

# Frozen Russian Assets and the Reconstruction of Ukraine

## Legal Options



RESEARCH PAPER

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**Spotlight on Corruption** is an anti-corruption charity that works to ensure the UK has strong anticorruption laws which are robustly enforced in order to reduce impunity for corruption globally, drive out dirty money from the UK and its dependent territories, and recover more corrupt assets which can be returned to their countries of origin and used to benefit the victims of corruption.

Photo: Personal yachts owned by Russian oligarchs off the coast of Monaco. (Drozdin Vladimir/Shutterstock)

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# 1. Executive Summary

Following Russia's invasion of Ukraine, a significant amount of assets linked to Russia has been frozen around the world. This reportedly includes approximately US\$300 billion in the Russian Central Bank's foreign currency reserves. The amount of frozen wealth that belongs to Russian state-owned enterprises or private persons, such as so-called oligarchs, is unknown but likely runs into tens of billions of US dollars.

Under international law, Ukraine is entitled to full reparations from Russia for the damage the latter caused. These continue to grow and, according to the Ukrainian government, total over US\$600 billion as of late April. But there is no real prospect of Russia honouring this obligation. It has openly acted in defiance of international law, including by disregarding the ruling of the International Court of Justice that ordered that Russia cease its invasion. As a result, frozen Russian property overseas presents the only pool of assets that can realistically be used to compensate Ukraine.

There is, however, no existing legal framework for doing so. The freezing of the assets means Russia cannot use them, but it does not permit their confiscation or handover to Ukraine. This is notwithstanding the recognition by major sanctioning powers, including the US, EU and UK, that it is desirable for these assets to be disbursed for Ukraine's benefit. There is therefore a gulf between political aspirations and available legal tools. This exacerbates the risk that the cost of rebuilding Ukraine will fall entirely on Ukrainian and allied nations' taxpayers, rather than Russia as the aggressor. In the meantime, Ukraine is under severe financial strain as it seeks to continue providing essential services to its population.

There are well-known and formidable legal challenges in the way of converting the temporary freezing of Russia-linked assets into their permanent seizure. State-owned property is shielded from enforcement by sovereign immunity rules. Meanwhile, the confiscation of private property gives rise to constitutional and human rights concerns. The objective of this paper is to present options for resolving these difficulties.

In summary, there appear to be four main options in dealing with frozen Russian assets:

1. **Continued freezing** does not require legal reform and can be used as a temporary solution until (a) frozen Russian assets are confiscated or disbursed for Ukraine's benefit, (b) Ukraine otherwise obtains full compensation for the damage it suffered or (c) the Ukrainian government requests that the asset freeze be lifted, e.g. to facilitate a peace settlement. In a sense, it is not a self-standing option for the disposal of the assets but a prelude to one of the three other approaches being taken.

2. **Confiscation** would require legislative changes but would result in a definitive taking of the frozen assets with a view to their use for Ukraine's benefit. The successful implementation of this option is, among other things, critical to the Ukrainian government's proposal to establish an International Claims Commissions for Ukraine, which would pool together Russian assets confiscated by participating states and make them available for Ukraine's benefit.<sup>1</sup>

- **Insofar as state-owned property is concerned**, legislation could be adopted that would enable the confiscation of frozen funds owned by:
  - (a) Russia specifically in the current circumstances of a large-scale armed aggression involving violations of international humanitarian law and international human rights law; or
  - (b) States whose armed activities violate a ruling by the ICJ or another international court, such as the ECtHR;
  - (c) States engaged in armed aggression that, in the absence of action by the UN Security Council due to a permanent member's veto, has been denounced by a majority of the UN General Assembly members acting under the 'Uniting for Peace' procedure; or
  - (d) States whose sovereign immunity should be limited based on a resolution by the UNSC, should one be adopted in the future in the context of a conflict not involving a UNSC permanent member.

It is arguable that, as long as confiscation takes place based on executive action rather than a court judgment, the law of sovereign immunities does not apply. Even if it does apply, however, confiscation can likely be justified as an exception to sovereign immunity rules. To bolster its legitimacy and international legality, this exception to sovereign immunity rules could either:

- (a) Be affirmed by a resolution of the UN General Assembly; or
- (b) Be adopted in a multilateral treaty or joint statement by as many as possible of (i) Ukraine, (ii) states that have frozen Russian assets, and (iii) states whose security is tangibly and adversely impacted by Russia's war in Ukraine, such as EU member states.

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<sup>1</sup> Chiara Giorgetti, Markiyano Kliuchkovsky and Patrick Pearsall, 'Launching an International Claims Commission for Ukraine', *Just Security*, 20 May 2022, <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>.

- **Insofar as private property is concerned**, confiscation efforts can proceed based on either existing laws, which differ across jurisdictions, or new legislation. The most ambitious approaches to the confiscation of Russia-linked private property, provided that such property derives from or is connected to criminal conduct,<sup>2</sup> involve either (a) reversing the burden of proof, for the purposes of proceeds of crime laws, in relation to assets owned by Russian government-affiliated individuals and companies; (b) enabling the confiscation of frozen assets if their owner is found, on the balance of probabilities,<sup>3</sup> to be involved in certain types of serious crime; or (c) enabling the confiscation of frozen assets if they are found, likewise on the balance of probabilities, to have a 'connection' to crime. Each state that has frozen Russia-linked private assets could consider the use of these options in light of applicable constitutional and human rights property protections.
  - **In those states that have bilateral investment treaties with Russia**,<sup>4</sup> additional analysis should be conducted on whether respective Russian state-owned or private assets fall under the protection of such treaties and, if so, what requirements should be satisfied by those states to minimise the risks of liability in arbitration under such treaties.
3. **Private claims** could be brought under existing laws vis-à-vis private individuals and organisations but would likely require changes to domestic legislation insofar as suing Russia or enforcing claims against Russian state assets are concerned. Such claims could present challenges related to fairness (would they mostly benefit well-resourced claimants?), orderliness (would they lead to a race for Russia's assets that would compete with any centralised claims commission that might be established?) and their relationship with public needs (would they deplete the assets available for state-run projects in Ukraine, either during or after the war?). The desirability of allowing for the enforcement of private claims against frozen Russian assets ought to be assessed in light of these concerns.

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<sup>2</sup> Such as, for example, corruption.

<sup>3</sup> In states that, like the US and the UK, use distinct standards of proof in criminal and civil proceedings. In civil law jurisdictions, there is generally no such differentiation.

<sup>4</sup> Including the UK, France and Germany, but excluding the US, which has signed but not ratified a bilateral investment treaty with Russia.

4. **Enforcement of a foreign judgment or international award** would likewise involve reforms to sovereign immunity rules as laid out above whenever Russian state assets are concerned, as distinct from private ones.

The common thread that unites all these multifarious issues is the challenge of, on the one hand, responding to Russia's egregious breaches of international law and, on the other hand, maintaining the rule of law in states that have frozen Russian assets. In practical terms, this means ensuring that those innocent of involvement in Russia's malign activities are able to protect their property from governmental overreach, but also that the Russian state and those affiliated with it should not be permitted to manipulate those rule of law protections that they enjoy in the West yet deny to those within their power. This paper has been an attempt to lay out some options for striking that balance.

## 2. Introduction

In the aftermath of Russia's invasion of Ukraine, a significant amount of assets belonging to the Russian state and persons and entities connected to it has been frozen in Western nations. This reportedly includes hundreds of billions of dollars in the US, UK and EU member states, such as France and Germany, as detailed below.

As the scale of ongoing destruction and harm becomes apparent, calls have multiplied for these frozen assets to be used for Ukraine's urgent fiscal and military needs, and eventual reconstruction.<sup>5</sup> Accessing these funds earlier, rather than later, would mitigate the risk of Ukraine becoming bankrupt and unable to defend itself militarily. In due course, it would also alleviate the financial burden on both Ukraine itself and Western nations that have committed to assisting Ukraine's reconstruction effort.<sup>6</sup>

This paper outlines potential legal options for achieving that, including reforms that governments of states that froze the assets should consider. It proceeds as follows:

- ▶ First, it describes the background to the issues under consideration, including Russia's invasion of Ukraine, ongoing litigation related to it, and international sanctions against Russia.
- ▶ Second, it considers options for disposing of frozen Russian assets, including their continued freezing, confiscation, their use to satisfy private claims, or their use to enforce a foreign judgment or international award.
- ▶ Third, it offers brief comments on the legal status of Russia's possible retaliatory measures.
- ▶ Finally, a summary of the conclusions is provided.

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<sup>5</sup> For instance, US Attorney General Merrick Garland stated: 'we would support legislation that would allow some of that money to go directly to Ukraine'. See Devan Cole, 'Garland says funds from assets US seizes from Russian oligarchs should go "directly to Ukraine"', *CNN*, 26 April 2022, <https://edition.cnn.com/2022/04/26/politics/merrick-garland-senate-budget-hearing/index.html>.

<sup>6</sup> See, e.g., Paola Tamma, 'Ukraine needs €500B to €600B for reconstruction: Commission's Dombrovskis', *Politico*, 11 May 2022, <https://www.politico.eu/article/ukraine-needs-e500b-to-600b-for-reconstruction> <https://www.politico.eu/article/ukraine-needs-e500b-to-600b-for-reconstruction-commissions-dombrovskis/commissions-dombrovskis/>.



## 3. Background

### 3.1. Russia's Invasion of Ukraine

Russia launched a full-scale armed invasion of Ukraine on 24 February 2022. This followed an eight-year campaign of lower-intensity activity against Ukraine, including the annexation of Crimea in 2014 and proxy warfare in Eastern Ukraine. The UN General Assembly and multiple individual governments have described Russia's invasion as an act of unlawful aggression.<sup>7</sup>

There are numerous and credible reports of Russia's actions having involved widespread and systematic violence against the civilian population, including summary executions, torture, rape, abductions and forced deportation.<sup>8</sup> The Russian forces have also caused significant damage to private property and civilian infrastructure in Ukraine, including through direct strikes on residential areas and public facilities, such as railway stations.<sup>9</sup>

The extent of the economic damage to Ukraine brought about by Russia's actions continues to grow. The World Bank estimates that Ukraine's economy will contract by at least 45% in 2022.<sup>10</sup> The Ukrainian government's latest assessment puts the costs of war to Ukraine at over \$600 billion, equivalent to more than three times its GDP in 2020.<sup>11</sup> Furthermore, the

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<sup>7</sup> United Nations General Assembly Resolution ES-11/1 of 2 March 2022. See also G7 Leaders' Statement on the invasion of Ukraine by armed forces of the Russian Federation, 24 February 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/g7-leaders-statement-on-the-invasion-of-ukraine-by-armed-forces-of-the-russian-federation/>.

<sup>8</sup> See, e.g., Amnesty International, 'Ukraine: Russian forces extrajudicially executing civilians in apparent war crimes – new testimony', 7 April 2022, <https://www.amnesty.org/en/latest/news/2022/04/ukraine-russian-forces-extrajudicially-executing-civilians-in-apparent-war-crimes-new-testimony/>; Human Rights Watch, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas', 3 April 2022, <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>.

<sup>9</sup> See, e.g., Lorenzo Tondo and Pjotr Zauer, 'Russia bombs five railway stations in central and western Ukraine', *The Guardian*, 26 April 2022, <https://www.theguardian.com/world/2022/apr/25/russia-bombs-five-rail-stations-in-central-and-western-ukraine>.

<sup>10</sup> World Bank, 'Russian Invasion to Shrink Ukraine Economy by 45 Percent this Year', 10 April 2022, <https://www.worldbank.org/en/news/press-release/2022/04/10/russian-invasion-to-shrink-ukraine-economy-by-45-percent-this-year>.

<sup>11</sup> Darryl Coote, 'Rebuilding Ukraine will cost \$600B, says Prime Minister Denys Shmyhal', *UPI*, 22 April 2022, [https://www.upi.com/Top\\_News/World-News/2022/04/22/ukraine-600-billion-](https://www.upi.com/Top_News/World-News/2022/04/22/ukraine-600-billion-)

Ukrainian government stated that, as of late April 2022, it required US\$7 billion a month in aid to continue the provision of essential services.<sup>12</sup> These figures offer a glimpse into the scale of damage that Ukraine has suffered and is continuing to face.

Under international law, Ukraine is entitled to full reparations from Russia for ‘any damage, whether material or moral’, caused by the invasion in breach of international law.<sup>13</sup> However, it is unclear whether there is at present an international judicial forum where Ukraine could bring such comprehensive claims. Furthermore, it seems unlikely that Russia would abide by any judgment adverse to its interests. For instance, it defied an order by the International Court of Justice (ICJ) to immediately suspend its military operations in Ukraine.<sup>14</sup> Likewise, it has a track record of noncompliance with rulings by the European Court of Human Rights (ECtHR) and international arbitral tribunals.<sup>15</sup> For these reasons, in practice Russia’s assets frozen beyond its borders are likely to be the only pool of assets from which claims for reparations can realistically be satisfied.

