1960, pp. 1-24, p. 10.

²⁷⁶ Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *American Journal of International Law*, Vol. 54, Cambridge University Press, 1960, pp. 1-24, pp. 13-14 (emphasis added).

²⁷⁷ *Schieber v United States* (2022) WL 227082, pp. 9-10. See also *Gutrejman v United States* (2022) 569 F.Supp.3d 1, pp. 12-13.

²⁷⁸ *Committee of United Citizens Living in Nicaragua* (1988) 859 F.2d 929, p. 934. This has been cited recently in *Schieber v United States* (2022) WL 227082, p. 5; *Gutrejman v United States* (2022) 569 F.Supp.3d 1, pp. 12-13; *Ali Jaber v United States* (2016) 155 F.Supp.3d 70; and *Natural Resources Defense Council v Environmental Protection Agency* (2006) 464 F.3d 1, p. 5.

²⁷⁹ *ibid*, p. 5.

There is also a related argument on whether the enforcement of international judgments might raise a justiciability concern, particularly in those jurisdictions that have some form of an 'act of state doctrine'.²⁸⁰ This rule, to the extent that it exists in foreign jurisdictions, could prevent domestic courts from enforcing a judgment of the ICJ, ICC, or ECtHR. However, it is not clear whether the rule would apply in this case,²⁸¹ and there is, in any event, public policy exception to this rule, which encompasses *jus cogens* norms,²⁸² such as the prohibition of aggression.²⁸³

5.2. Option 2: International treaty setting up a compensation commission

Calls have been made for states to enter into an international agreement creating an international institution that would disburse funds based on damages proved by victims. States could rely on the November 2022 resolution of the UNGA recognising that Russia 'must be held to account', and recommending 'the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss and injury'.²⁸⁴ The Council of Europe created a Register of Damage in May 2023.²⁸⁵ The Committee of Ministers have committed to working towards the establishment of a reparation mechanism. In its 12 May 2023 resolution, the Committee agreed:

*'to continue working, in co-operation with Ukraine and relevant international organisations and bodies, towards the establishment by a separate international instrument of a future international compensation mechanism, which may include a claims commission and a compensation fund, of which the work of the Register, including its digital platform with all data about claims and evidence recorded therein is intended to constitute an integral part.'*²⁸⁶

There have been two examples of state practice of seizing, pooling, and distributing foreign sovereign assets for the purpose of establishing a compensation mechanism. A distinction with the current situation is that Russia has not been defeated and a UNSC determination of its liability is not possible due to Russia's veto power.

First, at the end of World War II, the victorious allied powers entered into the Paris Agreement on Reparation of 1946, which provided for the seizure of German public and private property located in the territory of the parties to the Agreement. Article 6(a) of the Agreement provided that 'each

²⁸⁰ The 'act of state' doctrine is an exercise of judicial restraint where a domestic court will refuse to investigate the propriety of an act of a foreign government and exercise restraint in the adjudication of disputes relating to legislative or other governmental acts which a foreign state has performed within its territorial limits. See Fox and Webb, *The Law of State Immunity*, p. 51. In England, for example, this doctrine prohibits domestic courts from determining issues which 'are only really appropriate for diplomatic or similar channels', such as dealings between sovereign states, the legality of acts of foreign governments in the conduct of foreign affairs, or issues which require the sourcing of rights and duties from international treaties that are not incorporated in domestic law. See *Belhaj v Straw* [2017] UKSC 3, paras 123 and 147, per Lord Neuberger.

²⁸¹ English courts have held that proceedings concerned with judicial standards, such as the examination of the 'substantial justice' available in the courts of foreign jurisdictions, are justiciable. See *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, para. 125.

²⁸² *Belhaj v Straw* [2017] UKSC 3, para. 257, per Lord Sumption.

²⁸³ International Law Commission, [Draft conclusions](#) on peremptory norms of general international law, A/77/10, 2022, conclusion 23.

²⁸⁴ [UNGA Res ES/11/5](#) paras. 2, 4 (emphasis added).

²⁸⁵ [Register of Damage for Ukraine](#), Council of Europe. The register is for damages to private individuals, companies, and also the Ukrainian state.

²⁸⁶ [Council Resolution CM/Res\(2023\)3](#) establishing the Enlarged Partial Agreement on the Register of Damage Caused by Aggression of the Russian Federation Against Ukraine, 16 May 2023.

Signatory government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to prevent the return to German ownership or control and shall charge against its reparation share such assets.¹²⁸⁷

Second, in response to Iraq's invasion of Kuwait, in 1991 the UNSC established the Kuwait Compensation Fund, with the UN Compensation Commission (UNCC), which sought to provide a process by which reparation and compensation for the damage suffered could be effectively undertaken. The mandate for the Commission concluded on 22 February 2022.²⁸⁸ The UNSC reaffirmed in Resolution 687/1991 that 'Iraq [was] liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign governments, nationals and corporations as a result of the unlawful invasion and occupation of Kuwait.'²⁸⁹ The UNCC heard approximately 2.7 million claims in total, with an asserted value of US\$352.5 billion, with a total US\$52.4 billion awarded to approximately 1.5 million successful claimants.²⁹⁰ The Compensation Fund received a percentage of the proceeds generated by the export sale of Iraqi petroleum and petroleum products, transferred as compensation from Iraq, with the percentage originally set at 30 % and gradually reduced down to 3 % over the years under UNSC resolutions.²⁹¹

