Netherlands International Law Review (2023) 70:1–17
https://doi.org/10.1007/s40802-023-00231-7

ARTICLE

Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?

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Accepted: 4 April 2023 / Published online: 18 April 2023

Abstract
The war of aggression by a permanent member of the Security Council, combined with the availability of its assets on the territory of other states, creates an opportunity to solve one of international law's enigmas: the legality of third-party countermeasures in the general interest. Would confiscating Russia's frozen Central Bank assets and making the proceeds available to repair the war damage in Ukraine be permissible as such a countermeasure? This paper argues that state immunity cannot be relied upon to prevent the freezing or confiscation of foreign central bank assets by direct executive action; that freezing foreign state assets is permissible as a third-party countermeasure to stop a serious case of aggression; and that confiscation would not qualify as a countermeasure but may be permissible as a 'lawful measure' to repair the damage. Recent changes in Canadian legislation support the existence of such a permissive rule. On the other hand, controversial measures by the United States to control the assets of the Afghan Central Bank demonstrate the need for safeguards against abuse.

Keywords Russian Central Bank · Immunity · Asset freeze · Confiscation · Countermeasures

1 Introduction

On 28 February 2022, 4 days after Russia's armed forces invaded Ukraine, seven states holding Russian Central Bank assets (Austria, Canada, France, Germany, Japan, the United Kingdom and the United States, hereinafter referred to as G7[1])

[1] Strictly speaking, the reference to G7 is not correct because measures by EU member states were taken pursuant to decisions made within the framework of the EU's Common Foreign and Security Policy (CFSP).

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in a co-ordinated action prohibited all transactions with Russia's Central Bank by their citizens and on their territories.[2] As a result, Russia's Central Bank could no longer access its foreign assets, estimated at some $300 billion or about half of its total reserves.[3] According to the latest available figures from Russia's Central Bank itself, in June 2021 these assets were distributed as follows: France 12.2%, Japan 10%, Germany 9.5%, the United States 6.6%, the United Kingdom 4.5%, Austria 3%, Canada 2.8%.[4] This distribution is likely to have changed by the time of the invasion, however.

The damage caused by Russia's aggression against Ukraine cannot easily be overestimated. In March 2023, a joint assessment by the World Bank, the Government of Ukraine, the European Commission and the United Nations estimated the cost of reconstruction and recovery in Ukraine at $411 billion.[5] Physical damage was particularly high in the housing, transport, energy, commerce and industry, and agriculture sectors. Considerably higher damage estimates continue to be produced as the war progresses.

Natural justice[6] would seem to demand that the losses and damage caused by Russia's war of aggression must be borne by the Russian Federation and not by Ukraine or the international community. The $300 billion frozen by the G7 would cover only part of the damage, but it would be a start and there is the obvious appeal that the funds are already outside Russia's control. The establishment of an international compensation mechanism funded by Russia to compensate the victims would therefore seem eminently reasonable.

There is of course a precedent: the UN Compensation Commission (UNCC) established by the Security Council in 1991 to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait.[7] The UNCC was funded from a percentage of the proceeds from the sale of Iraqi oil (initially 30%, later gradually reduced to 5%).[8] Over a period of more than 30 years, the UNCC awarded a total amount of $52.4 billion to approximately 1.5 million claimants. Ironically, on 22 February 2022, 2 days before Russia invaded Ukraine, the Security Council terminated the UNCC's mandate because it had finished its work.[9] One wonders what Russia's representatives on the Security Council were thinking on that day. Did they realize that the spectre of the UNCC would come to haunt them? In any case, the mass claims procedure

[2] Art. 5a(4) EU Council Regulation No. 833/2014, as amended. US Treasury Directive 4, under Executive Order 14024.

[3] Russian Elites, Proxies, and Oligarchs Task Force Joint Statement, U.S. Department of the Treasury press release, 29 June 2022.

[4] Bank of Russia, Foreign Exchange and Gold Asset Management Report No. 1 (2022).

[5] Ukraine Rapid Damage and Needs Assessment, February 2022–February 2023, The World Bank, 23 March 2023.

[6] As the Permanent Court of International Justice observed 95 years ago: '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.' *Chorzow Factory (Germany v. Poland)*, Ser. A, No. 17, 1928, p. 29.

[7] Security Council Resolution 692 (1991).

[8] https://uncc.ch/compensation-fund.

[9] Security Council Resolution 2621 (2022).

conducted by the UNCC was widely considered a success and could of course be used as a template for a Compensation Commission for Ukraine.[10]

In view of the colossal damage caused by the invasion and the urgent need to rebuild Ukraine, the present article considers what role Russia's frozen Central Bank assets could play in this regard. Was it permissible to freeze these assets and would it be permissible to confiscate them and transfer the proceeds either directly to the Ukrainian Government or to an international compensation mechanism for Ukraine?