### 3.2. Ongoing Litigation

There are a number of ongoing court cases relating to Russia’s actions in relation to Ukraine. Jurisdictional constraints mean that none of them is directly concerned with the whole spectrum of bilateral issues between Ukraine and Russia, but to the extent that these cases are considered on the merits (as opposed to dismissed for lack of jurisdiction or inadmissibility), they could either directly result in monetary awards in Ukraine’s favour or provide further context as to the legitimacy and credibility of Ukraine’s compensation claims. Such cases include:

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[rebuildhttps://www.upi.com/Top\\_News/World-News/2022/04/22/ukraine-600-billion-rebuild-country/5451650610486/country/5451650610486/](https://www.upi.com/Top_News/World-News/2022/04/22/ukraine-600-billion-rebuild-country/5451650610486/country/5451650610486/).

<sup>12</sup> ‘Ukraine War: Country needs \$7bn a month in aid, Zelensky says’, *BBC*, 22 April 2022, <https://www.bbc.com/news/business-61184275>.

<sup>13</sup> Article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts, which are generally accepted to codify customary international law in most respects.

<sup>14</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Provisional Measures Order, 16 March 2022.

<sup>15</sup> See, e.g., ‘Russia slams European rights court’s ‘unlawful’ order to free Navalny’, *France 24*, 17 February 2021, <https://www.france24.com/en/europe/20210217-russia-slams-european-rights-court-s-unlawful-order><https://www.france24.com/en/europe/20210217-russia-slams-european-rights-court-s-unlawful-order-to-free-navalny-to-free-navalny> (non-compliance with provisional measures indicated by the ECtHR); Jacqueline Thomsen, ‘U.S. judge says Russia can’t delay \$50 bln Yukos case, citing sanctions’, *Reuters*, 15 April 2022, <https://www.reuters.com/legal/litigation/us-judge-says-russia-cant-delay-50-bln-yukos-case-citing-sanctions><https://www.reuters.com/legal/litigation/us-judge-says-russia-cant-delay-50-bln-yukos-case-citing-sanctions-2022-04-14/2022-04-14/> (non-compliance with an international arbitral award).

- ▶ The dispute under the Genocide Convention in the ICJ;<sup>16</sup>
- ▶ Two disputes under the UN Convention on the Law of the Sea, one considered by an ad hoc arbitral tribunal and the other by the International Tribunal for the Law of the Sea;<sup>17</sup>
- ▶ A number of interstate disputes in the ECtHR related to the ongoing invasion, human rights abuse in Crimea and the shooting down of MH17;<sup>18</sup> and
- ▶ Investment treaty claims brought by Ukrainian businesses in connection with lost investments in Crimea and/or Eastern Ukraine.<sup>19</sup>

### 3.3. International Sanctions against Russia

The war in Ukraine has led to a swathe of international sanctions against Russia. States that have imposed sanctions on Russia include many of those central to the global economy and finance, including the US, the UK and EU member states. There is a wide array of sanctions in place, ranging from restrictions on raising capital on Western financial markets to tightened export controls. In the context of reparations, the most relevant sanctions are those that involve the freezing of Russian-linked assets, which are summarised below:

- ▶ **Individual asset freezes.** Many hundreds of Russian citizens are subject to asset freezes across sanctioning states. These range from over a thousand individuals subject to sanctions in the EU to less than half that in Japan.<sup>20</sup> Only sporadic

<sup>16</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), <https://www.icj-cij.org/en/case/182/>.

<sup>17</sup> Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia), Case No 2017-06, PCA Case Repository (ad hoc arbitral tribunal); Case concerning the detention of three Ukrainian naval vessels (Ukraine v Russian Federation) (ITLOS), <https://www.itlos.org/en/main/cases/list-ofhttps://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federationhttps://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/provisional-measures/>.

<sup>18</sup> *Ukraine and the Netherlands v Russia*, app nos 8019/16, 43800/14 and 28525/20 (regarding MH17); *Ukraine v Russia*, app no 11055/22 (regarding violations during the ongoing invasion); *Ukraine v Russia*, app nos 20958/14 and 38334/18 (regarding human rights violations in Crimea); *Ukraine v Russia (VIII)*, app no 55855/18 (regarding the capture of three naval vessels and their crew).

<sup>19</sup> See, e.g., *PJSC CB PrivatBank and Finance Company Finilon LLC v Russian Federation*, PCA Case No. 2015-21 (a partial award was issued on 4 February 2019 and reportedly found Russia liable for direct expropriation), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/649/privatbank-and-finilon-v-russiarussia>.

<sup>20</sup> A useful tracker of individual sanctions is available at <https://nowheretorun.org/>. A similar resource for sectoral sanctions can be found at <https://www.castellum.ai/russia-sanctions-dashboard>.

information is available on the amounts of respective assets that have been frozen, with the further complication that reports do not always distinguish between state-owned and private assets:

- In the UK, a reported £10 billion was frozen in the assets linked to two of Roman Abramovich's associates, Eugene Tenenbaum and David Davidovich,<sup>21</sup> as well as a further US\$7 billion of Abramovich's assets in Jersey, one of the UK's Crown Dependencies.<sup>22</sup> Beyond that, the UK has not disclosed the total amount of frozen Russian-linked assets, although the UK government notes that the total net worth of oligarchs subject to UK sanctions is estimated at £150 billion.<sup>23</sup>
- In the EU, a reported €30 billion belonging to 'Russian and Belarusian individuals and companies',<sup>24</sup> including €800 million in France.<sup>25</sup>
- ▶ **The Russian Central Bank's (RCB's) assets.** Russia is reported to have accumulated significant currency and gold reserves prior to its invasion of Ukraine in preparation for possible sanctions. A proportion of these assets is stored outside Russia, primarily in accounts with other nations' central banks, which reportedly amounted to US\$630

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<sup>21</sup> Foreign, Commonwealth & Development Office, 'UK hits key Russian oligarchs with sanctions worth up to £10 billion', 14 April 2022, <https://www.gov.uk/government/news/uk-hits-key-russian-oligarchs-with-sanctions-worth-up-to-10bn>.

<sup>22</sup> Robert Wright, Cynthia O'Murchu and Robert Smith, 'Jersey freezes \$7bn worth of assets linked to Roman Abramovich', *Financial Times*, 14 April 2022, <https://www.ft.com/content/365b2f7a-2746-44d8-86bd-4beae7dfec51>.

<sup>23</sup> Foreign, Commonwealth & Development Office, 'Foreign Secretary announces 65 new Russian sanctions to cut off vital industries fuelling Putin's war machine', 24 March 2022, <https://www.gov.uk/government/news/foreign-secretary-announces-65-new-russian-sanctions-to-cut-off-vital-industries-fuelling-putins-war-machine>.

<sup>24</sup> European Commission, "'Freeze and Seize Task Force": Almost €30 billion of assets of Russian and Belarusian oligarchs and entities frozen by the EU so far', 8 April 2022, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_2373](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2373).

<sup>25</sup> 'France Says It Has Frozen More Than 800 Million Euros Worth of Russian Oligarch Assets', *US News*, 23 March 2022, <https://www.usnews.com/news/world/articles/2022-03-23/france-says-it-has-frozen-more-than-800-million-euros-worth-of-russian-oligarch-assets>. A further report, which does not distinguish between state-owned and private assets, lists the following amounts frozen as of 5 April 2022: €23.6 billion in France, €10 billion in Belgium, €1.16 billion in Italy, €839 million in Ireland, €515 million in the Netherlands, €86.3 million in Cyprus, €34.5 million in Poland, €28.7 million in Sweden, €17.5 million in Latvia, €13.5 million in Lithuania, €10 million in Czechia, €341,595 in Germany, €300,000 in Finland, €4,195 in Denmark and 'a very low figure' in Hungary. See Naomi O'Leary, 'EU states freeze over €36bn of Russian assets', *The Irish Times*, 21 April 2022, <https://www.irishtimes.com/news/world/europe/eu-states-freeze-over-36bn-of-russian-assets-1.48588141.4858814>.

billion worth of foreign exchange reserves worldwide.<sup>26</sup> Approximately half of these assets has been frozen across all G7 economies.<sup>27</sup> Assessments differ somewhat as to the amounts involved:

- According to the Atlantic Council, 15.6% of the RCB's total overseas assets is frozen in France (≈US\$98 billion); 12.2% in Germany (≈US\$78 billion); 8.5% in the US (≈US\$54 billion) and 5.8% in the UK (≈US\$37 billion).<sup>28</sup>
  - The RCB's own report suggests that, as of June 2021, its foreign asset reserve holdings constituted 12.2% in France, 9.5% in Germany, 6.6% in the US and 4.5% in the UK.<sup>29</sup>
- ▶ **Other Russian state property.** Beyond the RCB's assets, there are two main categories of what might be described as Russian state property abroad:
- First, there are assets owned directly by the Russian state or its agencies, such as the premises of Russian diplomatic missions, which are shielded from attachment by diplomatic inviolability.<sup>30</sup>
  - Second, there are assets owned or controlled by Russian state-owned enterprises and their subsidiaries, such as Gazprom's subsidiaries in the EU

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<sup>26</sup> The White House, Background Press Call by a Senior Administration Official on Imposing Additional Severe Costs on Russia, 27 February 2022, <https://www.whitehouse.gov/briefing-room/press-2022/02/27/background-press-call-by-a-senior-administration-official-on-imposing-additional-severe-costs-on-russia/>. For the composition of these reserves, see Gian Maria Milesi-Ferretti, 'Russia's external position: Does financial autarky protect against sanctions?', *Brookings Institution*, 3 March 2022, <https://www.brookings.edu/blog/up-front/2022/03/03/russias-external-position-does-financial-autarky-protect-against-sanctions/>.

<sup>27</sup> Max Seddon and Henry Foy, 'Russia plans to sue over frozen currency reserves, central bank says', *Financial Times*, 19 April 2022, <https://www.ft.com/content/055231b1-e3bc-44fe-a7fb-6eaaa0933f72> ('nearly a half' is reported to be frozen); Charles Lichfield, 'The Russian Central Bank is running out of options', *Atlantic Council*, 4 March 2022, <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-russian-central-bank-is-running-out-of-options/> (a 'conservative estimate' is that 53% of the RCB's assets have been frozen).

<sup>28</sup> Charles Lichfield, 'The Russian Central Bank is running out of options', *Atlantic Council*, 4 March 2022, <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-russian-central-bank-is-running-out-of-options/>. <sup>29</sup> Bank of Russia, *Foreign Exchange and Gold Asset Management Report*, 2022, p. 6.

<sup>29</sup> Bank of Russia, *Foreign Exchange and Gold Asset Management Report*, 2022, p. 6.

<sup>30</sup> Article 22 of the Vienna Convention on Diplomatic Relations 1969, which is generally reflected in domestic legal systems. However, the receiving state has a say as to whether it accepts the designation of a certain building as diplomatic premises. See *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment, ICJ Reports 2020, p. 300, 323.

and UK.<sup>31</sup> These assets benefit from lesser, if any, sovereign immunity protections. But, depending on corporate arrangements in place, it may be more difficult to establish the connection between such property and the Russian state than in the case of the RCB's assets.

On a practical level, the freezing of assets means they cannot be shifted abroad to evade future enforcement measures. As a matter of law, however, sanctions neither facilitate nor impede the confiscation of assets or their use to satisfy a court judgment against Russia, unless legislation is adopted that specifically provides for the confiscation of frozen assets.<sup>32</sup> If these assets are not simply to be returned to their owners, their ultimate disposal is likely to involve one of the options discussed below.

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<sup>31</sup> The UK has prohibited dealing in transferable securities issued by Gazprom Neft (Gazprom's oil trading company) and Gazprombank but there is no general prohibition on trading with either company. See HM Treasury, Office of Financial Sanctions Implementation, Consolidated List of Financial Sanctions Targets in the UK, <https://sanctionssearchapp.ofsi.hmtreasury.gov.uk/>; Section 16 and Schedule 2 of the Russia (Sanctions) (EU Exit) Regulations 2019. Gazprom is not subject to EU sanctions.

<sup>32</sup> Such as the recently enacted Canadian legislation, as discussed below.

## 4. Continued Freezing

### 4.1. Introduction

One of the easiest courses of action for states that have frozen Russian assets would be to keep those assets frozen until Russia provided full reparations to Ukraine.<sup>33</sup> In essence, the release of these assets would be conditional on Russia's compensation of the damage it caused, for instance under the terms of a peace settlement that may be reached by Ukraine and Russia. Alternatively, although less likely, one could also envisage financial sanctions being lifted on request from Ukraine's government should the latter deem it necessary to facilitate the peace process.<sup>34</sup> The primary appeal of this option is that it requires no tangible action beyond a decision that the lifting of sanctions is conditional on Russia's payment of reparations.

Fewer legal concerns appear to arise in connection with this option compared to any attempt at the ultimate disposal of frozen assets. It does, however, require considering (a) the sovereign immunity implications, which is relevant to Russian state assets but not private property, and (b) the prohibition on expropriation without adequate compensation.<sup>35</sup>

### 4.2. State Assets: Sovereign Immunity

International law generally protects states from being sued, or their property from being enforced against without their consent. One question that arises in this context is whether the freezing of Russia's state assets is itself incompatible with international law, even in the absence of any attempts to confiscate them. This would seem to be the implication of the RCB head Elvira Nabiullina's announcement of imminent legal action to unfreeze the RCB's assets.<sup>36</sup>

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<sup>33</sup> As recommended in Evan Criddle, 'Rebuilding Ukraine Will Be Costly. Here's How to Make Putin Pay', *Politico*, 30 March 2022, <https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649>.