The current proposals for the commission allow individuals and legal entities to submit applications for their loss or damage.²⁹² The Register of Damage will receive and process these claims, and will classify, categorise, and organise them and determine their eligibility for future compensation examination and adjudication by the future compensation commission.²⁹³ The categories that the board of the Register will approve include: claims relating to loss of life, torture and sexual violence, personal injury, involuntary displacement and forced relocation of individuals, loss of property and revenue, and other forms of economic loss, damage to critical infrastructure and other governmental facilities, damage to historic and cultural heritage, and environmental damage.²⁹⁴ Drawing upon the UNCC, the compensation commission will be mandated to adjudicate these claims, once approved, and order payments of compensation from a compensation fund.²⁹⁵

A compensation mechanism would require the collective transfer of assets into a collective fund which could be administered under the treaty.²⁹⁶ Since most states do not permit outright confiscation of foreign state assets, this option would also require domestic legislation enabling seizure of Russian state assets, which would need to be limited to the present circumstances – emphasising the 'special' nature of this remedy – in order to avoid concerns about other states using similar measures against the seizing states.²⁹⁷ Since the confiscation would be undertaken by the

²⁸⁷ [Agreement on Reparation from Germany 1946](#); New Lines Institute, [Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine](#), June 2023, pp. 5-8.

²⁸⁸ [UNSC Resolution 2621](#), February 2022.

²⁸⁹ [UNSC Resolution 687](#), 3 April 1991.

²⁹⁰ [What we did: The Claims](#), United Nations Claims Commission website.

²⁹¹ [Decision](#) on resumption of deposits of the Compensation Fund and payments toward the outstanding compensation award, S/AC.26/Dec.276(2017), United Nations Claims Commission Governing Council, November 2017; [Homepage](#), United Nations Claims Commission website.

²⁹² ['Register of damage for Ukraine is set up to launch registration of claims in Spring 2024'](#), Clifford Chance, January 2024.

²⁹³ [Statute](#) of the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine 2023, Art. 2.

²⁹⁴ ['The Board of the Register of Damage for Ukraine holds its inaugural meeting'](#), Council of Europe Newsroom, December 2023.

²⁹⁵ ['Register of damage for Ukraine is set up to launch registration of claims in Spring 2024'](#), Clifford Chance, January 2024.

²⁹⁶ See eg., Akande et al, 'Legal Memorandum', para. 2.

²⁹⁷ New Lines Institute, [Multilateral Action Model on Reparations](#), October 2022, p. 23.

executive branch, this would not raise immunity issues, and the commission would not be a court, and would operate at the international level.²⁹⁸ Another option would be to adopt a procedure similar to that of the UNCC, and, rather than seizing existing Russian state assets, states could place a charge on Russian oil and gas revenues (by, for example, retaining a sum of the purchase price owed to Russia when paying for oil and gas sales), which would then be paid into the Ukrainian compensation fund,²⁹⁹ though it is uncertain whether these funds would, by themselves, provide sufficient sums,³⁰⁰ especially given the reduced sum of Russian oil and gas sales today.³⁰¹

The mechanism would need to operate on the basis that Russia's liability is settled, such that no issue of liability will be argued before the commission.³⁰² The dispute between Ukraine and Russia is still pending before the ICJ³⁰³ and the ECtHR.³⁰⁴ The 2024 judgment of the ICJ on its jurisdiction has narrowed the scope of the case against Russia.³⁰⁵ It is unclear whether the absence of a judicial determination of liability may impact the successful establishment of a commission which relies on Russia's responsibility being determined, but support can be taken from the UNGA's recognition of Russia's responsibility for aggression.³⁰⁶ Due to Russia's veto power, there cannot be a UNSC Resolution like 687/1991, which decided 'that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demand[ed] that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt'.³⁰⁷

5.3. Option 3: Windfall contributions

The European Commission has prepared a proposal to use windfall contributions, to help finance Ukraine's recovery.³⁰⁸ This proposal has received endorsement from a number of EU leaders.³⁰⁹ Belgium has already taken similar action by recently seizing profits generated from the RCB's frozen reserves of €1.7 billion. The Belgian government promised to create a fund from the taxes collected from these profits, with a significant portion designated to assist Ukraine.³¹⁰ As a result of EU restrictive measures, financial assets are blocked by financial institutions such as the Central

²⁹⁸ The UNCC was 'neither a court nor a tribunal with an elaborate adversarial process. Rather, the Commission was created as a claims resolution facility that could make determinations on a large number of claims in a reasonable time.' See [What we did: The Claims](#), United Nations Claims Commission website.

²⁹⁹ New Lines Institute, [Multilateral Action Model on Reparations](#), October 2022, p. 7.

³⁰⁰ *ibid.* See generally, Tania Babina et al, '[Assessing the impact of international sanctions on Russian oil exports](#)', Vox EU, April 2023.

³⁰¹ '[Ukraine crisis: Who is buying Russian oil and gas?](#)', BBC News, May 2023.

³⁰² New Lines Institute, [Multilateral Action Model on Reparations](#), October 2022, p. 7.

³⁰³ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention of the Crime of Genocide (Ukraine v Russia)*, International Court of Justice website.

³⁰⁴ European Court of Human Rights, *Ukraine v Russia (X)*, [Application No. 11055/22](#), European Court of Human Rights website.

³⁰⁵ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention of the Crime of Genocide (Ukraine v Russia)*, [Preliminary Objections](#), ICJ Rep 2024.