The article's scope is limited to questions concerning Russia's Central Bank assets. It is not concerned with measures taken against the assets of so-called oligarchs and other natural and legal persons targeted by individual sanctions. The attention paid in the media to the seizing and confiscation of yachts and mansions belonging to Russian oligarchs is understandable. However, the total amount of frozen oligarchs' assets is estimated at $30 billion, i.e., considerably less than the $300 billion Russian Central Bank assets that have been frozen.[11] Moreover, freezing and seizing oligarchs' assets raises separate legal questions, including the right to property that may be invoked and the nexus with criminal conduct that must be proven. It will often be difficult to demonstrate that the individuals in question were responsible for Russia's aggression and protracted litigation may be expected before confiscations can occur.

The legal questions raised by the freezing and possible confiscation of Russian Central Bank assets have already given rise to a lively scholarly discussion.[12] Much of that discussion has focussed on the permissibility of such measures under American law.[13] It should be kept in mind, however, that only a small part of Russia's frozen Central Bank assets is held in the United States. As noted above, most of these assets appear to be held in France, Japan and Germany. In any case, the present paper is concerned with the permissibility of restrictive measures against foreign central bank assets under international rather than domestic law. Domestic legislation will be considered but merely as evidence of state practice for the purpose of identifying rules of customary international law.

The article is structured as follows. Section 2 sketches the context by identifying the arguments made in UN General Assembly debates on the consequences of Russia's aggression against Ukraine. Section 3 considers whether central bank assets enjoy sovereign immunity. Section 4 analyses whether freezing Russia's Central Bank assets was permissible. Section 5 examines whether confiscating these assets for the purpose of providing reparation to Ukraine might be lawful. Section 6 presents some concluding observations.

[10] For such a proposal see Giorgetti et al. (2022).

[11] Russian Elites, Proxies, and Oligarchs Task Force Joint Statement, U.S. Department of the Treasury press release, 29 June 2022.

[12] The widest inventory of relevant legal issues may be found in Moiseienko et al. (2022).

[13] E.g., Boyle (2022), Tribe (2022), Anderson and Keitner (2022), Stephan (2022).

2 UN General Assembly Debates

On 14 November 2022, the UN General Assembly adopted a resolution recognizing that Russia must be held accountable for its aggression against Ukraine, that it must bear the legal consequences of its internationally wrongful acts and that it must repair the damage caused.[14] The resolution's title leaves no doubt about its intentions: 'Furtherance of remedy and reparation for aggression against Ukraine.' The Assembly also recognized 'the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation of damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation'. The resolution was adopted by 94 votes in favour, 14 against and 73 abstentions.

The voting record on the General Assembly's 'remedy and reparation' resolution was less convincing than the vote on the 'aggression against Ukraine' resolution adopted 8 months earlier, which '[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter'.[15] The vote on this earlier resolution was 141 in favour, 5 against (Belarus, North Korea, Eritrea, Russia and Syria) and 35 abstentions. What explains this reluctance on the part of many member states to support the creation of a compensation mechanism for Ukraine even though they had earlier agreed in no uncertain terms that Russia had committed aggression?[16]

From the delegations' explanations of vote on the General Assembly's 'remedy and reparation' resolution three major legal objections may be distinguished.[17] First, it was argued that the Assembly was acting as a judicial body by holding Russia liable for having committed the internationally wrongful act of aggression (Russia, Eritrea,[18] Sri Lanka, North Korea, China); second, it was regretted that the mechanism would not report to the General Assembly or another UN body but would be set up unilaterally by some member states (Russia, Eritrea, Saudi Arabia,[19] Bahamas,[20] Egypt, Pakistan, South Africa); third, it was suggested that funding a compensation mechanism with Russia's frozen Central Bank assets would be incompatible with international standards on the sovereign immunity of state property (Russia, Sri Lanka, Nicaragua, North Korea, Venezuela, Iran).

The first two objections are not difficult to refute. The Assembly had already agreed, by a very large majority, that Russia had committed aggression against Ukraine. It would not seem to be a big step to then conclude that Russia is therefore obliged to repair the damage caused by its internationally wrongful act. As for the

[14] UN General Assembly Resolution ES-11/5 of 14 November 2022.

[15] UN General Assembly Resolution ES-11/1 of 2 March 2022.

[16] For a critical review of the resolution, see Moustafa Essawy (2023).

[17] UN General Assembly, summary records of the 11th Emergency Special Session, 14 November 2022, UN Doc. A/ES-11/PV.15.