<sup>34</sup> Provided the request comes from the elected and internationally recognised government of Ukraine, as opposed to any Russia-installed administration in any of the occupied parts of Ukraine.

<sup>35</sup> In the US, there is a historical and doctrinal argument that constitutional due process guarantees in the Fifth Amendment should extend to foreign states and their property: Ingrid Wuerth, 'The Due Process and Other

<sup>36</sup> Richard Partington, 'Russia "preparing legal action" to unfreeze \$600bn foreign currency reserves', *The Guardian*, 20 April 2022, <https://www.theguardian.com/business/2022/apr/19/russia-preparing-legal-action-to-unfreeze-600bn-foreign-currency-reserve>.

The precise content of sovereign immunity rules or possible exceptions thereto is difficult to establish. This is because these rules are not codified but are recognised as legally binding international customs.<sup>37</sup> But the most recent attempt at their codification, as well as analysis by the UN's International Law Commission (ILC), suggest that sovereign immunities preclude the attachment of state-owned assets *on the basis of a domestic court judgment*.<sup>38</sup> Since sanctions are imposed by executive rather than judicial authorities, views differ on whether sovereign immunities affect the resultant freezing of assets, as discussed below.

According to one opinion, since states are generally free to act as they please unless there is a specific rule to the contrary, and because temporary asset freezes on the basis of executive action are sufficiently distinct from the attachment of property in the context of juridical process, sovereign immunities are irrelevant to sanctions.<sup>39</sup> The opposing view is that, if a state cannot even freeze another state's property in pursuance of a court order, it cannot possibly be allowed to do so in the absence of such an order, merely based on the executive branch's decision – but the freezing of the Constitutional Rights of Foreign Nations' (2019) 88(2) *Fordham Law Review* 633, referred to in Paul Stephan,

'Giving Russian Assets to Ukraine—Freezing Is Not Seizing', *Lawfare*, 26 April 2022, <https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing>. This argument has not yet been resolved by the courts. See also Scott R. Anderson and Chimène Keitner, 'The Legal Challenges Presented by Seizing Frozen Russian Assets', *Lawfare*, 26 May 2022, <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets>; Paul

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<sup>37</sup> Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening), Merits, Judgment, 3 February 2012, paras. 56-58.

<sup>38</sup> In accordance with Article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention'. Article 2(1)(a) provides that "court" means any organ of a State, however named, entitled to exercise judicial functions'. One could argue that the freezing of assets amounts to an exercise of judicial functions, but that statement is inconsistent with widespread state practice of allowing for extra-judicial freezing of assets. Analogous wording is contained in the ILC's Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, *Yearbook of the International Law Commission*, 1991, vol. II, Part Two. The ILC notes that '[j]udicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgements' (p. 3), which suggests a nexus to legal proceedings that is ordinarily absent in the case of financial sanctions. See further Tom Grant, 'Article 5,' in O'Keefe, Tams & Tzanakopoulos (eds), *United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (2013), pp. 103 ff, cited by *Republic of Kazakhstan and National Bank of Kazakhstan v Ascom Group S.A., et al*, Svea Court of Appeal, Department 05, Division 0502, Decision, June 17, 2020, para. 19; and *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*, Supreme Court (UK), Lord Sumption, [2017] UKSC 62 (para. 39).

<sup>39</sup> Ingrid Wuerth, 'Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?', *Lawfare*, 7 March 2022, <https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks>.



B. Stephan, 'Seizing Russian Assets', *University of Virginia School of Law, Public Law and Legal Theory Research Paper Series 2022-40*, p. 8.

RCB's assets is nonetheless justified, in this case, as a lawful countermeasure to Russia's breaches of international law or an act of collective self-defence.<sup>40</sup> The law of countermeasures and collective self-defence is discussed in greater detail below, and it is sufficient to observe, at this juncture, that both state practice and expert commentary point to the conclusion that the freezing of the RCB's assets is *consistent* with international law insofar as sovereign immunities are concerned. That, in turn, means that the continuation of these measures would likewise be compatible with sovereign immunities.

### 4.3. Expropriation

Customary international law also bars the expropriation of foreigners' property without adequate compensation, which constitutes part of the minimum standard of treatment that must be afforded to foreigners.<sup>41</sup> Bilateral investment treaties, such as that between the UK and Russia, extend this protection to 'investments' made in their respective territories, which raises the question of whether the RCB's foreign exchange reserves or relevant private assets could fall within their scope.<sup>42</sup> Insofar as the prohibition on expropriation without compensation is applicable, the question arises of whether at some point a temporary asset freeze, once it has been in place long enough, can amount to an 'indirect' expropriation, on the basis that it will result in an effective taking control of, or interference with the use, enjoyment or benefit of, the frozen property.

To date, the issue remains unsettled. For instance, in a leading terrorist sanctions case, the Court of Justice of the European Union deemed an asset freeze that had been in place for almost a decade to be temporary and preventative, but acknowledged it might at some point lose this temporary quality.<sup>43</sup> As a result, it appears that the substantial duration of an asset freeze does not, without more, render it a breach of the EU's human rights law, let alone of the minimum standard of treatment of foreigners under international law. The freezing by the US

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<sup>40</sup> Matthias Goldmann, 'Hot War and Cold Freezes', *Verfassungsblog*, 28 February 2022, <https://verfassungsblog.de/hot-war-and-cold-freezes/>.

<sup>41</sup> *Neer v United Mexican States* [1926] IV RIAA 60–66; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9<sup>th</sup> edn, OUP 1992) pp. 916-917.

<sup>42</sup> The list of Russia's bilateral investment treaties, together with their texts, is available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation>.

<sup>43</sup> *Kadi v Commission and Council*, CJEU General Court, Judgment of 30 September 2010 in Case T-85/09, paras. 149-150.

of the Iranian Central Bank's assets has likewise been in place for a decade now,<sup>44</sup> and while Iran has complained that this is tantamount to expropriation, the ICJ is yet to rule on Iran's claims.<sup>45</sup>

Given the lack of conclusive authorities on this point, one cannot rule out the risk that a long-term asset freeze of Russia-linked property could result in an expropriation claim if an avenue for bringing such a claim exists, such as via arbitration under an investment treaty. If the asset freeze was expressly intended to be permanent, it is more likely that such a claim would succeed. A permanent asset freeze would, however, be unnecessary in dealing with Russian assets. The restraint would only be temporary in the sense of their release being conditional on Russia's compensation of the damage it caused. So long as adequate safeguards were put in place to ensure regular review of whether the asset freeze should be maintained, as well as of its ongoing consistency with applicable domestic law, the risk of such measures being incompatible with international law could be adequately addressed.

#### 4.4. Conclusion

From a legal perspective, therefore, there are no serious impediments to continuous freezing of sanctioned assets so long as it is intended to be temporary, for instance until Russia provides compensation to Ukraine for the damage inflicted by its invasion in compliance with international law. On a practical level, though, the main drawbacks of this option are twofold:

- ▶ First, the eventual payment of reparations to Ukraine is made contingent on Russia's agreement to do so. It may not be forthcoming, especially if the amount of reparations approaches or even exceeds the total value of the frozen assets, as is likely to be the case.
- ▶ Second, even if an agreement on reparations were reached between Russia and Ukraine, this is likely to take a long time, which means that the assets will be unavailable to Ukraine for the duration of the war and in the crucial early stages of its post-war reconstruction.

For these reasons, a better approach may involve the use of one or more of the other options discussed below. Continued freezing of the assets would only be necessary until those other efforts came to fruition, as opposed to waiting for a settlement between Ukraine and Russia.

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<sup>44</sup> Executive Order 13599 of 5 February 2012: Blocking Property of the Government of Iran and Iranian Financial Institutions.

<sup>45</sup> See *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Preliminary Objections, Judgment, ICJ Reports 2019, p. 7, 16.

In the meantime, the assets can remain frozen based on the same legal authorities that enabled the imposition of sanctions in the first place.

Whichever option is chosen is, however, a matter of political judgment. Insofar as law is concerned, it is highly likely that the US, EU and UK can, lawfully and based on existing legal authorities, continue to keep Russian assets frozen until (a) they are confiscated or disbursed for Ukraine's benefit, (b) Ukraine otherwise obtains full compensation for the damage it suffered or (c) the Ukrainian government requests that the asset freeze be lifted, e.g. to facilitate a peace settlement.

## 5. Confiscation

### 5.1. Introduction

Insofar as the ultimate disposal of frozen assets is concerned, their ultimate seizure is one possibility. They could be subsequently handed over to the government of Ukraine or otherwise disbursed for the benefit of the Ukrainian population.<sup>46</sup> There is a great variety of current terms that can be used to describe such taking of property, depending on jurisdiction and context: confiscation, forfeiture and recovery in the proceeds of crime law,<sup>47</sup> and expropriation and nationalisation in international investment law.<sup>48</sup> In this paper, ‘confiscation’ is used in a generic fashion to describe the taking of frozen property by the state, whatever the process used to effect it.

The ability to successfully confiscate Russia-linked assets is critical to the Ukrainian government’s ability to finance the reconstruction of damage caused by Russia’s invasion and obtain reparations, including through its proposal to establish an International Claims Commissions for Ukraine, which would pool together Russian assets confiscated by participating states and make them available for Ukraine’s benefit.<sup>49</sup> It is therefore worth considering seriously the issues that arise. Such confiscation presents three sets of challenges, which are considered in turn below, namely:

- ▶ Those related to the confiscation of Russian state assets, specifically legal bases for such measures and their sovereign immunity implications;
- ▶ Those related to the confiscation of Russian private assets, specifically possible use of the proceeds of crime law or dedicated legislation on the confiscation of frozen assets; and

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<sup>46</sup> For instance, the latter option is envisaged in the proposed Repurposing Elite Luxuries Into Emergency Funds for Ukraine Act (S. 3936), which would allocate seized funds into a specially established Ukrainian Relief Fund, although the proposal appears to be geared towards privately owned assets that may be seized as the US KleptoCapture Task Force continues its operation.

<sup>47</sup> Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart 2017) pp. 16–18.

<sup>48</sup> Alice Ruzza, ‘Expropriation and Nationalization’ in *Max Planck Encyclopedias of International Law*, 2017.

<sup>49</sup> Chiara Giorgetti, Markiyani Kliuchkovsky and Patrick Pearsall, ‘Launching an International Claims Commission for Ukraine’, *Just Security*, 20 May 2022, <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>. Considerations relevant to the operation of a potential claims commission have also been explored in an anonymous contribution to the Ukraine Peace Settlement Project at the University of Cambridge: ‘A Russia-Ukraine claims commissions after the armed conflict’, [https://www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.cam.ac.uk/ukraine/anon\\_a\\_russia-ukraine\\_claims\\_commission\\_after\\_the\\_armed\\_conflict\\_web\\_version.pdf](https://www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.cam.ac.uk/ukraine/anon_a_russia-ukraine_claims_commission_after_the_armed_conflict_web_version.pdf).

- ▶ Those related to the implications of potentially applicable investment treaties for the confiscation of either Russian state or private assets.

## 5.2. State Assets

### 5.2.1. Legal Basis for Confiscation

Confiscation of state assets is *unlikely* to be possible based solely on the legal authorities used to freeze the assets in the first place:

- ▶ In the US, the International Economic Emergency Powers Act (IEEPA) vests in the President the power to imposed far-reaching restrictions on the exercise of property rights, but the authority to order an outright confiscation is limited to ‘when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals’.<sup>50</sup> This authority has been used to confiscate Iraqi state assets in 2003.<sup>51</sup> It has been queried whether the latter prong of this provision (‘attacked by a foreign country or foreign nationals’) might have application in the context of a cyberattack,<sup>52</sup> perhaps subject to some proviso such as the cyberattack have significant kinetic effects. If that interpretation were accepted, confiscation might be possible should Russia resort to (further) serious cyberattacks against the US, but the proposition remains untested.
- ▶ In the EU, the regulations that order the freezing of assets on the basis of the EU’s Common Foreign and Security Policy competency cannot be extended to requiring the permanent confiscation of assets.<sup>53</sup> Confiscation therefore remains a matter for individual EU member states, where it may take place based on domestic legislation. A pending proposal by the European Commission would set some common EU-wide

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<sup>50</sup> International Emergency Economic Powers Act, 50 USC §§ 1702(C).

<sup>51</sup> Executive Order 13290 of 20 March 2003: Confiscating and Vesting Certain Iraqi Property.

<sup>52</sup> Devin DeBacker, ‘Congress Has Already Authorized the President to Require Reporting of Foreign Cyberattacks’, *Lawfare*, 14 June 2022, <https://www.lawfareblog.com/congress-has-already-authorized-https://www.lawfareblog.com/congress-has-already-authorized-president-require-reporting-foreign-cyberattacks-president-require-reporting-foreign-cyberattacks>. Conversely, another analysis of the IEEPA’s potential application in the current circumstances ‘presumes that recent cyber-attacks do not count for [the purpose of establishing the US has been attacked by a foreign country or foreign nationals]’: Andrew Boyle, ‘Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable’, *Just Security*, 18 April 2022, <https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/bank-assets-are-legally-unavailable/>.