³⁰⁶ [UNGA Res ES/11/5](#), para. 2.

³⁰⁷ [UNSC Res 687](#), paras 17-18.

³⁰⁸ Jorge Liboreiro, '[EU vows to tax Russia's immobilised assets for Ukraine reconstruction](#)', Euro News, October 2023. This proposal was initially to be finalised before the summer break, but was postponed. Support has been received from US officials. See Vikotria Dendrinou and Christopher Condon, '[Yellen Backs EU Windfall Tax on Frozen Russian Assets](#)', Bloomberg, October 2023; Olena Mukhina, '[Bloomberg: EU to unveil plan to tap frozen Russian assets in December, sources say](#)', Euromaidan Press, November 2023.

³⁰⁹ Paola Tamma, Jacopo Barigazzi and Laura Hülsemann, '[EU leaders approve using profits from frozen Russian assets](#)', Politico, October 2023.

³¹⁰ '[Belgium seizes Russian Central Bank assets to create Ukraine fund](#)', Volterra Fietta.

Securities Depositories, who hold assets of the RCB. By investing liquid assets, entities such as Central Securities Depositories are generating windfall profits. Euroclear, a Brussels-based private clearinghouse and securities depository in Belgium, had to stop all payments to Russia as a result of sanctions. It is now in possession of almost €200 billion worth of assets and cash. These holdings generate gains: in the first nine months of this year, the Russian-sanctioned assets in the firm's holdings generated €3 billion in interest and €34 million in management costs. Euroclear is entitled to manage the assets but in principle cannot benefit from them. The Commission's proposal will 'pool together' the interest gained on invested RCB assets and channel them through the bloc's common budget to Kyiv.³¹¹

It is not clear whether this proposal complies with international law. Immunity and the principle of non-intervention will not be violated where there has been no change in ownership of the assets. To comply with international law, therefore, it would need to be shown that Russia has no ownership of the withheld profits (i.e. interest gained on invested RCB assets). The Central Securities Depositories Regulation,³¹² as well as other EU legislation and Euroclear procedures, suggests that, as they reach maturity, Russia's assets are reinvested to protect the company and its clients to, for example, manage risks and maximise returns.³¹³ Euroclear's website suggests that the income from reinvestment will no longer be considered Russia's income, but instead will be classified as belonging to Euroclear.³¹⁴ However, as has already been noted,³¹⁵ beyond this, it cannot be known where the property rights in interest have been assigned due to a lack of public access to contracts between Euroclear and its clients, such as the RCB.³¹⁶ The bare assets on RCB balance sheets do, however, belong to the RCB or other Russian entities and must be paid back once the sanctions are lifted in addition to the principal sum of the initially immobilised assets.³¹⁷

The proposal may also give rise to issues unrelated to international law obligations. The European Central Bank has expressed concern for the reputation of the euro as well as the security of European government bonds as a store of value for other central banks. Some have suggested that the EU coordinate with other states in the G7 to ensure that reputational loss is shared.³¹⁸

³¹¹ Liboreiro, '[EU vows to tax Russia's immobilised assets for Ukraine reconstruction](#)', Euronews, 27.10.2023.

³¹² [Regulation \(EU\) No 909/2014](#) of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, 23 July 2014. The main objective of the Central Securities Depositories Regulation is increasing 'the safety and efficiency of securities settlement and settlement infrastructures in the EU'. See [CSD Regulation](#), Euroclear.

³¹³ Artem Ripenko, '[Funding Ukraine's Aid: New Challenges](#)', EJIL:Talk!, December 2023.

³¹⁴ Matt Levine, '[Euroclear made some Russian money](#)', Bloomberg, October 2023.

³¹⁵ Artem Ripenko, '[Funding Ukraine's Aid: New Challenges](#)', EJIL:Talk!, December 2023.

³¹⁶ There are two possibilities arising out of a change in ownership over the income from reinvestment. First, if the interest belongs to Russia, it could be possible for states to order that Euroclear withhold the income, relying on countermeasures as a justification. However, states could not confiscate the income and transfer it to Ukraine, since doing so would be contrary to the rules on temporariness and reversibility (see section 5.1.3). Second, if the income belongs to Euroclear, on the basis of *Corfu Channel*, it could be possible to execute a judgment of an international court against assets held by a third party, subject to Euroclear's consent (see section 6.1.2). See International Court of Justice, *Corfu Channel (UK v Albania)*, [Compensation](#), ICJ Rep 1949, p. 244. It is not clear, however, how these options would operate in light of the Central Securities Depositories Regulation, and whether, for this reason, they would generate support from states.

³¹⁷ Artem Ripenko, '[Funding Ukraine's Aid: New Challenges](#)', EJIL:Talk!, December 2023.

³¹⁸ '[Why the EU will not seize Russian state assets to rebuild Ukraine](#)', The Economist, June 2023.