[18] Speaking on behalf of Angola, Belarus, Bolivia, Cambodia, China, Cuba, North Korea, Equatorial Guinea, Eritrea, Iran, Laos, Nicaragua, Palestine, Saint Vincent and the Grenadines, Syria, Venezuela and Zimbabwe.

[19] Speaking on behalf of the six states members of the Gulf Cooperation Council (GCC).

[20] Speaking on behalf of the 14 states members of the Caribbean Community (CARICOM).

second objection, certainly it would be preferable if the compensation mechanism would be created as a subsidiary body of the Security Council, but such a proposal would no doubt be vetoed by Russia. Because of the lack of unanimity among its permanent members the Security Council has referred the matter of Russia's aggression against Ukraine to the General Assembly, under the Uniting for Peace procedure.[21] Under Article 14 of the UN Charter, the General Assembly 'may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'. As the International Court of Justice has pointed out, 'while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory'.[22]

The third objection raises questions of international law that will be discussed in the following section.

3 Immunity

Central banks tend to enjoy a considerable degree of autonomy from governments but from the point of view of international law they are nevertheless regarded as organs of the state. The UN Convention on Jurisdictional Immunities of States and their Property (2004) accordingly refers to central banks as 'other monetary authority of the state'.[23] It has therefore been suggested that central bank assets enjoy sovereign immunity and that taking measures against these assets would be incompatible with the Convention.[24]

The Convention has not yet entered into force, it currently has 23 of the required 30 parties.[25] Nevertheless, as pointed out in the preamble, the Convention purports to be a codification of customary international law. Interestingly, the Convention's parties include three states that have frozen Russia's Central Bank assets, i.e., Austria, France and Japan. Apparently, they did not regard their measures as incompatible with their obligations under the Convention.

Several years before Russia's invasion of Ukraine Tom Ruys asserted that financial sanctions against central banks are not incompatible with the Convention.[26] This is because Part IV of the Convention regulates 'State immunity from measures of constraint in connection with proceedings before a court'. The freezing of Russian Central Bank assets was conducted by direct executive action and not through

[21] Security Council Resolution 2623 (2022) of 27 February 2022.

[22] *Certain expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151 at p. 163.

[23] Art. 21.

[24] Thouvenin and Grandaubert (2019), p. 247; Goldman (2022).

[25] The Russian Federation has signed but not ratified the Convention. The Netherlands may accede to the Convention in the course of 2023. See *Kamerstukken II* [Parliamentary Documents II] 2022/23, 36027.

[26] Ruys (2019), reviewed with approval by O'Keefe (2021), p. 712. In the same vein, Wuerth (2022).

'measures of constraint in connection with proceedings before a court'. The conclusion must therefore be that since the freezing orders by the G7 did not involve attachment, arrest or execution they did not breach international immunity law.[27]

Although this finding makes sense on the face of it, it can be criticized on two grounds. First, on the ground that it would be rather incongruous if central bank immunity could be invoked against intervention by the judicial branch but not against intervention by the executive branch.[28] Second, on the ground that drawing a sharp distinction between judicial and executive action may be difficult to apply in practice, for example when an executive order to seize foreign state property must first be authorised by a judge before entering into effect.[29] Time will tell whether objections along these lines will succeed in court.

In a case brought before the International Court of Justice Iran argued inter alia that the United States had, through its measures against the assets of Iran's Central Bank (Bank Markazi), breached the immunity of those assets. However, the Court found that it lacked jurisdiction to consider this claim because a claim based on the right to sovereign immunity under customary international law did not fall within the scope of the compromissory clause of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.[30]

4 Freezing

The freezing of the foreign assets of Russia's Central Bank is an internationally wrongful act because it amounts to unlawful (indirect) expropriation of state property, or 'outright thievery' in the colloquial terms of Russia's Foreign Minister Sergey Lavrov.[31] This raises the question whether the asset freeze was permissible as a countermeasure, i.e., a measure against a state responsible for an internationally wrongful act to induce it to comply with its obligation not to commit aggression. Moreover, since the measure was undertaken collectively by the G7, was it permissible as a third-party countermeasure?

It is now well accepted that a state that has breached an obligation towards the international community may be held accountable by states that were not directly injured. Under Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) such states may claim the cessation of the internationally wrongful act and the performance of the obligation of reparation in the interest of the injured state.[32] The provision stops short of allowing third states to

[27] Wuerth (2022).

[28] For a response to this criticism see Ruys (2019), pp. 709–710.

[29] See, for example, Subsection 5.1(a) of the Canadian Special Economic Measures Act, infra n. 67. See (Wuerth) Brunk (2023), p. 20.

[30] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, ICJ Reports 2019, p. 7 at p. 21, para. 80.