<sup>53</sup> Article 29 of the Treaty on European Union.

rules on asset confiscation, which would among other things make assets involved in sanctions evasion liable to confiscation.

Broadly speaking, though, the proposals do not alter the generally accepted principle that only assets that provably derive from criminal activity can be subject to confiscation.<sup>54</sup> This is of no relevance to Russian state-owned assets unless Russia seeks to dissipate them in breach of applicable EU sanctions.

- ▶ In the UK, the Sanctions and Anti-Money Laundering Act (SAMLA) provides for the freezing but not confiscation of assets as a type of sanctions.<sup>55</sup>

As a consequence, a separate legal basis needs to be found in domestic law to enable confiscation in the US, UK and EU member states. While in the context of privately owned funds proceeds of crime laws could be used to seize assets obtained through or intended for crime, no comparable options are available for state-owned assets. This can be altered by adopting legislative changes that would, for instance, enable the confiscation of frozen funds owned by a state engaged in an armed aggression (in this case, Russia). If further tailoring the reach of such new legislation were thought desirable, one could limit it as appropriate, for instance only to apply to:

- (a) Russia specifically in the current circumstances of a large-scale armed aggression involving violations of international humanitarian law and international human rights law;
- (b) States whose armed activities violate a ruling by the ICJ or another international court, such as the ECtHR;
- (c) States engaged in armed aggression that, in the absence of action by the UN Security Council 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;<sup>56</sup> or
- (d) States whose sovereign immunity should be limited based on a resolution by the UNSC, should one be adopted in the future in the context of a conflict not involving a UNSC permanent member.

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<sup>54</sup> See Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245 final, 25 May 2022.

<sup>55</sup> Section 3 of SAMLA.

<sup>56</sup> The procedure established under Resolution 377 (V) in 1950 for the UN General Assembly to make recommendations to UN member states, in an emergency session, if 'the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression'.

To adopt such changes, in the UK a new law would be best enacted as its subject matter is sufficiently distinct from the rest of SAMLA's provisions. In the EU, they would have to be promulgated on a state-by-state basis in a manner that best suits existing domestic frameworks. In the US, they could be introduced by either amending the IEEPA or promulgating a bespoke statute.<sup>57</sup>

So far, several bills related to the possible confiscation of frozen Russian assets have been introduced in the US Congress, but none have been adopted. Some of them would enable the outright confiscation of frozen public or private assets,<sup>58</sup> whereas others do not create new confiscation authorities but determine that Russia-linked assets confiscated under existing powers must be used in specified ways for Ukraine's benefit.<sup>59</sup> One of such bills, which has passed the House of Representatives but is yet to be considered by the Senate, would require the President to:

[E]stablish an interagency working group, which shall be headed by the Secretary of State, to determine the constitutional mechanisms through which the President can take steps to seize and confiscate assets under the jurisdiction of the United States of foreign persons whose wealth is derived in part through corruption linked to or political support for the regime of Russian President Vladimir Putin and with respect to which the President has imposed sanctions.<sup>60</sup>

The Biden administration's current approach appears to have involved precisely such a study of existing authorities as well as of opportunities to expand them. The resultant proposals for limited reform to US proceeds of crime laws are considered later in this paper.

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<sup>57</sup> 'Seek[ing] express legislative authority from Congress for [confiscation]' is one of the options listed in Lee Buchheit and Mitu Gulati, 'Alphaville's guide to seizing Russian assets', *FT Alphaville*, 30 March 2022, <https://www.ft.com/content/50aae1a2-088a-47f9-b936-30fa02cf03de>.

<sup>58</sup> See, respectively, S.4283 – A bill to authorize the confiscation of assets of the Russian Federation and the use of such assets to offset costs to the United States of assistance to Ukraine, <https://www.congress.gov/bill/117th-congress/senate-bill/4283/text> and H.R.7086 – Oligarch Asset Forfeiture Act, <https://www.congress.gov/bill/117th-congress/house-bill/7086/text>.

<sup>59</sup> H.R.7187 – Yachts for Ukraine Act, <https://www.congress.gov/bill/117th-congress/house-bill/7187/text> and S.3936 – Repurposing Elite Luxuries Into Emergency Funds for Ukraine Act, <https://www.congress.gov/bill/117th-congress/senate-bill/3936/text>.

<sup>60</sup> H.R.6930 – Asset Seizure for Ukraine Reconstruction Act, <https://www.congress.gov/bill/117th-congress/house-bill/6930/text>.

### 5.2.2. Sovereign Immunity Implications

Sovereign immunity implications must be considered in connection with the possible confiscation of Russian state-owned assets. Relevant rules are found both in international law and in respective states' domestic legal systems. The interaction between these two legal orders, international and domestic, depends on the state in question. In the US and the UK, in practice confiscation can proceed so long as it is allowed by domestic law, irrespective of the international law implications.<sup>61</sup> In certain EU member states, such as Germany, for confiscation to be possible it will also have to be consistent with international law.<sup>62</sup> The discussion that follows is therefore of particular relevance to the latter jurisdictions, although even for states that could legislate domestically in breach of international law, there is a strong argument that compliance with international law should be afforded significant weight.<sup>63</sup>

Under international law, certain state-owned property benefits from immunity from execution, which means that it cannot be confiscated or otherwise transferred, at least based on a court judgment, as discussed above. It is generally, albeit not unanimously, accepted that the immunity from execution *does* accrue to central bank assets.<sup>64</sup> Under English law, for instance, this is expressly provided for in the statute.<sup>65</sup> Likewise, US law endows central bank assets with immunity from execution, even in the context of the 'state sponsor of terrorism'

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<sup>61</sup> For an overview of US practice, see Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law*, Congressional Research Service, 2018, p. 30. For the UK position, see *R (S G) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [235] per Lord Kerr.

<sup>62</sup> Article 25 of the German Constitution ('The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory').

<sup>63</sup> See, e.g., Scott R. Anderson and Chimène Keitner, 'The Legal Challenges Presented by Seizing Frozen Russian Assets', *Lawfare*, 26 May 2022, <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen><https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets>; 'Russian asset seizures must follow the law', *Financial Times*, 5 June 2022, <https://on.ft.com/3GPzQtY>. Past experience confirms that the international law position is likely to play a role in the consideration of any legislative amendments. It is, for instance, central to the discussions of whether the UK could choose to override, in its domestic law, the provisions of a treaty it concluded with the EU in the context of Brexit negotiations. See Peter Walker, 'Opposition MPs demand full legal advice on Northern Ireland protocol bill', *The Guardian*, 12 June 2022, <https://www.theguardian.com/uk-news/2022/jun/12/northern><https://www.theguardian.com/uk-news/2022/jun/12/northern-ireland-protocol-bill-wont-break-international-law-says-minister-brandon-lewis-brex>. There is, of course, a significant difference between honouring the provisions of a recently negotiated treaty with a friendly trading block and abiding by customary sovereign immunity rules vis-à-vis an aggressor state.

<sup>64</sup> See Ingrid 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* (CUP 2019).

<sup>65</sup> Section 14(4) of the State Immunity Act 1978.



exception, which will be discussed later in this paper.<sup>66</sup> Sovereign immunities do not apply to property used for commercial purposes, which means that some Russian state-owned property could be amenable to seizure, such as assets of Russian state-owned enterprises. But, as mentioned above, confiscation raises other problems in relation to such assets, such as rule of law concerns from expropriation of 'private' property and the difficulty of demonstrating a sufficient connection to the Russian state.

This creates a paradox. On the one hand, Russia is engaged in a war of aggression and apparent war crimes that trigger its obligation to provide full reparation to Ukraine. It has also acted in contempt of international law so as to render most options for obtaining reparations from Russia illusory. On the other hand, it is precisely the respect by other states for a rule of international law that might enable Russia to shield its assets from Ukraine's legitimate claims.

The possible solutions of this dilemma include:

- ▶ **Taking executive action to confiscate the assets.** As discussed previously, immunity from execution is conventionally understood as immunity from execution *of a court judgment*.<sup>67</sup> This raises the possibility that a non-judicial (executive) confiscation of Russian state-owned assets would be compatible with the law of sovereign immunities. This proposition may appear counterintuitive given that confiscation of property ordinarily takes place based on a court judgment, but it has support in international law. The rationale underpinning the law of sovereign immunities is understood to be the principle that one state must not sit in judgment over another state's conduct – hence sovereign immunity rules are arguably limited to judicial rather than executive action.<sup>68</sup> In those limited circumstances where any interference with a state's property is deemed unacceptable, whether judicial or executive in nature, rules to that effect are explicitly adopted, such as in relation to diplomatic immunities. As a result, it is arguable that confiscating Russian state-owned assets on the basis of executive action alone could be, without any need for further justification, compatible with international law. Such executive action would however need to be provided for by domestic law, which should include safeguards to ensure that such confiscation could only be utilised in exceptional circumstances; that affected parties could challenge the confiscation; and that confiscated assets be used for narrowly defined

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<sup>66</sup> 28 USC § 1611(b)(1).

<sup>67</sup> See the authorities reviewed in footnote 38 above.

<sup>68</sup> See, e.g., Hazel Fox and Philippa Webb, *The Law of State Immunity* (3<sup>rd</sup> edn, OUP 2015) p. 27.

purposes, such as compensation for victims, reconstruction of Ukraine's damaged infrastructure or the ongoing provision of essential services.

- ▶ **Limiting sovereign immunity.** Sovereign immunities are uncodified and have emerged organically over time as customary international law. Customs are binding in international law and rest on a combination of states' actual behaviour (state practice) and their belief that they act in a manner required or permitted by the law (*opinio juris*). As state practice changes, so can the content of customary rules morph.

One of the areas of particular tension is whether sovereign immunities preclude lawsuits against foreign states in domestic courts based on the breaches of peremptory rules of international law (*jus cogens* rules), such as the prohibition of armed aggression or crimes against humanity. In 2012, the ICJ ruled in a dispute between Germany and Italy that sovereign immunities barred such lawsuits regardless of the underlying violations of international law.<sup>69</sup> In the aftermath of the ICJ's judgment, the Italian Constitutional Court decided that complete immunity from suit for war crimes and crimes against humanity was incompatible with the foundations of Italian constitutional order. This enabled multiple further claims against Germany in Italian courts and led to a further German application to the ICJ in April 2022.<sup>70</sup> Italy's position is illustrative of the dilemma which states that have frozen Russian assets will face, with access to justice weighing heavily against immunity, although the issue in Russia's context pertains to immunity from execution (status of the frozen assets) rather than immunity from suit.

If one accepts the ICJ's judgment as a reflection of the current state of international law, there is nonetheless a possibility that a new exception to sovereign immunity rules may arise based on states' reactions to Russia's actions. In substance, and consistent with the legislation proposed above, it could provide for the abrogation of sovereign immunities of:

- (a) Russia specifically in the current circumstances of a large-scale armed aggression involving violations of international humanitarian law and international human rights law;<sup>71</sup>

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<sup>69</sup> Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening), Merits, Judgment, 3 February 2012, paras. 27-36.

<sup>70</sup> International Court of Justice, 'Germany institutes proceedings against Italy for allegedly failing to respect its jurisdictional immunity as a sovereign State', 29 April 2022. Germany swiftly withdrew its request for provisional measures in May after Italy promised that no attachment measures would be taken against German property: International Court of Justice, 'Germany withdraws its request for the indication of provisional measures', 6 May 2022.

<sup>71</sup> If Russia were singled out specifically, the respective resolution, treaty or statement could note relevant considerations, such as that Russia has abused its UNSC veto, thus preventing the latter from acting; that the UN General Assembly has voted overwhelmingly to acknowledge that Russia has carried out a war of aggression

- (b) States whose armed activities violate a ruling by the ICJ or another international court, such as the ECtHR;
- (c) States engaged in armed aggression that, in the absence of action by the UN Security Council 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; or
- (d) States whose sovereign immunity should be limited based on a resolution by the UNSC, should one be adopted in the future in the context of a conflict not involving a UNSC permanent member.

Possible vehicles for espousing the proposed exception could include:

- ▶ **A resolution by the UN General Assembly** that would 'make clear that sovereign immunity should not prevent Russian state assets being made available to Ukraine and its people'.<sup>72</sup> Such a resolution would have special value because it 'could signal a change in how the majority of States view the entitlement to immunity in these exceptional circumstances, opening the way to judicial, legislative, and executive action in pursuit of resources that would allow Ukraine and its people to rebuild their lives'.<sup>73</sup>
- ▶ **A multilateral treaty** on the (inapplicability of) immunity from execution to Russian assets, which could, for instance, contain the following provisions:

[O]n the one hand, that all assets, funds and economic resources belonging directly or indirectly to Russia, including the funds of its Central Bank and state-owned enterprises, which have been frozen or blocked in response to Russia's destabilization and military aggression actions against Ukraine since 2014, will remain frozen until full redress for the damage caused to Ukraine and Ukrainians is duly ensured.

On the other hand, the two clauses of this treaty could also specify that no immunity from jurisdiction or execution will be granted or recognized to Russia, its Central Bank, its state-owned enterprises or other enterprises controlled by Russia, as well as their assets, funds or economic resources by

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against Ukraine; that the Council of Europe has expelled Russia; that the ICJ has ordered the immediate cessation of its ongoing armed aggression; that Russia in multiple instruments, formats and forums had explicitly accepted as final and settled all frontiers of Ukraine, etc.