As a practical issue, the sum that this proposal will produce is relatively small. Belgium estimated that windfall contributions will generate around US\$3.3 billion a year,³¹⁹ in comparison to estimates of US\$411 billion worth of damage to Ukraine.³²⁰

5.4. Option 4: Placing RCB assets into an escrow account as collateral

Former Biden administration officials have proposed that immobilised Russian state assets could be placed into an escrow account,³²¹ which could be used by Ukraine as collateral for any new bonds that it could issue. In this case, RCB assets would be used to guarantee for future loans for Ukraine. The IMF has already issued a loan package of US\$15 billion for Ukraine, the first ever lending to a country at war, providing Ukraine with an amount nearing 10% of its total gross domestic product.³²² Loans of this type will assist in the reconstruction of Ukraine, and RCB assets could be used to secure future payments of this type. The RCB assets would remain untouched and serve only as a guarantee. If Ukraine could repay the debt (over a period of 10 to 30 years), Russia would be entitled to have its frozen assets back.³²³

This proposal would involve the confiscation of RCB assets to constitute the guarantee because Russia would lose ownership,³²⁴ which in turn would need justification in international law. As a countermeasure, using RCB assets as collateral would be a temporary and reversible measure, since the assets would be able to be returned to Russia once Russia has fulfilled its obligation to provide reparation. On this basis, it would be a lawful countermeasure.

5.5. Option 5: Identifying Russia as having financed terrorism

Another proposal is to find that Russia has financed terrorism within the meaning of the Warsaw Convention 2005,³²⁵ and rely on that Convention as a basis for the confiscation of RCB assets. There are 26 parties to the Warsaw Convention, including Ukraine.³²⁶ However, some of the largest administrators of frozen RCB assets, including Luxembourg, France, Germany, and the UK, have not ratified the Convention. Its parties are obliged to take measures to seize and confiscate property used or intended for use to finance terrorism or the proceeds obtained following this crime, which may permit the seizure of assets related to the financing of Russia's terrorist activities.

First, it is not clear that the Warsaw Convention will, of itself, be sufficient grounds for justifying the violation of a foreign state's immunity. It is not entirely clear that the Convention will permit the confiscation of state assets in the first place (in that it does not clarify whether the 'sponsor' of terrorism is to be an individual or a state under Articles 1 and 2), such that the Convention, as a result,

³¹⁹ Julia Payne, '[Windfall from Russia's frozen assets in Europe could be \\$3 billion a year, Belgium says](#)', Reuters, June 2023.

³²⁰ [Ukraine Rapid Damage and Needs Assessment](#), World Bank, March 2023, p. 9.

³²¹ David E Sanger and Alan Rappeport, '[U.S. and Europe Eye Russian Assets to Aid Ukraine as Funding Dries Up](#)', New York Times, December 2023. This report uses the terms 'escrow' and 'trust' interchangeably, with the understanding that they confer the same meaning.

³²² Kimberley Donovan and Maia Nikoladze, '[Global Sanctions Dashboard: What to do with Sanctioned Russian Assets](#)', Atlantic Council, March 2023; Volodymyr Verbyany and Eric Martin, '[Ukraine Clinches \\$15.6 Billion IMF Loan, a First for Nation at War](#)', Bloomberg, March 2023.

³²³ Monika Pronczuk and Eshe Nelson, '[Europe Vowed to Make Russia Pay for the War. It's Not That Easy](#)', The New York Times, July 2023.

³²⁴ In classic examples of escrow accounts, legal ownership is transferred to the administrator of the escrow account.

³²⁵ [Council of Europe Convention on Laundering Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism](#), CETS 198, 2005.

³²⁶ [Warsaw Convention 2005](#), United Nations Treaties Database.

is silent on the application of sovereign immunity to confiscatory action taken against state property.

Ukraine has, since the beginning of Russia's aggression, classified Russia as a terrorist state.³²⁷ The European Parliament has also identified Russia as a state sponsor of terrorism, and called upon states to adopt this conclusion.³²⁸ Russia's actions, including funding missile attacks on energy infrastructure, shopping centres, civilian apartment blocks, humanitarian convoys, and the Zaporizhzhya mining plant, have terrorised the Ukrainian civilian population, and will therefore likely fall under the definition of 'financing of terrorism' under the Warsaw Convention.³²⁹

In practice, the obligations under the Warsaw Convention are carried out as follows: if one of the parties to the Convention has initiated a criminal case related to terrorism against an individual (before a domestic court), it can demand other states to block or seize the property used for the financing of terrorism. If it is decided to confiscate the property of those engaged in terrorist activities, member states can take measures to implement this decision in their states.³³⁰ There are limitations within the Convention, which could prevent it from being used as a basis for confiscation of state property, and in particular RCB assets. Article 28 sets out the grounds upon which a state party could refuse to cooperate. Article 28(1) provides that cooperation may be refused where 'the action sought would be contrary to the fundamental principles of the legal system of the requested Party'. State immunity, sovereign equality or due process could fall within these 'fundamental principles'. The explanatory report to the Convention clarifies that this provision was intended to ensure that '[w]hen a request for confiscation relates to a case that, had it been a domestic case, would not result in a confiscation because of those laws, the requested Party should have the possibility of refusing cooperation'.³³¹ This would of course not be a barrier where the requested state amended its domestic legislation to permit the confiscation of RCB assets.

Articles 3 and 5 of the Warsaw Convention provide that confiscation may only be taken against assets that have been instrumental to the conduct of terrorism, which may be difficult to show in the context of RCB assets. Another issue with relying on the Warsaw Convention to justify the confiscation of RCB assets is whether confiscation will allow for the transfer of assets to Ukraine, should it request the cooperation of other states. Article 6 of the Warsaw Convention provides that '[e]ach Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.' However, the Convention's explanatory report provides that '[p]arties remain free to determine the

³²⁷ See, in general, International Court of Justice, [Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination \(Ukraine v Russia\)](#), 2017.

³²⁸ [European Parliament declares Russia to be a state sponsor of terrorism](#), Press Release, European Parliament, 23 November 2022.