[31] See infra, n. 56.

[32] Articles on Responsibility of States for Internationally Wrongful Acts, taken note of by UN General Assembly Resolution A/RES/56/83 of 28 January 2002.

take countermeasures to induce the responsible state to comply with its obligations. Whether not directly injured states may take unilateral countermeasures in response to serious violations of community interests is a long-standing debate in international law.[33] In its Commentary the International Law Commission (ILC) observed that at present there appeared to be no clearly recognised entitlement of states referred to in Article 48 to take countermeasures in the collective interest.[34] However, state practice appears to be moving to a situation in which the entitlement to take countermeasures no longer distinguishes between directly and indirectly injured states.[35] According to a resolution adopted by the Institut de Droit International: 'Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed […] are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach.'[36]

Aggression is no ordinary breach of an international legal obligation, however. Article 41 ARSIWA provides for a special regime to respond to serious breaches of an obligation arising under a peremptory norm of international law. The prohibition of aggression is of course the peremptory norm *par excellence*.[37] Under that regime states 'shall cooperate to bring to an end' such a breach. The asset freeze by the G7 is apparently such a form of cooperation.[38] Moreover, the ban on transactions with Russia's Central Bank assets has all the characteristics of a countermeasure. The frozen assets remain untouched and control thereover can be returned to Russia after it has ended its aggression. The asset freeze is therefore a permissible third-party countermeasure to induce Russia to halt its aggression against Ukraine (although unfortunately the G7 did not couch their measure in these terms).[39]

The General Assembly has by a large majority '[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine'.[40] This determination is authoritative because the lack of unanimity among its permanent members has prevented the Security Council from exercising its primary responsibility for the maintenance of international peace and security.[41] The Security Council therefore decided to call an emergency session of the General Assembly to consider the

[33] See, e.g., Tams (2011), pp. 390–392.

[34] Commentary to Art. 54 ARSIWA, para. 6.

[35] For thorough assessments of state practice see Katselli Proukaki (2009) and Dawidowicz (2017).

[36] Institut de Droit International, Krakow session, Resolution on Obligations *Erga Omnes* in International Law, adopted on 27 August 2005.

[37] See, for example, Conclusion 23 of the ILC's Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), ILC Report of its 37th session, UN Doc. A/77/10, para. 43.

[38] The Commentary at para. 2 to Art. 41 ARSIWA specifically envisages such a form of 'non-institutionalised co-operation'.

[39] In this sense also, Report by the Netherlands Advisory Committee on Questions of Public International Law, Legal Consequences of a Serious Breach of a Peremptory Norm: The International Rights and Duties of States in Relation to a Breach of the Prohibition of Aggression (2022), pp. 12–18.

[40] UN General Assembly Resolution ES-11/1 of 2 March 2022.

[41] UN Security Council Resolution 2623 (2022) of 27 February 2022.

matter.[42] China's objection that the General Assembly has no authority to act as an international judicial body[43] is therefore unconvincing. The Assembly has previously made determinations that aggression had been committed by South Africa (in respect of Namibia), Israel (in respect of occupied Palestinian territory and Iraqi nuclear installations) and the United States (in respect of Grenada and Panama).[44]

There can be little doubt about the serious nature of Russia's breach. A year after the beginning of the invasion, Russia's aggression continues unabated, in the face of even a binding interim measure by the International Court of Justice that Russia must immediately suspend its military operations in the territory of Ukraine.[45] Compared to the seriousness of the breach and the resulting widespread loss of life, the freezing of Russia's Central Bank assets would seem to be a minor interference that could not possibly be considered disproportional.[46]

The freezing of foreign central bank assets is not a novelty. The G7 were able to move so quickly on Russia's Central Bank assets precisely because they already had considerable experience with asset freezes of foreign banks. Some of these freezes were imposed pursuant to Security Council decisions[47] but the United States and member states of the European Union have also imposed asset freezes at their own initiative that continue to this day. For example, Syria's Central Bank assets have been frozen by the member states of the European Union since 2012.[48] Iran's Central Bank assets have been frozen by the European Union[49] and the United States[50] since 2012. Afghanistan's Central Bank assets have been frozen by the United States since 2021.[51] These measures all duly refer to the relevant provisions of EU and US law on which they are based but they do not provide a legal justification under international law. Asset freezes have not only been imposed by Western states. In 2011, the member states of the Arab League banned all transactions with Syria's Central Bank.[52]

These measures have generated few formal protests, but they have not remained entirely unchallenged either. Some of the states that have been targeted in this way voice their objections each year under the UN General Assembly's agenda

[42] Ibid.

[43] UN Doc. GA/12470, 14 November 2022, p. 6.