<sup>72</sup> Philippa Webb, 'Ukraine Symposium – Building Momentum: Next Steps Towards Justice for Ukraine', *Articles of War*, 2 May 2022, <https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/>.

<sup>73</sup> *Ibid.*

the domestic courts of the States Parties, in connection with cases brought before their courts by Ukraine or Ukrainians on the basis of claims arising from events occurring on or after February 24, 2022.<sup>74</sup>

Alternatively or in addition to these provisions, the adoption of such a treaty could be combined with the establishment of a mechanism for the disbursement of funds for Ukraine's benefit.<sup>75</sup> It is also noteworthy, in this context, that a bill was tabled in the US House of Representatives that would, if adopted, require the US president to seek a multilateral agreement for the use of frozen Russian assets towards Ukraine's reconstruction.<sup>76</sup> The bill does not, however, allow for the distribution of such assets for the benefit of Ukraine while the war is ongoing, which is when they are sorely needed.

The multilateralism of either of these options would both endow the proposed exception with greater legitimacy than unilateral action and make its effects more difficult to reverse. The best course of action, therefore, would be the adoption of a resolution by the General Assembly by a significant majority of the vote.

But the exception could also arise, arguably, if a smaller number of 'specially affected states' accepted that Russia's sovereign immunities should be limited. This is because, while substantial consistency and uniformity across states is in principle necessary in the formation of an international custom, particular weight can be

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<sup>74</sup> Jean-Marc Thouvenin, 'Let's guarantee that Russia will pay for the reconstruction of Ukraine', *Le Monde*, 2 May 2022. The author of the article is Ukraine's counsel in ICJ litigation as well as a law professor. The proposal bears similarity to the one made in Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine', *Lawfare*, 12 May 2022, <https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine>. On the latter proposal, frozen Russian assets would be vested in an international claims commission, which would be justified as a lawful countermeasure.

<sup>75</sup> Thomas Grant and Scott Kieff, 'Attorneys Can Promote Trade, Security Amid Global Conflict', *Law360*, 13 April 2022 (suggesting a 'multilateral procedure to provide remedies for Ukraine and individual victims of Russia's aggression'). See also the proposal in Oleksandr Vodiannikov, 'Compensation Mechanism for Ukraine: An Option for Multilateral Action', *Opinio Juris*, 13 May 2022, <http://opiniojuris.org/2022/05/13/compensation-mechanism-for-ukraine-an-option-for-multilateral-action/>.

<sup>76</sup> H.R.7724 – To direct the President to seek to obtain an agreement between the United States and other countries that have frozen the assets of the Central Bank of the Russian Federation under which parties to the agreement will use such assets to provide for the reconstruction of Ukraine upon cessation of hostilities in Ukraine, <https://www.congress.gov/bill/117th-congress/house-bill/7724/>.

afforded to the practice of specially affected states.<sup>77</sup> The notion of a specially affected state is vague,<sup>78</sup> but in this instance they can plausibly include:

- (a) Ukraine;
- (b) States that have frozen Russian assets; and
- (c) States whose security is tangibly and adversely impacted by Russia's war in Ukraine, such as EU member states.

Depending on the exact nature and content of the proposed exception, it could effect a shift in customary international law that would be desirable for dissuading aggression in the future. In that way, a multilateral treaty would shape the emergence of a new customary rule. This would not only go some way towards addressing the accountability deficit attendant on the use of veto powers, which is increasingly treated as deeply problematic,<sup>79</sup> but would also minimise the possible unintended consequences because the legal position of the vast majority of UN member states, which are not engaged in armed aggression while protected by a UN Security Council permanent member's veto power, would not be affected.

- ▶ **Countermeasures.** Denying Russia the benefit of sovereign immunities is also compatible with international law as a lawful countermeasure. The recourse to countermeasures is one of the circumstances that preclude the wrongfulness of an act that would otherwise be in breach of international law. The law on countermeasures is likewise customary in nature but codified in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, which postulate a range of applicable conditions, including the following:

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<sup>77</sup> *North Sea Continental Shelf Cases (Germany/Denmark, Germany/Netherlands)*, Judgment, 1969 ICJ Rep 3, para. 73. Furthermore, the ILC states as follows: 'A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law (accompanied by *opinio juris*)'. It also says: 'While in many cases all or virtually all States will be equally affected, it would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of relevant coastal States and flag States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made'. See ILC, *Draft conclusions on identification of customary international law, with commentaries*, UN Doc A/73/10, 2018, fn. 715 (p. 136) and pp. 136–137.

<sup>78</sup> See Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) *American Journal of International Law* 191.

<sup>79</sup> See, e.g., Dame Barbara Woodward DCMG OBE, 'Veto initiative adopted by the UN General Assembly', 26 April 2022, <https://www.gov.uk/government/speeches/veto-initiative-adopted-by-the-un-general-assembly>.

Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.<sup>80</sup>

Certain procedural requirements are likewise stipulated, such as notifying countermeasures to the state whose behaviour gave rise to them.<sup>81</sup> Countermeasures cannot impinge on diplomatic inviolability.<sup>82</sup> No such limitation attaches to the observance of sovereign immunity rules.<sup>83</sup> Furthermore, countermeasures can be invoked both by the injured state (Ukraine) and other states as long as 'the obligation breached is owed to the international community as a whole'.<sup>84</sup>

As the obligation to refrain from aggressive war is owed to the international community as a whole, there is no bar to any state's use of countermeasures vis-à-vis Russia. The main challenge arising in this connection is the need for countermeasures to be, 'as far as possible', reversible. This is challenging because, by definition, confiscation is permanent rather than reversible.

However, the net effect of confiscating Russia's assets to pay for Ukraine's reconstruction is equivalent to that of Russia complying with its obligation to provide full reparation. For that reason, confiscating Russian state-owned assets as a countermeasure is consonant with the logic of ensuring that the state in breach of its obligations (Russia) does not continue to experience the negative impact of countermeasures once it ceases non-compliance. In line with this reasoning, a proposal has been made to transfer frozen Russian assets to a centralised, international fund that will disburse them for Ukraine's benefit in lieu of Russia's own performance of its obligation to compensate Ukraine.<sup>85</sup> A key benefit of this approach

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<sup>80</sup> Article 49(3), Article 51 of the Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>81</sup> Article 52.

<sup>82</sup> Article 50(2)(b).

<sup>83</sup> Notably, countermeasures were *not* considered by the ICJ in *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Merits, Judgment, 3 February 2012.

<sup>84</sup> Article 48(1)(b) of the Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>85</sup> Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine', *Lawfare*, 12 May 2022, <https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine>.

is making frozen Russia's assets available to Ukraine immediately, so as to enable Ukraine to fund its wartime needs.

In short, therefore, regardless of whether a new exception to sovereign immunity rules were accepted, the confiscation of Russian state-owned assets would likely be compatible with international law as a lawful countermeasure.

- ▶ **Collective self-defence.** Like countermeasures, acting in self-defence can provide a legal justification for an act that would otherwise be unlawful under international law.<sup>86</sup> Acts taken in self-defence can be of a non-military nature, as long as they do not breach international humanitarian law and human rights obligations.<sup>87</sup> Self-defence can be individual or collective.<sup>88</sup> Collective self-defence can be lawfully exercised if (a) an armed attack occurs; and (b) the state subject to the armed attack requests other states to exercise collective self-defence.<sup>89</sup> The former condition is satisfied, and Ukraine would no doubt be willing to fulfil the latter one, too. Indeed, it is arguable that it has already done so by repeatedly calling on other states to intervene militarily by establishing a no-fly zone in Ukraine.<sup>90</sup>

Under customary international law, self-defence must be necessary and proportionate, although these conditions are almost always discussed in connection with the use of military force in self-defence.<sup>91</sup> Given the scale of destruction, as well as Ukraine's obvious financial needs as the war progresses, the necessity and proportionality of the potential confiscation appears beyond any doubt. Some also argue that the requirement of 'immediacy' applies, i.e. no measures can be taken in self-defence once the armed attack is no longer occurring.<sup>92</sup> If this is correct, then to be justified on

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<sup>86</sup> Article 21 of the Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>87</sup> ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission on the work of its fifty-third session, 2001, p. 74.

<sup>88</sup> Article 51 of the UN Charter (referring to the 'inherent right of individual or collective self-defence'). <sup>89</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, p. 110, para. 232.

<sup>89</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, p. 110, para. 232.

<sup>90</sup> See, e.g., President of Ukraine, 'Speech by President of Ukraine Volodymyr Zelenskyy at the NATO Summit', 24 March 2022, <https://www.president.gov.ua/en/news/vistup-prezidenta-ukrayini-volodimira-zelenskogo-nahttps://www.president.gov.ua/en/news/vistup-prezidenta-ukrayini-volodimira-zelenskogo-na-samiti-n-73785samiti-n-73785> ('I addressed you with a perfectly clear, logical request to help close our skies').

<sup>91</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, p. 94, para. 176.

<sup>92</sup> See, e.g., Terry Gill, 'When Does Self-Defence End?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 737, 745.

the basis of self-defence, the lifting of Russia's sovereign immunities has to happen while the armed conflict is afoot before any potential peace settlement is reached. For these reasons, the exercise of collective self-defence offers another opportunity for curtailing Russia's sovereign immunities in compliance with international law.<sup>93</sup>

### 5.2.3. *Historical Precedent*

While the measures discussed above are both far-reaching and novel, they are not wholly without precedent insofar as wars of aggression are concerned, although to date they have involved measures taken by belligerents in an armed conflict against each other. Following the conclusion of World War II, conferences in Potsdam and Paris dealt with the issue of reparations for German aggression. The Paris Conference on Reparations resulted in an agreement that established an InterAllied Reparations Commission and provided, in relevant part, that states parties shall:

hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets.<sup>94</sup>

This, in turn, was concordant with the approach that had been taken in the post-World War I Treaty of Versailles.<sup>95</sup> These measures were not entirely uncontroversial, but whatever criticism they attracted, pertained mostly to the treatment of private, rather than state-owned, property. For instance, US lawyer Charles Cheney Hyde wrote in his treatise on international law in 1922:

The right of a belligerent to confiscate public property within its territory and belonging to the enemy is believed to exist and to be limited by few rules which expediency and custom have developed. The confiscation, for example, of the archives and other

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<sup>93</sup> See Jean-Marc Thouvenin, 'Let's guarantee that Russia will pay for the reconstruction of Ukraine', *Le Monde*, 2 May 2022 ('[waiving Russia's immunities] would be an additional measure of collective self-defense, undoubtedly necessary and proportionate in the present context'). See also a similar proposal by a Ukrainian lawyer: Oleh Marchenko, 'The Aggressor's Weak Immunity: How Courts Dispose of Russia's Funds to Compensate War Damages' (Агресор з підірваним імунітетом: як суди спрямовують гроші Росії на компенсацію втрат від війни), *European Pravda*, 8 June 2022, <https://www.euointegration.com.ua/articles/2022/06/8/7140806/> (in Ukrainian).

<sup>94</sup> 'The Policy and Practice of the United States in the Treatment of Enemy Private Property' (1948) 34 *Virginia Law Review* 928, 939–940.

<sup>95</sup> 'The Policy and Practice of the United States in the Treatment of Enemy Private Property' (1948) 34 *Virginia Law Review* 928, 931–932.



property appurtenant to the embassy or legation of the enemy would doubtless be deemed an abuse of power.<sup>96</sup>

In contrast to some other contemporaries,<sup>97</sup> Hyde was apprehensive of the confiscation of private which was covered by the Paris and Potsdam accords alongside public assets,<sup>98</sup> but the core of his objections concerned the indiscriminate nature of alien property confiscation, which aggrieves those ‘who may or may not be in fact responsible for the wrongs committed’.<sup>99</sup> As will be discussed below, current proposals in relation to Russia-linked private property, such as that of so-called oligarchs, provide for confiscation based on more than mere nationality, although it remains legitimate to ask whether due process guarantees afforded allow distinguishing between those who bear some culpability for Russia’s actions and those who do not.

The same distinction between public and private enemy property, of which the former was liable to confiscation whereas the latter was not, underpinned the following statement in the German jurist Lassa Oppenheim’s classic *Treatise on International Law*, published in 1921:

In former times belligerents could confiscate all private and public enemy property, movable and immovable, on each other’s territory at the outbreak of war, and also enemy debts: and the treaties concluded between many states for the withdrawal of their subjects at the outbreak of war provided likewise for the unrestrained withdrawal of the *private property of their subjects*. Through the influence of such treaties, and of municipal laws and decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate *private* enemy property on their territory nor annul enemy debts. (Emphasis added)<sup>100</sup>

As already mentioned, one salient difference between the current situation and historical precedent is that the latter involves belligerents confiscating their enemies’ assets, whereas in the present circumstances confiscation would be carried out by states not involved in

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<sup>96</sup> Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Little, Brown 1922) p. 235.

<sup>97</sup> See, e.g., Edward A. Harriman, ‘Confiscation of Enemy Private Property’ (1923) 3 *Boston University Law Review* 156.

<sup>98</sup> ‘The Policy and Practice of the United States in the Treatment of Enemy Private Property’ (1948) 34 *Virginia Law Review* 928, 939–940.