³²⁹ Art. 1(h) adopts the definition set out in Art. 2 of the International Convention for the Suppression of the Financing of Terrorism, which defines the 'financing of terrorism' as occurring where a person 'by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [any act] intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.' See [International Convention for the Suppression of the Financing of Terrorism](#) 1999, Art. 2(1)(b).

³³⁰ Markiian Bem, '[Penalties against Terrorist State: Ways Council of Europe Could Assist in Confiscating Russian Assets](#)', European Pravda, August 2023.

³³¹ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism: [Explanatory Report](#), Committee of Ministers, 2005, para. 228.

best way of ensuring an adequate management of the assets',³³² and Article 25 states that '[w]hen acting on the request made by another Party in accordance with Articles 23 and 24 of this Convention, Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated property to the requesting Party so that it can give compensation to the victims of the crime or return such property to their legitimate owners'.

That said, due to: (i) the lack of clarity on whether the Warsaw Convention can apply to states in the first place; (ii) the limits imposed by domestic legislation with respect to state immunity; and (iii) the causal link requirement within the Convention, it is unlikely that this proposal will succeed in providing a basis for confiscation of RCB assets.

As noted above in section 4.1, an exception to immunity for state-sponsors of terrorism is not recognised under customary international law. The ICJ in *Jurisdictional Immunities* considered the so-called 'terrorism exception' contained in §1605A of the US Foreign Sovereign Immunity Act to be *sui generis*.³³³ Since that Judgment, only Canada has adopted similar legislation on a terrorism exception to immunity.

As Russia is a state party to the Warsaw Convention, there is an argument that it has impliedly waived its state immunity, but waivers of immunity generally need to express.³³⁴

Another option would be for states to rely on Article 75 of the Vienna Convention on the Law of Treaties (VCLT), which provides '[t]he provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor state in consequence of measures taken in conformity with the Charter of the United Nations with reference to that state's aggression', such as measures pursuant to the General Assembly resolutions condemning Russia's aggression or measures in support of the ICJ Order on Provisional Measures. States could rely on this provision as authority for the fact that, under international law, states may conclude a treaty that overcomes immunity where a state has violated its international obligation to refrain from acts of aggression.

5.6. Option 6: the European Commission's proposal for an Investment 'Common Fund'

The European Commission has proposed an Investment 'Common Fund', involving the creation of a structure to manage frozen RCB funds, invest them, and use the proceeds in favour of Ukraine.³³⁵ This proposal would involve 'active management through sound investment', allowing for the use of RCB assets 'on a temporary basis to generate resources to support Ukraine', allowing for the use of (i) all interest accrued on the assets; and (ii) interest accrued in excess of the contractually agreed

³³² Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism: [Explanatory Report](#), Committee of Ministers, 2005, para. 78.

³³³ International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [Judgment](#), ICJ Rep 2012, p. 99, para. 88.

³³⁴ *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, Ex parte Pinochet (No 3)* [1999] 1 AC 147.

³³⁵ [Options paper](#) by the European Commission on the use of frozen assets to support Ukraine's reconstruction, November 2022. This proposal is separate to the proposal mentioned in the paper for confiscating Russia's assets, selling them, and using revenue from sale in the common fund. This proposal has not been mentioned since the report, and the most recent discussion by the Commission has been for the EU to manage immobilised assets through investment. See AHWP Frozen Assets - Non-paper by the Commission services on the generation of resources to support Ukraine from immobilised Russian assets, WK 3926/2023 INIT, Council of the European Union, 21 March 2023. See also G7 Finance Ministers and Central Bank Governors' [Statement](#), European Council, October 2023.

sums.³³⁶ Once the sanctions against Russia are lifted, the assets could be returned. The European Commission has envisaged a system of voluntary contributions – whereby Member States could agree amongst themselves through a formal or informal agreement, and a system of incentives to transfer relevant revenues to the EU for Ukraine's reconstruction.³³⁷ However, mandatory transfer could be possible under Article 311, Treaty on the Functioning of the European Union (TFEU).³³⁸ On the current statistics, if, in accordance with the Commission's plan, the fund generates an annual return of 5 %, the EU could send between US\$1.7 billion to US\$3.6 billion a month to Ukraine indefinitely.³³⁹ Ukraine, however, has already pointed out that this amount would be insufficient to satisfy the economic demands of its reconstruction.³⁴⁰

5.6.1. Implication of state immunity and other legal issues

In general, property law provides that there is no distinction between a state's property right to the principal and its right to the returns generated by investing the principal. Consequently, Russia has ownership interests in both. 'If seizing Russia's assets is not permitted under international and domestic law ... then the same conclusion would follow for seizure of Russia's investment returns'.³⁴¹ Given that Russia would, legally speaking, own the returns generated on its assets, the transfer of the returns to Ukraine would create a change in ownership, implicating its immunity issues. One way of addressing this issue would be to argue that Russia did not intend for its RCB assets to generate profit, so it does not have a right to the profits generated through investment. According to Russian federal law, the RCB does not seek to 'derive profits', and its assets are instead used to 'organise and implement its currency regulation and currency control'.³⁴²

In any case, the transfer of the RCB assets to the common fund, if the EU were to adopt a centralised model,³⁴³ could raise similar issues. Such a transfer would pre-suppose a changing of the ownership of frozen RCB assets to give the mechanism sufficient control over them. It is not immediately clear, therefore, that the Commission's proposal would avoid the immunity issues, since it would still involve confiscation, even if temporarily.