[44] ILC Report of its 73rd session, UN Doc. A/77/10 (2022), p. 74.

[45] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional measures, Order of 16 March 2022.

[46] See Art. 51 ARSIWA.

[47] Asset freezes were imposed, for example, on Libya's Central Bank pursuant to Security Council Resolution 1970 (2011).

[48] Council Regulation No. 168/2012 of 27 February 2012 Concerning Restrictive Measures in View of the Situation in Syria.

[49] Council Decision 2012/35/CFSP of 23 January 2012 Concerning Restrictive Measures against Iran.

[50] Executive Order 13599 of 5 February 2012—Blocking Property of the Government of Iran and Iranian Financial Institutions.

[51] 'Biden Administration Freezes Billions of Dollars in Afghan Reserves, Depriving Taliban of Cash', Washington Post, 17 August 2021.

[52] 'Syria Defiant as Arab League Votes for Financial Sanctions', The Guardian, 27 November 2011.

item on economic coercion against developing states.[53] The Coordinating Bureau of the Non-Aligned Movement in 2016 adopted a communiqué arguing that the United States had violated sovereign immunity by permitting private plaintiffs to bring claims against sovereign states, including Iran.[54] The case that Iran brought against the United States at the International Court of Justice was already referred to above.[55]

Russia's reaction to the freezing of its Central Bank assets was more subdued than might perhaps have been expected. Foreign Minister Sergey Lavrov called the freezing and possible confiscation of central bank assets 'outright thievery'.[56] However, no diplomatic steps were apparently taken to object to the freezing. Lavrov is reported to have said 'that no one could have predicted' that Western states would have targeted Russia's Central Bank reserves. This sounds like making excuses for the failure of his ministry to foresee the measures. Presumably, Lavrov's legal department was not asked to prepare a risk assessment prior to the invasion of Ukraine. If it had been asked to do so, it might have suggested that it would be a good idea to return any Central Bank assets to Russia before the start of the incursion.

The head of Russia's Central Bank, Elvira Nabiullina, is reported to have said that Russia was preparing legal action to unfreeze its assets[57] but no details of such steps have so far been reported. Russia could for example invoke the international arbitration clauses of relevant investment treaties and argue that its property had been unlawfully expropriated. At the time of writing, the Russian Federation is a party to bilateral investment treaties with Austria, Canada, France, Germany, Japan and the United Kingdom.[58]

[53] The latest UN Secretary-General's report includes protests by Iran, Iraq, Russia and Syria. See Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries, UN Doc. A/76/310, 30 August 2021.

[54] Communiqué of the Coordinating Bureau of the Non-Aligned Movement in Rejection of Unilateral Actions by the United States in Contravention of International Law, in Particular the Principle of State Immunity, UN Doc. A/70/861, 5 May 2016.

[55] See the text accompanying n. 30.

[56] 'Sergey Lavrov Admits Russia Was Surprised by the Scale of Western Sanctions', Politico, 23 March 2022.

[57] 'Russia "Preparing Legal Action" to Unfreeze 600bn Foreign Currency Reserves', The Guardian, 19 April 2022.

[58] See https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation.

5 Confiscation

The traditional laws of war prohibit the taking of private enemy property (pillage) but allow the taking of enemy state property.[59] In the United States, for example, the International Emergency Economic Powers Act allows the President to 'vest' assets from states with which the United States is engaged in armed hostilities.[60] This provision was employed in 2003, when the United States was at war with Iraq, to 'vest' Iraqi Central Bank assets to assist inter alia in the reconstruction of Iraq.[61] As a belligerent state at war with Russia, Ukraine would accordingly be entitled to confiscate any Russian Central Bank assets in the unlikely event that they were found on its territory. However, the states that have frozen Russia's Central Bank assets are not in armed conflict with Russia and the laws of war therefore do not apply.

Under general international law, by its aggression against Ukraine Russia has committed an internationally unlawful act for which Ukraine is entitled to reparation. Moreover, because Russia has breached an obligation owed towards the international community as a whole, all states are entitled to insist on reparation for Ukraine.[62] The UN General Assembly has already concluded 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'.[63] Could third states not merely insist on reparation for Ukraine but also take measures to enforce that obligation by confiscating the frozen Russian Central Bank assets and making the proceeds available for the reconstruction of Ukraine?

It has been argued that the instrument of third-party countermeasures could be employed for this purpose ('a novel use of state countermeasures that may seem unfamiliar').[64] However, confiscating Russia's Central Bank assets would be fundamentally different from merely freezing them. Confiscation (also called seizing or sequestering or vesting, depending on the jurisdiction) would be irreversible and not aimed at inducing Russia to stop its aggression but at repairing the damage that it has caused. Moreover, seizing assets and directly making the proceeds available for the rebuilding of Ukraine is not the same as claiming reparation in the interest of the injured state.[65] Confiscation would therefore lack the essential characteristics of a countermeasure and cannot be qualified as such.