<sup>99</sup> Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Little, Brown 1922) p. 240.

<sup>100</sup> Cited in ‘Return of Alien Property’, Hearings Before a Subcommittee of the Committee on Ways and Means, House of Representatives, 69<sup>th</sup> Congress, First Session on H.R. 10820, 1926, 275.

hostilities. While this distinction might have been historically significant, it is arguable that it should play a lesser role today if one accepts that the overarching objectives of confiscation are, in this instance, securing a measure of accountability for the aggression as well as procuring funds for the aggrieved state's (Ukraine) immediate and legitimate means. If that view is adopted, collective confiscation of the aggressor state's assets carried out by a coalition of states in support of the victim state can be seen as a legitimate and desirable extension of a hitherto more limited practice.

## 5.3. Private Assets

### 5.3.1. Proceeds of Crime Laws

Property rights tend to be protected by constitutional and/or human rights guarantees. For instance, the Fifth Amendment to the US Constitution provides, in relevant part, as follows: 'Nor shall private property be taken for public use, without just compensation'. States parties to the European Convention on Human Rights (ECHR) are bound by the First Additional Protocol to the Convention, which reads as follows:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Confiscation of the proceeds or instrumentalities of crime is compatible with these provisions. Furthermore, some states in Europe have enabled non-conviction based (civil) confiscation of property if its owner cannot prove its legitimate origin.<sup>101</sup> This in effect reverses the ordinarily applicable burden of proof. The ECtHR has found these measures to be compliant with the ECHR when they concerned:

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<sup>101</sup> Transparency International, *Up to the Task? The state of play in countries committed to freezing and seizing Russian dirty money*, May 2022, 38–39. See also Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart 2017) pp. 227–230.

- ▶ Individual suspected of belonging to a mafia-type organisation (in Italy);<sup>102</sup> and
- ▶ Public officials previously convicted of money laundering, extortion, misappropriation, embezzlement, tax evasion or violations of custom regulations (in Georgia).<sup>103</sup>

It is likely that the same approach would be compatible with the ECHR if tailored to a specific category of persons connected with Russia's invasion of Ukraine, for instance individuals determined to be exercising authority on behalf of the Russian government, acting as its agents or otherwise complicit in its actions. This would be more in line with the Italian experience of predicating the reverse burden of proof on someone's affiliation with an organisation implicated in serious crime than with the Georgian approach of applying it to (a) public officials with (b) an existing criminal conviction, neither of which conditions is likely to be satisfied in relation to so-called 'oligarchs'. In states with no additional constitutional protections, such as the UK, there would be no further legal impediments to the enactment of such a provision, once the political decision has been made to introduce it. In other states, constitutional guarantees of property rights may erect additional barriers, and so their implications would have to be studied.

Another way of facilitating the seizure of Russia-linked private assets has been mooted in the US and has both substantive and procedural facets to it. The proposal unveiled by the US government includes the following:

Create a new, streamlined administrative process involving the Departments of the Treasury and Justice, for the forfeiture of property in the United States that is owned by sanctioned Russian oligarchs and that has a connection to specified unlawful conduct. A forfeiture decision would be reviewable in federal court on an expedited basis.<sup>104</sup>

Some of the implications of the proposed change have been explained as follows:

[I]n most cases, asset forfeiture requires a judicial procedure and proof that the property constitutes criminal proceeds or instrumentalities. By contrast, administrative forfeiture does

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<sup>102</sup> *Arcuri et al v Italy*, ECtHR, App no 52024/99, Judgment of 5 July 2001.

<sup>103</sup> *Gogitidze et al v Georgia*, ECtHR, App No 36862/05, Judgment of 12 May 2015.

<sup>104</sup> The White House, 'Fact Sheet: President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable', 28 April 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable/>

not require a prior judicial proceeding. However, it is available only for a few categories of property, including contraband, conveyances (i.e., boats, cars, airplanes) used to import, transport, or store a controlled substance, and certain other forms of property worth less than \$500,000. It is not available for real property or property worth more than \$500,000.

The White House proposal would allow the government to seize mansions, bank accounts, yachts, jets and other expensive property belonging to oligarchs without first proving in court that the property had been acquired with criminal proceeds – a significant change from current practice. While it would require proof of a “connection” to “specified unlawful activity” (a term which covers a number of predicate crimes, typically referred to as [specified unlawful activities], listed in 18 USC 1956 (c) (7)), proving a mere “connection” would presumably be easier than proving that the property constitutes proceeds or instrumentalities of an SUA which, as explained above, can be extremely difficult when the SUA was committed in Russia many years ago.<sup>105</sup>

### **5.3.2. Dedicated Legislation**

A novel, non-conviction based mechanism for the use of assets frozen under sanctions has been adopted in Canada. It was first proposed under the Frozen Assets Repurposing Act (FARA), which would have authorised the courts to order the confiscation of frozen assets subject to the following conditions:

An order under subsection 5(1) may only be made if the court is satisfied, on a balance of probabilities, that the frozen asset is associated with a foreign national responsible for or complicit in

- (a) extrajudicial killings, torture or other gross violations of internationally recognized human rights;
- (b) the forced displacement of peoples;
- (c) ordering, controlling or otherwise directing acts of corruption that amount to acts of significant corruption when taking into consideration, among other things, their impact, the monetary amounts involved, the foreign national’s influence or position of authority or the complicity of the government of the foreign state in question; or

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<sup>105</sup> Tom Firestone, ‘The New White House Proposal To Seize Russian Assets: A Legal Analysis, 2 May 2022, <https://www.stroock.com/news-and-insights/the-new-white-house-proposal-to-seize-russian-assets-a-legal-analysis>

- (d) violations of human rights standards that are based on customary international law and international human rights conventions to which Canada is a party.<sup>106</sup>

Following three readings of the FARA in the Senate of Canada, similar provisions were included by the Canadian government in the Budget Implementation Act 2022 tabled in April and passed in June 2022.<sup>107</sup> This obviates the need for a separate FARA bill. Specifically, the government may:

by order, cause to be seized or restrained in the manner set out in the order any property situated in Canada that is owned – or that is held or controlled, directly or indirectly – by

- (i) a foreign state,
- (ii) any person in that foreign state, or
- (iii) a national of that foreign state who does not ordinarily reside in Canada.<sup>108</sup>

The conditions under which such an order can be issued are the same as those for the freezing of the assets under the Special Economic Measures Act 1992, namely that:

- (a) an international organization of states or association of states, of which Canada is a member, has made a decision or a recommendation or adopted a resolution calling on its members to take economic measures against a foreign state;
- (b) a grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis;
- (c) gross and systematic human rights violations have been committed in a foreign state; or
- (d) a national of a foreign state who is either a foreign public official (...), or an associate of such an official, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption.<sup>109</sup>

Once certain property has been frozen, a forfeiture order could be issued without any further preconditions except it being held or controlled, directly or indirectly, by a sanctioned person.<sup>110</sup> Analogous provisions in relation to confiscation would also be inserted in the

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<sup>106</sup> FARA (Bill S-217), section 6, <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-217/first-reading>.

<sup>107</sup> The Budget Implementation Act 2022, <https://fin.canada.ca/drleg-apl/2022/nwmm-amvm-0422-bil.pdf>.

<sup>108</sup> Section 440 of the Budget Implementation Act 2022, replacing section 4(1)(b) in the Special Economic Measures Act 1992.

<sup>109</sup> Section 4.1, subsection 1.1 of the Special Economic Measures Act 1992.

<sup>110</sup> Section 441 of the Budget Implementation Act 2022, replacing section 5.4(1) in the Special Economic Measures Act 1992.

Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), which contains a similar but different definition of human rights abuse that can give rise to sanctions.<sup>111</sup>

The Canadian approach is especially expansive in that it would appear to enable the confiscation of frozen assets without any further preconditions. Conversely, the FARA would have required establishing on the balance of probabilities that the owner of the assets is responsible for or complicit in certain serious crime.

If one views the Canadian and (proposed) US reforms alongside the Italian and Georgian approaches, a range of options emerges for facilitating the confiscation of Russian-linked property. They can be summarised in two steps:

- ▶ First, a special regime of property confiscation applies to a narrowly defined group of people: either those who satisfy certain criteria such as being linked to the Russian government (following the blueprint of the Italian anti-mafia or Georgian anti-corruption legislation); or those who have been subject to sanctions (recently enacted reforms in Canada and proposed ones in the US).<sup>112</sup>
- ▶ Then, property is confiscated: either if its owner cannot prove its lawful origins (the Italian/Georgian approach); if the property has a 'connection' to crime (proposed US reforms); if the court is satisfied, on the balance of probabilities,<sup>113</sup> that its owner is responsible for or complicit in certain serious crime (the FARA approach); or without any further preconditions at all (the current Canadian approach).

If one combines these approaches, available options can be summarised as follows:

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<sup>111</sup> Sections 446-449 of the Budget Implementation Act 2022.

<sup>112</sup> The difference is arguably more superficial than might appear at first sight, because the imposition of sanctions is also based on certain criteria, e.g. reasonable suspicion of involvement in human rights abuse or corruption under the UK's SAMLA.

<sup>113</sup> It states that, like the US and the UK, use distinct standards of proof in criminal and civil proceedings. In civil law jurisdictions, there is generally no such differentiation, although judges might in practice require greater or lesser proof of the facts depending on the subject matter of the case. See, e.g., Mark Schweizer, 'The civil standard of proof—what is it, actually?' (2016) 20(3) *The International Journal of Evidence and Proof* 217.

The regime applies to:	Property confiscated if:
1. Those who satisfy certain criteria (e.g. affiliation with the Russian government)	1. The owner does not prove its legitimate origins
2. Those who have been sanctioned	2. The owner is determined, based on a balance of probabilities, to be responsible for or complicit in certain types of serious crime
	3. The property is found, likewise on the balance of probabilities, to have a 'connection' to crime
	4. No further preconditions except the property having been frozen and the persons who owns or holds it having been sanctioned

No combination of these options is entirely free of human rights concerns. On the other hand, as long as confiscation requires something more than the mere fact of someone's property being subject to sanctions, most of these options are likely to be compatible with the ECHR, which is an imperfect but useful indicator of their potential to comply with domestic human rights standards, as well. Moreover, a trend is evident in states' continuous drift towards ever more intrusive nonconviction based confiscation measures as existing mechanisms fall short in reaching the assets of high-value targets.<sup>114</sup>

If one of the options outlined above is adopted, the specificity of applicable criteria will be vital. For instance, if responsibility for or complicity in certain types of serious crime were to trigger confiscation, one would need to decide on the range of crimes covered as well as their definitions, for instance in relation to forms of corruption covered.<sup>115</sup>

<sup>114</sup> For instance, the UK introduced unexplained wealth orders (UWOs) by the Criminal Finances Act 2017, which were intended to facilitate going after the assets of corrupt foreign officials and 'criminals who declare themselves almost penniless, yet control millions of pounds': HC Deb, vol 616, col 198, 25 October 2016. Yet their enforcement stalled, with the government suffering a major setback in *NCA v Baker* [2020] EWHC 822 (Admin); [2020] All ER (D) 59 (Apr) and no UWOs obtained since July 2019: Home Office, *Asset recovery statistical bulletin: financial years ending 2016 to 2021*, 9 September 2021. This has led to modest reforms in the Economic Crime (Transparency and Enforcement) Act 2022, whose impact is yet to be seen.

<sup>115</sup> Thus, under the UK's Global Anti-Corruption Sanctions Regulations 2021, 'corruption' means bribery and misappropriation of property, both defined in the Regulations.

In light of this background, it is advisable for states that have frozen Russian assets to study the options outlined above in light of their constitutional property rights protections, if applicable, and decide which model best enables them to confiscate assets frozen under sanctions while minimising the potential for mistake or abuse.

## 5.4. The Implications of Bilateral Investment Treaties

In common with many other states, Russia has concluded a range of bilateral investment treaties (BITs), including with France, Germany and the UK. The treaty with the US has been signed but not ratified and is therefore not in force.<sup>116</sup> Each of these treaties prohibits expropriation without adequate compensation and requires that fair and equitable treatment be afforded to investments.<sup>117</sup> Depending on the treaty concerned, other standards may apply as well, such as that of full protection and security.<sup>118</sup> Beyond the treaties mentioned here, it is also possible that private assets will be held via companies incorporated in other jurisdictions, in which case other BITs may apply.

To minimise risks of liability under a BIT, states contemplating the confiscation of Russia-linked assets will need to ascertain (a) whether the relevant property fits the definition of ‘investment’; (b) whether its owner qualifies as an ‘investor’; and (c) whether its confiscation amounts to either an expropriation or another violation of an applicable treaty standard.

These issues are likely to be especially complex in the context of the RCB’s assets given that, while the wording of BITs is normally apt to encompass any organisation incorporated in one of the parties to the treaty, some tribunals have interpreted BIT protections to only apply to ‘government controlled entities as long as they act in a commercial rather than in a governmental capacity’.<sup>119</sup> In view of this complexity, consistency of any proposed domestic legislation with BIT provisions requires separate analysis to be undertaken in light of the wording of the relevant treaty, the nature of the property that is likely to be affected, and the identity of its owner.

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<sup>116</sup> For a weblink to the list of treaties, see footnote 42 above.