5.6.2. Justifications

The Commission may turn to justifications, such as third-party countermeasures, in order to provide its proposal with greater legitimacy. Since under the proposal Russia will permanently be deprived

³³⁶ AHWP Frozen Assets - Non-paper by the Commission services on the generation of resources to support Ukraine from immobilised Russian assets, WK 3926/2023 INIT, Council of the European Union, 21 March 2023, p. 1.

³³⁷ [Options paper](#) by the European Commission on the use of frozen assets to support Ukraine's reconstruction, November 2022, pp. 5-6.

³³⁸ [Options paper](#) by the European Commission on the use of frozen assets to support Ukraine's reconstruction, November 2022, pp. 5-6.

³³⁹ AHWP Frozen Assets - Non-paper by the Commission services on the generation of resources to support Ukraine from immobilised Russian assets, WK 3926/2023 INIT, Council of the European Union, 21 March 2023, p. 7. See also Eleanor Runde, '[Why the European Commission's Proposal for Russian State Asset Seizure Should be Abandoned](#)', Just Security, March 2023: 'If the Commission's plan generates an annual return of 5%, Europe could send more than \$1 billion a month to Ukraine, indefinitely.'

³⁴⁰ Pavel Polityuk, '[Ukraine wants frozen Russian assets for war damage, not just interest](#)', Reuters, 9 November 2023.

³⁴¹ Laurence H Tribe, Raymond P Tolentino, Kate M Harris, Jackson Erpenbach, and Jeremy Lewin, '[The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine](#)', Renew Democracy Initiative, September 2023.

³⁴² Russian Federal Law No 86-FZ, 10 July 2002, Art. 3.

³⁴³ AHWP Frozen Assets - Non-paper by the Commission services on the generation of resources to support Ukraine from immobilised Russian assets, WK 3926/2023 INIT, Council of the European Union, 21 March 2023, pp. 8-9.

of the returns on RCB assets (which it legally owns), the Commission's proposal would fall short of meeting the temporariness and reversibility conditions for countermeasures.

Some argue that the proposal goes beyond what countermeasures allow in any case. 'If the funds belong to Russia, but are merely frozen, it is difficult to see how other countries have an ownership interest in the profits generated through investment.³⁴⁴ One way to bolster the reliance on countermeasures for this approach would be to ensure that the RCB assets remain delineated as Russian property, rather than commingled with other non-Russian funds. Using funds traceable to the Russian State would make it legally more justifiable, since the funds could then be returned when the countermeasure terminates, assuming Russia has complied with its obligation to provide full reparation.³⁴⁵

Finally, one commentator has questioned the proposal given that the Fund could undermine the punitive nature of sanctions. 'To be able to mobilise these assets and invest them, the EU would have to provide guarantees that in the event of losses, it would still honour its legal obligation to the lawful owner. This necessarily means that the EU must provi[de] for such losses that provide guarantees upfront. Setting up a fund to guarantee the Bank of Russia assets is costly, no matter how small it is. The EU should not incur any cost to manage the funds of a country that it sanctions. This would go against the punitive nature of sanctions and the optics of the EU setting up a *Bank of Russia reserves guarantee fund* sends the wrong message. Beyond the economic risk, there is also a legal risk.'³⁴⁶

5.6.3. Suitability

A key uncertainty is what would happen if investments were to drop in value, leading to legal action against states who support the Investment Fund with frozen assets. Some note that investing such large sums in a short period of time will be a challenging task, which could cause insecurity.³⁴⁷ The European Central Bank has also argued that it will be crucial to coordinate with the G7 in order to ensure that no single currency carries the burden of risk.³⁴⁸ There is also the question of whether the time and effort that would be required to establish the Fund would pay off, given that the returns

³⁴⁴ Ingrid Brunk Wuerth, '[Countermeasures and the Confiscation of Russian Central Bank Assets](#)'; Criddle, '[Turning Sanctions into Reparations: Lessons for Russia/Ukraine](#)'.

³⁴⁵ Zelikow, '[A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine](#)'.

³⁴⁶ Maria Demertzis, '[Bank of Russia's immobilised assets: What happens next?](#)', Bruegel, May 2023.

³⁴⁷ Demertzis, '[Bank of Russia's immobilised assets: What happens next?](#)'.

³⁴⁸ '[Why the EU will not seize Russian state assets to rebuild Ukraine](#)', *The Economist*, 20 June 2023. See also Martin Arnold and Laura Dubois, 'Risk in seizing Russian profits, warns Italy's central bank boss', *Financial Times Weekend*, 27-28 January 2024, p. 5.

on the investments are likely to be dwarfed by Ukraine's reconstruction costs,³⁴⁹ and the sums would be given out gradually rather than being available at once.

At a glance:

Option 1 – Enforcement of ECtHR judgments domestically: There is support in state practice and academic commentary for an exception to immunity for the enforcement of international judgments. This exception is also compatible with the nature and function of the law of immunity. Its applicability in each state will depend to an extent on rules of private international law and standing. However, the main problem is practical in that international judgment take years to reach the compensation phase and the amounts awarded fall short of what Ukraine's reconstruction will cost.

Option 2 – International Treaty setting up a compensation commission: Establishing an international commission for Ukrainian victims at the present stage of the conflict goes beyond past practice regarding claims commissions. In those cases, the target state had been defeated or the UN Security Council had made a determination of liability. Reliance could be placed on the UNGA's reference to Russia's responsibility for aggression.