However, when the ILC drafted the ARSIWA it realized that it needed to leave room for future developments. In its Commentary it pointed out that the practice of

[59] Art. 13 Lieber Code (1863): 'A victorious army appropriates all public money, seizes all public moveable property until further direction by its government.' Art. 53 Regulations Respecting the Laws and Customs of War on Land (1907): 'An army of occupation can only take possession of cash, funds and realizable properties which are strictly the property of the State…' See also, Moiseienko (2022).

[60] International Emergency Economic Powers Act (1977) as amended in 2011, 50 U.S.C. 1702(c). See Stephan (2022) and Boyle (2022).

[61] Executive Order 13290 of 20 March 2003: Confiscating and Vesting Certain Iraqi Property.

[62] Art. 48(2)(b) ARSIWA.

[63] UN General Assembly Resolution ES-11/5 of 14 November 2022, para. 2.

[64] Zelikow (2022).

[65] See (Wuerth) Brunk (2023), p. 34.

third-party countermeasures in the collective interest was still 'limited and rather embryonic'.[66] It could not therefore include a provision on the subject, but it decided to adopt 'a savings clause which reserves the position and leaves the resolution of the matter to future developments'. Accordingly, Article 54 ARSIWA provides that Article 48 ARSIWA was without prejudice to the right of not directly injured states to take 'lawful measures […] to ensure reparation in the interest of the injured State'. The ILC pointed out that Article 54 'speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest'.

The exceptional circumstances of a war of aggression waged by a permanent member of the Security Council (so that the Security Council is unable to act) combined with the availability of its financial assets on the territory of third states may be regarded as sufficient ground for such a 'future development' anticipated by the ILC. Accordingly, it can now legitimately be maintained that the G7's confiscation of Russia's foreign Central Bank assets and making the proceeds available to rebuild Ukraine would be permissible under international law as a 'lawful measure' envisaged by Article 54 ARSIWA.

Among the clearest indications that the confiscation of foreign central bank assets for this purpose may indeed be permissible are the recently adopted amendments to Canada's Special Economic Measures Act.[67] According to these amendments, Canadian authorities may confiscate property situated in Canada and held by a foreign state if 'a grave breach of international peace and security has occurred that has resulted or is likely to result in an international crisis' or 'gross and systematic human rights violations have been committed in a foreign state'. The proceeds may inter alia be used for 'the reconstruction of a foreign state affected by a grave breach of international peace and security' or for 'the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption'. While these provisions have not so far been relied upon to confiscate frozen Russian Central Bank assets, they appear to reflect *opinio juris* that in exceptional circumstances the confiscation of foreign central bank assets for the purpose of providing reparation to an injured state or its inhabitants may indeed be permissible even if the confiscating state is not itself involved in armed conflict with the state owning the assets.

However, two recent cases demonstrate the risk of arbitrariness when host states decide to exercise control over the assets of foreign central banks. In 2019, the United States decided to recognize Juan Guaidó as the interim president of Venezuela instead of Nicolas Maduro and gave him control over assets of the Venezuelan National Bank that were being held in the United States.[68] This decision may be

[66] Commentary to Art. 54 ARSIWA, para. 3.

[67] Sections 4(1)(b) and 5(6) Special Economic Measures Act, as amended on 23 June 2022. See Curry (2022).

[68] 'Venezuelan Opposition Leader Guaidó Controls U.S. Bank Accounts, State Dept. Says', New York Times, 19 January 2019.

regarded as a matter not of confiscation but of the recognition of a government since the United Sates did not retain control over the assets.

More worrisome are the measures taken by the United States to exercise control over the frozen assets of Afghanistan's Central Bank.[69] On 14 September 2022, the United States established a 'Fund for the Afghan People' and transmitted half of the previously frozen assets, estimated at some $3.5 billion, to the Fund.[70] The purpose of the Fund (set up in Switzerland) is to 'protect, preserve, and make targeted disbursements of that $3.5 billion to help provide greater stability to the Afghan economy'. The Fund will be administered by a board consisting of the US Ambassador to Switzerland (chair), two handpicked Afghan financial experts and a Swiss official.[71] Since decisions require unanimity, 'the United Sates controls the board's agenda, through the chair, and is given a veto over the board's decisions'.[72] The aim is for these funds to be returned to the Afghan Central Bank in the long term, but only if the bank first meets certain criteria. The other $3.5 billion of the frozen funds 'remains potentially available to terrorist victims to recover the damages that they have been awarded in suits against the Taliban'.[73] 'The executive order sought to balance the humanitarian needs of Afghanistan with the moral and political imperative of allowing terrorist victims and their families the opportunity to have their claims to the [Afghan Central Bank] assets heard in court, and split the money accordingly.'[74]