<sup>117</sup> Articles 4(3) and 3(1) of the France-Russia BIT; Articles 4(1) and 2(1) of the Germany-Russia BIT; and Articles 5(1) and 2(2) of the UK-Russia BIT.

<sup>118</sup> E.g. Article 2(2) of the UK-Russia BIT.

<sup>119</sup> Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3<sup>rd</sup> edn, Oxford University Press, 2022) 58.



## 5.5. Conclusion

In summary, confiscation of Russian assets may be a viable legal option, both as regards state property and private wealth. In relation to state assets, amending domestic laws would suffice to enable such confiscation in the US and, subject to applicable BIT protections that require further analysis, the UK. In other states, such as Germany, attention would also need to be paid to sovereign immunity implications under customary international law. This challenge can be dealt with by, first, adopting either a resolution by the UN General Assembly or a multilateral statement or treaty asserting an exception that applies to Russia's property and, second, by relying on the law of countermeasures or collective self-defence.

In relation to private assets, constitutional and human rights concerns loom large. At the same time, past experience in Europe, recent changes in Canada and ongoing discussions in the US suggest that tailored options are available to facilitate confiscation while minimising the risk of unintended consequences. It is desirable that those options be considered in light of applicable domestic guarantees, specifically constitutional and human rights law, as well as international law guarantees, namely applicable BITs.

## 6. Private Claims

### 6.1. Introduction

Apart from confiscation, another option is to enable private claims in the respective state's courts and the enforcement of the resulting judgments. The two main sets of legal issues that arise pertain to (a) the legal basis for claims; and (b) the implications of sovereign immunities and related concepts, such as that of justiciability.

In this context, private claims include those pursued in foreign courts by the state of Ukraine, including via Ukrainian state-owned enterprises. Claims could also be brought by private litigants, such as individuals or companies, which raise a number of practical concerns:

- ▶ **Fairness.** Only the most well-resourced claimants will be in a position to afford such litigation, given the financial, information security and personal safety risks that it would entail. That, in turn, will create concerns as relates to the fairness of distribution.
- ▶ **Orderliness.** A difficulty one should anticipate, if many private claimants proceed in multiple national courts, is confusion of the process, or at least its considerable complexification. Thus, an advantage of claims commissions tends to be their centralisation and rationalisation under a single procedure with one set of rules and one consolidated asset pool.
- ▶ **Relationship with public needs.** While a significant amount of private property has been damaged and can give rise to legitimate compensation claims, significant involvement of the Ukrainian state is necessary to repair the damage to public infrastructure.

For these reasons, private litigants' claims are best viewed as a secondary, complementary option rather than the primary avenue for achieving compensation. In particular, thought should be given to ensuring that private claims do not unduly impede coordinated efforts to disburse confiscated Russian assets, such as via a claims commission.

From a tactical standpoint, claimants contemplating private claims will need to consider which state(s) to bring them in. This is likely to be a function of where they expect success to be most likely, with a view to subsequent enforcement of the judgment in other states where Russian state-owned assets are located.

## 6.2. Legal Basis

In relation to private defendants, such as so-called oligarchs, claims may be viable against specific individuals or companies if they can be proven to have been involved in causing the damage to the claimant. Assessing the possible bases for such claims and the likelihood of their success is fact specific and requires analysis beyond the scope of this paper.

In relation to the Russian state, private claims could be brought based on a new (dedicated) statute or existing laws, such as those dealing with torts or delictual responsibility. To date, notable examples of private claims against sovereign states or de facto governments include:

- ▶ Claims against Iran in US courts based on the ‘state sponsors of terrorism’ exception to the Foreign Sovereign Immunities Act (discussed below), which have resulted in almost US\$8.9 billion dollars in damages, of which most have not been collected.<sup>120</sup> In an ongoing dispute, the ICJ ruled it had no jurisdiction to consider Iran’s claim that these judgments were rendered in breach of its sovereign immunities.<sup>121</sup>
- ▶ Another US example that is often raised is that of private litigation against the Taliban, now the de facto government of Afghanistan, which involved the freezing of the assets of the Central Bank of Afghanistan in the US.<sup>122</sup> In that case, the courts granted judgments against the Taliban *before* it ascended to power in Afghanistan. Once the Taliban became the de facto government of Afghanistan, a real prospect arose that the Central Bank of Afghanistan’s assets would be seized by US courts in satisfaction of the judgments against the Taliban. Faced with this possibility, the US government ring-fenced half of the Central Bank of Afghanistan’s assets to ensure their future use

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<sup>120</sup> *Evan Fain III v Islamic Republic of Iran*, US District Court for the District of Columbia, Memorandum Opinion, July 2012, p. 8, [https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1\\_10-cv-00628/pdf/USCOURTS-dcd-10-cv-00628-2.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_10-cv-00628/pdf/USCOURTS-dcd-10-cv-00628-2.pdf). See also Chimène Keitner, ‘World Court Rules on Iran Challenge to US Suits for Acts of Terrorism: An Explainer’, *Just Security*, 19 February 2019, <https://www.justsecurity.org/62604/unpacking-icjhttps://www.justsecurity.org/62604/unpacking-icj-judgment-certain-iranian-assets/judgment-certain-iranian-assets/>.

<sup>121</sup> *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Preliminary Objections, Judgment, ICJ Reports 2019, p. 7.

<sup>122</sup> Laurence Tribe and Jeremy Lewin, ‘\$100 Billion. Russia’s Treasure in the U.S. Should Be Turned Against Putin’, *The New York Times*, 15 April 2022, <https://www.nytimes.com/2022/04/15/opinion/russia-warhttps://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.htmlcurrency-reserves.html>; cf Paul Stephan, ‘Giving Russian Assets to Ukraine—Freezing Is Not Seizing’, *Lawfare*, 26 April 2022, <https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing>; Andrew Boyle, ‘Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable’, *Just Security*, 18 April 2022, <https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-usehttps://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/russian-central-bank-assets-are-legally-unavailable/>.

for the benefit of the Afghan population, while continuing to deny the Taliban any control over any portion of the Central Bank of Afghanistan's assets.<sup>123</sup>

- ▶ Private claims by Italian and Greek nationals against Germany arising from crimes committed during World War II, which gave rise to the ICJ dispute between Italy and Germany, resulting in the ruling that Italy violated Germany's sovereign immunities.<sup>124</sup>

Significant amounts of compensation awarded in US courts make Iran's example particularly apposite. They involve provisions in the Foreign Sovereign Immunity Act that deal with states sponsors of terrorism. If a foreign state has been designated by the US president as a state sponsor of terrorism, three things occur:

- ▶ First, a cause of action is created for 'personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency'.<sup>125</sup> Such claims can be brought by US nationals, members of the US armed forces or those otherwise employed by the US government.<sup>126</sup>
- ▶ Second, a state sponsor of terrorism enjoys no immunity from the jurisdiction of US courts in such an action.<sup>127</sup>
- ▶ Thirdly, such a state's assets in the US can be seized to enforce the judgment,<sup>128</sup> although an exception applies to 'the property (...) of a foreign central bank or monetary authority held for its own account', which remains shielded from seizure.<sup>129</sup>

Some have argued that the US should designate Russia as a state sponsor of terrorism,<sup>130</sup> alongside the currently listed Cuba, Iran, North Korea and Syria.<sup>131</sup> The Ukrainian government

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<sup>123</sup> For a detailed overview, see Scott R. Anderson, 'What's Happening with Afghanistan's Assets?', *Lawfare*, 18 February 2022, <https://www.lawfareblog.com/whats-happening-afghanistans-assets>.

<sup>124</sup> *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Merits, Judgment, 3 February 2012, paras. 27-36.

<sup>125</sup> 28 USC § 1605A(a)(1).

<sup>126</sup> 28 USC § 1605A(a)(2)(ii).

<sup>127</sup> *Ibid.*

<sup>128</sup> 28 USC § 1610(a)(7).

<sup>129</sup> 28 USC § 1611(b)(1).

<sup>130</sup> Jason Blazakis, 'The ultimate sanction: Listing Russia as a state sponsor of terrorism', *Los Angeles Times*, 1 March 2022, <https://www.latimes.com/opinion/story/2022-03-01/russia-state-sponsor-terrorism-ukraine><https://www.latimes.com/opinion/story/2022-03-01/russia-state-sponsor-terrorism-ukraine-invasion>.

<sup>131</sup> US Department of State, State Sponsors of Terrorism, <https://www.state.gov/state-sponsors-of-terrorism/>.

has reportedly requested this, too.<sup>132</sup> In addition to the symbolism of this measure, it would have the practical effect of enabling claims against Russia by US citizens affected by its actions in Ukraine. Russia's designation would not, however, extend this opportunity to Ukrainian citizens or the Ukrainian state. Nor, importantly, could such claims be satisfied by the RCB's assets.

Subject to sovereign immunity and justiciability considerations discussed below, other causes of action may exist against Russia in states that have frozen Russian state-owned assets. Further analysis is necessary to explore them, and considerable complexity is likely to be involved in such a study. Depending on the applicable conflict of law rules, Ukrainian substantive laws may govern some of the claims, which would to some extent attenuate the importance of the law where the proceedings take place. In any event, given the complexities and uncertainties associated with possible private claims, the Ukrainian government could undertake or commission a separate, detailed analysis of their viability – subject to the caveat about the need for an orderly claims process, which in any event may be difficult to achieve through reliance on disparate private claims.

### 6.3. Sovereign Immunity and Justiciability

Sovereign immunity considerations arising in this context are largely analogous to those that emerge in connection with confiscation. In this instance, however, both the immunity from suit and the immunity from execution come into play, the former preventing Russia from being sued without its consent and the latter foreclosing the seizure of Russian state-owned assets.

Here, too, US practice offers an example of curtailing a foreign state's sovereign immunity in case of its involvement in serious crime, namely terrorism. However, the respective provision, which was introduced by the Justice Against Sponsors of Terrorism Act, requires a US territorial nexus:

A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by--

- (1) an act of international terrorism in the United States; and

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<sup>132</sup> Dan De Luce, Carol E. Lee and Courtney Kube, 'Ukraine's Zelenskyy asked Biden to label Russia a state sponsor of terrorism', *NBC News*, 15 April 2022, <https://www.cnbc.com/2022/04/15/ukraines-zelenskyy-asked-biden-to-label-russia-a-state-sponsor-of-terrorism.html>

- (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.<sup>133</sup>

States that hold frozen Russian assets would need to go further if they are to allow claims against Russia arising from the events on Ukraine's territory. Furthermore, provision would have to be made not only for lifting Russia's immunity from jurisdiction, but also its immunity from execution, so that RCB assets can be seized in satisfaction of the final judgment. In the context of Iran, this has been addressed by the Iran Threat Reduction and Syria Human Rights Act 2012, which provides that Iran's blocked financial assets in the US:

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.<sup>134</sup>

In line with this, Russia's sovereign immunities could, for domestic law purposes, likewise be abrogated or limited by statute. This is the approach that was taken in the proposed Ukrainian Sovereignty Act of 2022, which was tabled in the US House of Representatives in March 2022 but has not advanced since.<sup>135</sup> In pertinent part, the bill provided as follows:

- (a) CIVIL ACTION.—Notwithstanding any other provision of law, a foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against the foreign state for physical injury, including death, property damage, or loss of property caused by the foreign state's invasion of another sovereign nation located in Europe if such invasion—
- (1) was by or at the direction of the foreign state irrespective of where such injury, death, damage, or loss occurred; and
  - (2) has been, at any time, condemned by the General Assembly of the United Nations and by a concurrent resolution or separate resolutions of the United States House of Representatives and the United States Senate.

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<sup>133</sup> 28 USC § 1605B.

<sup>134</sup> 22 USC § 8772.

<sup>135</sup> H.R. 7205 - Ukrainian Sovereignty Act of 2022, <https://www.congress.gov/bill/117th-congress/house-bill/7205/textbill/7205/text>.

(b) ATTACHMENT.—Notwithstanding any other provision of law, including the limitations in section 1610, the property in the United States of the aggressor foreign state shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act.

(c) JURISDICTION.—The district courts of the United States shall have original jurisdiction, without regard to the amount in controversy, of any civil action made under this section. Personal jurisdiction over a foreign state shall exist as to each claim for relief where service has been made pursuant to section 1608.

A difficulty that is distinct, yet related in that it arises in connection with litigation arising in connection with actions of a sovereign state, is whether the claims are justiciable. In common law jurisdictions including in the US and the UK, justiciability refers to whether a particular dispute is apt to be decided by the courts. The primary operation of the doctrine is to exclude purely political controversies from the ambit of judicial process. Matters related to acts of foreign states may therefore be considered non-justiciable. The rationale behind the rule is to ensure that courts do not impinge on the executive's foreign policy prerogatives and do not compromise the conduct of the nation's foreign affairs by weighing in on international controversies.<sup>136</sup> As a result, in deciding whether a particular matter is justiciable the courts may afford weight to the government's views.<sup>137</sup> In light of the support that relevant states have expressed for Ukraine, of which the freezing of Russian state-owned assets is one manifestation, it is possible they will argue in favour of the claims against Russia being justiciable.