Option 3 – Windfall contributions: The legality of placing a windfall tax on frozen Russian state assets depends on what the relevant contracts between the Central Securities Depositories and the RCB provide as to Russia's ownership of the taxed funds (ie. interest gained on invested assets). If the funds belong to Russia, states could only rely on countermeasures to withhold the sums, but not to transfer them to Ukraine, which would go against the rules on temporariness and reversibility. It would also be possible for states to attempt to execute an international judgment against the funds if they are held by Euroclear (with its consent), though it is unclear how this would be reconciled with the Central Securities Depositories Regulation.

Option 4 – Placing RCB assets in an escrow account as collateral: This option would involve the confiscation of RCB assets to constitute the guarantee because Russia would lose ownership, which would need a justification in international law. If this is designed as a temporary and reversible measure, it could constitute a lawful countermeasure.

Option 5 – Identifying Russia as having financed terrorism: Applying an exception to immunity on the basis that Russia has financed terrorism within the meaning of the Warsaw Convention 2005 and/or is a state sponsor of terrorism has a limited basis in state practice. The Warsaw Convention does not expressly waive Russia's immunity and key states are not parties to it. Furthermore, it is not clear that the Convention applies to states, and domestic limitations relating to state immunity may prevent states from cooperating with Ukraine. Finally, it will be difficult to show that RCB assets are linked to Russia's alleged financing of terrorism.

Option 6 – The European Commission's proposal for an Investment 'Common Fund': This option raises issues as to Russia's right to the returns generated by investing the principal (including those in excess of the contractually agreed sums). The change of ownership implicated by the transfer of the assets to the fund would have to be justified under international law (e.g., as a third-party countermeasure).

³⁴⁹ Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?', p. 13.

6. Conclusion

In conclusion, the avenues explored above show that confiscating RCB assets for the reconstruction of Ukraine will inevitably face legal difficulties, particularly those arising from state immunity. At the same time, it is widely recognised that action must be taken to hold Russia to account for its obligation to provide reparation.³⁵⁰ As set out in the Table of Risk Assessment, the most promising options in terms of compliance with international law are: (i) States justifying confiscation of RCB assets as third-party countermeasures with a conditional element, e.g., RCB assets are given as a loan to Ukraine, repayable in principle if and when Russia complies with obligation to make full reparation; (ii) States confiscate RCB assets based on an exception to immunity for the enforcement of international judgments ordering damages.

³⁵⁰ Members of the European Parliament have already demanded that assets from the Russian Federation or other entities or individuals directly in connection with Russia's war of aggression be used to reconstruct Ukraine. See: A long-term solution for Ukraine's funding needs, [Press Release](#), European Parliament, 5 October 2023.

Table 1 – Risk assessment

This table provides an overview of the risks associated with the options discussed in this report. For the detail on these various options, please see the analysis above. The evaluation of risk is based on the author's assessment of international law as it presently stands, drawing on customary international law, treaties, general principles, judicial decisions and scholarly analysis.

Risk assessment key:

Low (green, less than 30 % risk of non-compliance with international law)

Medium Low (yellow, 30-50 %)

Medium High (amber, 50-70 %)

High (orange, 70+ %)

Unlawful (red)

OPTION	LEGAL BASIS	RISK IN TERMS OF NON-COMPLIANCE WITH INTERNATIONAL LAW	COMMENT
<p>States justify confiscation of RCB assets as third-party countermeasures with a conditional element, e.g., RCB assets are given as a loan to Ukraine, repayable in principle if and when Russia complies with obligation to make full reparation (§5.1).</p>	<p>Customary international law of countermeasures, reflected in Article 54 ARSIWA</p>	<p>Low (less than 30 %)</p>	<p>There do not seem to be past examples of countermeasures with respect to the immunity of central bank assets, but this is not excluded by legal principles especially if the scheme has the goal of inducing Russia's compliance with its reparation obligation and the sums are in principle repayable to Russia if it meets that obligation. In reality, if Russia agrees to pay reparation one day, that amount is likely to exceed what has been 'confiscated' so there will not be any repayment owed Ukraine.</p>

OPTION	LEGAL BASIS	RISK IN TERMS OF NON-COMPLIANCE WITH INTERNATIONAL LAW	COMMENT
States confiscate RCB assets based on an exception to immunity for the enforcement of international judgments ordering damages (§4.1.4; §6.1).	Russia's acceptance of an international court's jurisdiction in e.g. the UN Charter and ECHR; the inapplicability of state immunity to the vertical relationship between an international court and domestic jurisdictions; case law (ICJ, <i>Corfu Channel</i> and <i>Belgium, Socobel</i>)	Low (less than 30 %)	A judgment ordering damages in favour of Ukraine will take time to be determined (two years or more); international courts rarely hand down large damages awards – the ICJ's largest award was US\$325 million, and the ECtHR's largest award was €1.9 billion
States confiscate assets from Russia's sovereign wealth fund that are not connected to the Russian Central Bank's monetary purposes (§3.2.3)	The law of state immunity; limited case law in Sweden and Belgium	Medium Low (30-50 %)	Russia's National Wealth Fund (RNWF) and Direct Investment Fund (RDIF) have assets located abroad, some of which are already immobilised.
States confiscate RCB assets through executive or legislative, rather than judicial, process, to avoid implicating state immunity (§4.1.1)	International instruments, case law (ICJ, <i>Jurisdictional Immunities</i>), domestic laws and state practice holding that immunity only applies to courts and other bodies exercising judicial functions	Medium Low (30-50 %)	Even if immunity is inapplicable, this does not mean that the confiscation is consistent with other international obligations such as sovereign equality and protections accorded to foreign-owned property
States confiscate RCB assets on the basis of an international treaty, establishing an international compensation commission (§6.2)	Past practice: Paris Agreement on Reparation of 1946 providing for the seizure of German public and private property located in the territory of the parties to the Agreement; UN Compensation Commission set up after Iraq's invasion of Kuwait in 1991, funded by a percentage of the proceeds generated by the export sale of Iraqi petroleum and petroleum products	Medium Low (30-50 %)	Risk would depend on whether the RCB assets are seized using e.g. a countermeasure justification and/or executive action; past practice is different in that the aggressor state was defeated or the UNSC passed a resolution.