These measures are problematic for several reasons. To begin with, by specifically keeping half of the frozen assets available for attachment by victims of the 9/11 attacks the administration fails to acknowledge that under customary international law central bank accounts enjoy immunity from proceedings before a court.[75] It does not appear as if this rule could be set aside by a 'terrorist exception' created under domestic law.[76] Although the measures envisage that what is left of the funds will ultimately be returned to the Afghan Central Bank, they amount, in effect, to a permanent change of ownership or confiscation.[77] It is difficult to comprehend what could give the United States the right to recognize two handpicked economists as the new representatives of Afghanistan and then hand them (shared) control over Afghanistan's Central Bank assets.[78] Moreover, the criteria that must be met by the Afghan Central Bank before it can regain its funds are paternalistic to say the least.

[69] See Anderson (2022).

[70] Joint Statement by the U.S. Treasury and State Department: The United States and Partners Announce Establishment of Fund for the People of Afghanistan, 14 September 2022.

[71] 'The United States Establishes Fund for the Afghan People from Frozen Afghan Central Bank Assets', (2023) AJIL 117:139–144, at pp. 143–144.

[72] Ibid., at p. 144.

[73] Ibid., at p. 139.

[74] Ibid., at p. 141.

[75] See supra, Sect. 3.

[76] See (Wuerth) Brunk (2022).

[77] Ibid.

[78] Ibid.

The European Commission has recently floated a possible intermediate solution for dealing with the frozen Russian assets: investment, somewhere halfway between freezing and confiscation. In a press release the Commission suggested:

> *In the short-term*: set up a structure to manage the frozen public funds, invest them and use the proceeds in favour of Ukraine. *In the long-term*: once the sanctions are lifted, the Central Bank assets will need to be returned. This could be linked to a peace agreement, which compensates Ukraine for the damages it has suffered. The assets that would need to be returned, could be offset against this war reparation.[79]

The Commission's attempt to come up with a creative solution is laudable. The proposal combines some of the characteristics of both freezing and confiscation. Since the proposal envisages that the assets 'would need to be returned', it appears to stop short of confiscation. However, Russia would certainly regard it as a hardly disguised form of confiscation. It is unclear what would happen if the investments were to drop in value. Moreover, the fruits of the investments are likely to be minimal in comparison to Ukraine's needs so that it may be questioned whether it is worth all the trouble. At the time of writing, it is not yet clear whether (a version of) the Commission's proposal will be pursued further.

In the absence of much evidence that the confiscation of foreign central bank assets for the purpose of providing reparation to a state injured by aggression is permitted under international law, it may be asked whether such measures are prohibited. There can be little doubt that confiscation for such purposes would be frowned upon by many non-Western states. They might regard confiscation, even more so than freezing, as a form of 'vigilantism' or even economic coercion.[80] Whatever the status of the prohibition of economic coercion in international law,[81] it reflects a sentiment that deserves to be taken seriously because in practice these measures can only be taken by powerful states. At the same time, those powerful states are unlikely to act rashly because they wish to maintain the attractiveness of their banks as depositories of foreign central bank assets.[82] Strict safeguards against abuse are therefore in the interest of all parties.[83]

[79] 'Ukraine: Commission presents options to make sure that Russia pays for its crimes', European Commission press release, 30 November 2022 (emphasis in the original). A somewhat less explicit version appears in the paper itself: Options paper by the European Commission on the use of frozen assets to support Ukraine's reconstruction, https://www.politico.eu/wp-content/uploads/2023/02/07/Use-of-assets-option-paper_19-Nov-2022_final_clean.docx.

[80] See, most recently, UN General Assembly Resolution 76/191, Unilateral economic measures as a means of political and economic coercion against developing countries, 17 December 2021.

[81] On which see Tzanakopoulos (2015) and Hofer (2017).

[82] See 'Yellen: Not legal for U.S. to seize Russian official assets', Reuters, 18 May 2022 ('U.S. Treasury officials have also expressed concerns about setting precedents and eroding other countries' confidence in holding their central bank assets in the United States.').

[83] For a discussion of such safeguards, see the Report by the Netherlands Advisory Committee on Questions of Public International Law, Legal Consequences of a Serious Breach of a Peremptory Norm: The International Rights and Duties of States in Relation to a Breach of the Prohibition of Aggression (2022), pp. 15–16 and Ruys (2017), pp. 47–49.