## 6.4. Conclusion

The use of private claims to go after frozen Russian assets presents challenges related to legal bases for action and, primarily, sovereign immunity. All of these difficulties can arguably be overcome by legislative changes in a manner compatible with international law, but practical questions arise as to the role that private litigation should play alongside the Ukrainian government's claims or the work of a potential claims commission. It is desirable

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<sup>136</sup> *AY Bank Ltd v Bosnia and Herzegovina and Others* [2006] EWHC 830 (Ch) at [32].

<sup>137</sup> 'Finally, with particular reference to Foreign Act of State, any domestic court will naturally always think hard before reaching any decision which might be seen as inconsistent with and undermining of the policy and interests of its own Government at an international level, in a context where the judicial and executive branches should normally speak with one voice; that includes any decision which would inflict serious damage on this country's international relations with another State or States.' See Lord Mance, 'Justiciability', 40<sup>th</sup> Annual FA Mann Lecture at Middle Temple Hall, London, 27 November 2017, p. 21, <https://www.supremecourt.uk/docs/speech-171127.pdf>. In the US, see *Sosa v Alvarez-Machain*, 542 US 692, 733 n21 (2004) ('[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy').

for the Ukrainian government to undertake or commission a detailed analysis of private claim prospects in key jurisdictions, and for those strategic issues of the relationship between private and public claims to be addressed as part of it.



## 7. Enforcement of a Foreign or International Judgment

A foreign court or international arbitral tribunal may grant monetary awards against Russia or Russian government-affiliated individuals or companies to Ukraine or other claimants. Such judgments or awards can be enforced against Russian assets provided (a) the latter are not covered by immunity from enforcement and (b) other conditions for enforcement are met, for instance due process requirements were observed in the proceedings that gave rise to the judgment or award.<sup>138</sup> The main advantage of this route is that the assets are used to satisfy claims that have already been adjudged as legitimate, and there is therefore no need for the state that froze the assets to decide on their disbursement.

This includes the enforcement of judgments that may be issued in Ukraine. In April 2022, the Supreme Court of Ukraine decided that Russia did not enjoy immunity in the Ukrainian courts from claims for damages caused during its invasion. The Court's reasoning is based on the argument that customary international law provides for the territorial tort exception, which would permit for claims against a sovereign state to proceed in the courts of another state in whose territory the foregoing state has committed a tort.<sup>139</sup>

At the international level, awards against Russia may be issued by the ICJ,<sup>140</sup> ECtHR, arbitral tribunals seized of investment treaty disputes against Russia, or bespoke institutions that may be created in the future, such as claims commissions. The enforcement of their decisions would require the abrogation of the immunity from enforcement that accrues to Russian state assets. To the extent that some of these judgments may involve private claims against Russia, the practical challenges of ensuring the fairness, orderliness and consistency with Ukraine's public needs arise, as discussed above. There may, therefore, be an argument in favour of only lifting Russia's immunity from execution as relates to judgments or awards issued in litigation brought by the Ukrainian state and/or judgments rendered by Ukrainian

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<sup>138</sup> For instance, US states that follow the Uniform Foreign Money-Judgments Recognition Act (1962) and the Uniform Foreign-Country Money Judgments Recognition Act (2005) are likely to deny recognition and enforcement of foreign judgments if: '(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (b) the foreign court did not have personal jurisdiction over the defendant; or (c) the foreign court did not have jurisdiction over the subject matter'. See Scott A. Edelman et al, 'United States' in Patrick Doris (ed), *Enforcement of Foreign Judgments* (2015) p. 132. In states bound by the ECHR, it is arguable that the enforcement of a foreign confiscation order can be in breach of the ECHR if the foreign proceedings that gave rise to it involved a 'flagrant denial' of the right to a fair trial: see Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (CUP 2014) pp. 228–252. These human rights guarantees protect individuals but not the state of Russia.

<sup>139</sup> Supreme Court of Ukraine, Case No 308/9708/19, Judgment of 14 April 2022.

<sup>140</sup> In the context of Ukraine's claim for reparations should it prevail on the merits.

courts in cases related to personal injury or damage to property, but excluding judgments obtained in private litigation against Russia in non-Ukrainian courts.

## 8. Russia's Retaliatory Measures

It is likely that Russia will take measures in retaliation for the confiscation of frozen Russian assets. It has already mooted the prospect of nationalising the assets of foreign companies that suspend or cease their operations in Russia.<sup>141</sup> As a matter of international law, these measures are highly likely to be unlawful and, if carried out, may result in investment treaty arbitration against Russia. In such arbitration, Russia may seek to argue its nationalisation is a lawful countermeasure against prior confiscation of its assets, which would preclude international responsibility under BITs. These arguments would fail if the arbitral tribunal concluded, in line with the analysis above, that the confiscation of Russian state-owned assets overseas fell within the scope of a newly developed exception to sovereign immunity or adjudged it to itself be a lawful countermeasure. It is also possible that an arbitral tribunal would not at all be able to adjudicate Russia's claim that the confiscation of its assets abroad was unlawful because that issue is outside the tribunal's jurisdiction, which would prevent the consideration of Russia's countermeasures argument.<sup>142</sup>

For all these reasons, confiscation of Russian state-owned assets is unlikely to prejudice foreign companies' ability to seek compensation from Russia for its illegal measures. As ever, those companies' main concern would be their ability to enforce arbitral awards against Russia in the face of its virtually certain refusal to comply. The property protected by sovereign immunities, including the RCB's assets, cannot generally be used for the enforcement of court judgments or arbitral awards, which means that its confiscation – if it only concerns those assets that are off limits to private claimants at the moment – does not deplete the pool of property currently available to claimants. If, on the other hand, states opt for enabling the enforcement of foreign judgments or international awards against frozen Russian assets, the pool of available property will in fact be expanded.

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<sup>141</sup> King & Spalding, 'Russia's Recent Actions Against Foreign Investors Will Give Rise to Claims Under International Investment Treaties', *JD Supra*, 8 April 2022, <https://www.jdsupra.com/legalnews/russia-s-recent-actions-against-foreign-4249107/>.

<sup>142</sup> For instance, in one NAFTA investment arbitration case Mexico argued that its disputed measures constituted a lawful countermeasure against a prior breach of international law by the US. The arbitral tribunal stated as follows: 'In the present case, the Tribunal has no jurisdiction to decide whether the United States committed an internationally wrongful act which justified a countermeasure'. The same logic applies to Russia's possible purported countermeasures against alleged breaches of international law by other states. In that case, however, the tribunal established that, in any event, other criteria for the lawfulness of Mexico's countermeasures were not satisfied. See *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/05, Award, 21 November 2007, para. 131. The same comment in relation to jurisdiction was made in *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, paras. 180-188.

Russia has also imposed sanctions of its own against Western public officials and journalists, as well as engaged in 'hostage diplomacy' by arbitrarily detaining foreign nationals.<sup>143</sup> The former measures are generally lawful under international law while the latter ones are manifestly illegal, in either case wholly irrespective of the confiscation of Russian-owned assets abroad. In summary, while the political risk of Russia's retaliatory measures has to be assessed by policymakers to make an informed decision as to the confiscation of Russia-linked assets,<sup>144</sup> the confiscation is unlikely to alter the (il)legality of such possible actions on Russia's part.

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<sup>143</sup> See, e.g., Jennifer Hansler and Wayne Sterling, 'US government says that Brittney Griner has been wrongfully detained in Russia', *CNN*, 3 May 2022, <https://edition.cnn.com/2022/05/03/football/brittney-griner><https://edition.cnn.com/2022/05/03/football/brittney-griner-wnba-spt-intl/index.html>[wnba-spt-intl/index.html](https://edition.cnn.com/2022/05/03/football/brittney-griner-wnba-spt-intl/index.html).

<sup>144</sup> Thus, an argument has been made that the taking of Russian assets would 'expose all cross-border assets, including Western ones, to tit-for-tat appropriation by governments': 'Why the West should be wary of permanently seizing Russian assets', *The Economist*, 9 June 2022.

## 9. Conclusions

The analysis in this paper surveys the legal issues related to the use of frozen Russian assets, including state property and private wealth, for the reconstruction of Ukraine. There is a broad array of questions to consider, which reflects both the multiplicity of possible options for disposing of the frozen assets and the interplay between domestic legal systems and international law. This paper is not intended to provide comprehensive answers and is best read as a guide to matters that require consideration by governments working on the issues that it covers.

In summary, there appear to be four main options in dealing with frozen Russian assets:

1. **Continued freezing** can be maintained based on existing legal authorities. It is likely to remain lawful even for an extended period of time unless explicitly intended to be permanent, in which case it may offend against domestic and international property rights guarantees, insofar as private – rather than state – property is concerned.

For these reasons, continuous freezing of the assets could be used as a temporary solution until (a) frozen Russian assets are confiscated or disbursed for Ukraine's benefit, (b) Ukraine otherwise obtains full compensation for the damage it suffered or (c) the Ukrainian government requests that the asset freeze be lifted, e.g. to facilitate a peace settlement.

2. **Confiscation** would require legislative changes across the states that have frozen Russian assets. In this context, it is particularly important to distinguish between state and private assets, and complexities are likely to arise in connection with the notionally private property of Russian state-owned enterprises.
  - **Insofar as state-owned property is concerned**, legislation could be adopted that would enable the confiscation of frozen funds owned by:
    - (a) Russia specifically in the current circumstances of a large-scale armed aggression involving violations of international humanitarian law and international human rights law;
    - (b) States whose armed activities violate a ruling by the ICJ or another international court, such as the ECtHR;
    - (c) States engaged in armed aggression that, in the absence of action by the UN Security Council 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; or  
(d) States whose sovereign immunity should be limited based on a resolution by the UNSC, should one be adopted in the future in the context of a conflict not involving a UNSC permanent member.

In some states, this will raise issues of compliance with customary international law of sovereign immunities. It is arguable that, as long as Russian assets are confiscated based on executive action rather than a court judgment, the law of sovereign immunities does not apply. In any event, even if it were to apply, denying Russian state assets the immunity from execution would likely be either a lawful countermeasure in response to Russia's breaches of international law or an act in collective self-defence.

It may also be desirable, both in view of the current situation and to disincentivise future aggression, to postulate a new exception to sovereign immunity rules asserting that immunity from execution does not apply in one of the four cases listed above, depending on which one is deemed most appropriate.

Such an exception to sovereign immunity could be:

(a) Affirmed by a resolution of the UN General Assembly; or  
(b) Adopted in a multilateral treaty or joint statement by as many as possible of (i) Ukraine, (ii) states that have frozen Russian assets, and (iii) states whose security is tangibly and adversely impacted by Russia's war in Ukraine, such as EU member states.

- o **Insofar as private property is concerned**, confiscation efforts can proceed based on either existing laws, which differ across jurisdictions, or new legislation designed to facilitate the taking of Russia-linked property. This is an area where strides are already being made, most notably with the proposed administrative forfeiture process in the US and sanctions law reform in Canada. Broadly speaking, the most ambitious approaches to the confiscation of Russia-linked private property involve either (a) reversing the burden of proof, for the purposes of proceeds of crime laws, in relation to assets owned by Russian government-affiliated individuals and companies; (b) enabling the confiscation of frozen assets if their owner is

found, on the balance of probabilities, to be involved in certain types of serious crime; or (c) enabling the confiscation of frozen assets if they are found, likewise on the balance of probabilities, to have a 'connection' to crime. Each state that has frozen Russia-linked private assets could consider the use of these options in light of applicable constitutional and human rights property protections.

- **In those states that have BITs with Russia**, additional analysis should be conducted on whether respective Russian state-owned or private assets fall under the protection of such treaties and, if so, what requirements should be satisfied by those states to minimise the risks of liability in arbitration under such treaties.

3. **Private claims** could be brought under existing laws vis-à-vis private persons but would likely require changes to domestic legislation insofar as suing Russia or enforcing claims against Russian state assets are concerned. While the issue of sovereign immunities could be dealt with in the same fashion as proposed previously in connection with confiscation, given the diversity of potential bases for private claims across jurisdictions concerned, the Ukrainian government could undertake or commission a separate, detailed analysis of the viability of private claims against Russia or Russian government-affiliated individuals and companies.
4. **Enforcement of a foreign judgment or international award** would likewise involve reforms to sovereign immunity rules as laid out above whenever Russian state assets are concerned, as distinct from private ones. From the standpoint of each given state that have frozen Russian assets, a distinct advantage of opting for this route is that the adjudication of relevant claims, and thus responsibility for its outcome, would lie with the courts or arbitral tribunals elsewhere, with that state's own involvement limited to recognising and enforcing a judgment or award. That, however, presupposes that there are courts or arbitral tribunals elsewhere that can consider claims related to Russia's invasion of Ukraine. Yet, with Ukraine itself torn by war, and few if any international judicial fora competent to consider issues of compensation, it is difficult to escape the conclusion that the most natural place to obtain a judgment to begin with would be precisely the states where Russian assets have been frozen.

The common thread that unites all these multifarious issues is the challenge of, on the one hand, responding to Russia's egregious breaches of international law and, on the other hand, maintaining the rule of law in states that have frozen Russian assets. In practical terms, this means ensuring that those innocent of involvement in Russia's malign activities are able to protect their property from governmental overreach, but also that the Russian state and those affiliated with it should not be permitted to manipulate those rule of law protections that they enjoy in the West yet deny to those within their power. This paper has been an attempt to lay out some options for striking that balance.



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