OPTION	LEGAL BASIS	RISK IN TERMS OF NON-COMPLIANCE WITH INTERNATIONAL LAW	COMMENT
<p>The European Commission taxes windfall contributions on RCB assets held Central Securities Depositories (§6.3)</p>	<p>Contractual terms between RCB and Central Securities Depositories; the principles of property and financial services law in the relevant jurisdiction</p>	<p>Medium Low (30-50 %)</p>	<p>Risk depends on the contractual terms between the RCB and the Central Securities Depositories, in particular whether the interest above the contractually-agreed amount is owned by the Central Securities Depositories. This information is contained in contracts which are not publicly accessible. The law of state immunity will be implicated if the tax applies to assets owned by the RCB in which case countermeasures may need to be invoked. The scheme would only generate a small sum relative to Ukraine's reconstruction costs.</p>
<p>States place RCB assets into an escrow account as collateral for loans by to Ukraine. (§6.4)</p>	<p>The law of state immunity; the law of countermeasures; the principles of property and financial services law in the relevant jurisdictions</p>	<p>Medium Low (30-50 %)</p>	<p>This measure would require confiscation of RCB assets but could be justified as a countermeasure, as long as it is designed to induce compliance with the reparation obligation and is temporary and reversible.</p>
<p>States confiscate RCB assets in reliance on a newly established exception to immunity, applicable in narrowly defined circumstances (§4.1.3)</p>	<p>Evolving state practice and <i>opinio juris</i> reflected in, e.g., UNGA resolutions or regional practice</p>	<p>Medium High (50-70 %)</p>	<p>Customary rules take time to crystallise. The exception could be restricted to, e.g., when there is a large-scale armed aggression involving the violation of international humanitarian law and human rights law recognised by a UN principal organ.</p>
<p>States confiscate RCB assets justified as a measure of collective self-defence (§5.2)</p>	<p>Customary international law of self-defence reflected in Article 51 UN Charter and Article 21 ARSIWA</p>	<p>Medium High (50-70 %)</p>	<p>The measure can only be exercised while Russia's armed attack is ongoing and it is unclear whether it applies to non-forcible measures</p>

OPTION	LEGAL BASIS	RISK IN TERMS OF NON-COMPLIANCE WITH INTERNATIONAL LAW	COMMENT
<p>The European Commission establishes an Investment 'Common Fund' to manage RCB assets and generate profits to be transferred to Ukraine (§6.6).</p>	<p>The law of state immunity; the principles of property and financial services law in the relevant jurisdictions</p>	<p>Medium High (50-70 %)</p>	<p>This fund is expected only to generate an annual return of 5 %; great uncertainty about what would happen if the assets drop in value; there is no distinction between Russia's property right in the principal and its right to returns generated by investing the principal, countermeasures may not be a viable justification because Russia's property (i.e. the returns) would be permanently lost to Ukraine.</p>
<p>States confiscate RCB assets based on legislation identifying Russia as having financed terrorism (§6.5)</p>	<p>The Warsaw Convention which obliges states parties to take measures to seize and confiscate property used or intended for use to finance terrorism or the proceeds obtained following this crime; the law of state immunity</p>	<p>High (70+ %)</p>	<p>Some of the largest administrators of RCB assets, such as Luxembourg, are not parties to the Warsaw Convention; the Convention is silent on the application of immunity to state property; the ICJ has stated that state sponsorship of terrorism is not a customary exception to immunity (<i>Jurisdictional Immunities</i>).</p>

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This report analyses the options under international law for the confiscation of Russian state assets to support Ukraine's reconstruction. It focuses on Russian Central Bank assets, US\$300 billion of which are frozen in various jurisdictions. The report considers four avenues for overcoming Russia's immunity from enforcement: avoidance of immunity through purely executive or legislative action; justification for the breach of international law on the grounds that it is a countermeasure; evolution of international law to lift immunity from enforcement upon, for example, a finding of aggression by a United Nations principal organ; and an exception in international law for the enforcement of international judgments. The report addresses proposals based on third-party countermeasures and collective self-defence. It assesses six options under current review: enforcement of European Court of Human Rights judgments; an international treaty setting up a compensation commission; taxing windfall contributions; placing Russian state assets into an escrow account as collateral; identifying Russia as a state sponsor of terrorism; and the establishment of an investment 'common fund'. In conclusion, the report presents a risk assessment of each option, noting that (i) confiscation based on third-party countermeasures with a conditional element and (ii) confiscation based on the enforcement of international judgments against Russia are most likely to comply with international law.

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