6 Concluding Observations

This article has considered whether freezing and confiscating Russia's foreign Central Bank assets for the purpose of rebuilding Ukraine is permitted under international law. We found that sovereign state immunity is not implicated by freezing or confiscation measures, because central bank assets do not enjoy immunity from direct executive action. The reason for this is that the international law of state immunity, as codified in the UN Convention on Jurisdictional Immunities of States and their Property, only protects such assets against 'measures of constraint in connection with proceedings before a court'.

We saw that freezing and confiscation differ in their methods and in their objectives. *Freezing* Russia's foreign Central Bank assets was a reversible measure aimed at inducing Russia to halt its aggression against Ukraine. As such, it was permissible as a third-party countermeasure aimed at the cessation of a serious breach of an obligation under a peremptory norm of international law. This conclusion is supported by state practice consisting of freezing measures previously taken by the member states of the European Union, the United States and other states against the foreign assets of the central banks of Syria, Iran and Afghanistan.

Confiscation of Russia's Central Bank assets would not qualify as a countermeasure because it would be an irreversible measure aimed at repairing the damage done to an injured state. However, the new provisions of Canada's Special Economic Measures Act specifically authorising the authorities to confiscate a foreign state's property to repair injury suffered by another state, represent evidence of *opinio juris* supporting such a permissive rule of customary international law.

The ILC decided to leave room for future developments by adopting a savings clause according to which the ARSIWA were without prejudice to the right of not directly injured states to take 'lawful measures […] to ensure reparation in the interest of the injured State'.[84] The exceptional circumstances of a war of aggression by a permanent member of the Security Council combined with the availability of its assets on the territory of the G7 may be regarded as such a 'future development' justifying the adoption of 'lawful measures'.

For reasons of legitimacy and feasibility, the preferred approach remains a peace settlement with Russia that would include the matter of the frozen funds. The funds could be used as a bargaining chip in the negotiations. Like most wars, Russia's war with Ukraine will have to end with a peace settlement that covers three broad elements: control over territory, prosecution of perpetrators and reparation for victims. For the first two elements there are plenty of tools in the international legal toolbox. Borders may be defined, peacekeeping may be organized, referenda may be held, minority rights may be guaranteed, international supervision may be organised, ad hoc international criminal tribunals and hybrid courts may be set up. The toolbox is rather empty, however, when it comes to ensuring that victims receive reparation.

[84] Art. 54 ARSIWA.

If no agreement can be reached on a peace settlement, negotiators should be aware that Russia's frozen Central Bank assets may be confiscated, and the proceeds made available for the rebuilding of Ukraine. Measures of this kind are not to be taken lightly, however. Because of the factual inequality between states, concerns about vigilantism and economic coercion (reflected in the General Assembly debates summarised at the beginning of this article) should be taken seriously. At the same time, states hosting foreign central bank assets are understandably concerned about their continuing ability to attract such deposits. Without due diligence, there is plenty of opportunity for abuse on political grounds. The highly arbitrary way in which the United States took control of the foreign assets of the Afghan Central Bank serves as an ominous example of how things can go wrong.

There must therefore be safeguards against abuse. In order to ensure coherence in the international legal framework, such safeguards should be consistent with Articles 40–54 ARSIWA. A sufficiently high threshold could be 'a serious breach of the prohibition of aggression' and not the broad wording adopted in Canada's Special Economic Measures Act ('a grave breach of international peace and security' and 'gross and systematic human rights violations'). The existence of such a situation should be authoritatively determined by a competent international body. The measures should be proportional[85] and aimed at 'reparation in the interest of the injured State'.[86] The legal justifications for the measures should be publicly explained to counter the suspicion that they are politically motivated. Perhaps most importantly, in order to achieve wide support and accountability, the measures should be carried out under the auspices of the UN Security Council or, if that is not possible because of the exercise of the power of veto, the UN General Assembly and be modelled on the UNCC.

Finally, apart from its legality, it should not be overlooked that attempts to confiscate Russia's frozen Central Bank assets might run into serious practical difficulties. Freezing these assets was straightforward, it merely involved prohibiting transactions. Confiscation would be more complicated since it requires exact knowledge of the location of the assets. One year after the decision to freeze Russia's Central Bank assets within the European Union they have still not been exactly located.[87]

Acknowledgements Thoughtful comments from Marcel Brus, Cedric Ryngaert and Jure Vidmar are gratefully acknowledged.

Data Availability Data sharing not applicable to this article as no datasets were generated or analysed during the current study.

[85] Art. 51 ARSIWA.

[86] Art. 54 ARSIWA.

[87] See the reply to question 3939/2022 by member of the European Parliament Urmas Paet, 23 January 2023.

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