

# Repurposing frozen Russian sovereign assets for the support and reconstruction of Ukraine: a legal assessment

Joop Voetelink \*

## Abstract

The sanctions imposed on the Russian Federation following its further invasion of Ukraine in 2022 include measures such as the seizing of goods and freezing of assets. As the war between Russia and Ukraine grinds on, the call to confiscate these goods and assets, and use the proceeds for the recovery and reconstruction of Ukraine, are growing stronger. However, this endeavor is not without legal challenges, particularly concerning the repurposing of frozen Russian sovereign assets, such as the exchange reserves of the Central Bank of Russia, for which there is no clear basis under international law. Based on a legal assessment, the author argues that repurposing these assets, even if such an action does not fully meet the criteria to be classified as a third-party countermeasure, can still be justified as an *in extremis* measure given the exceptional circumstances of the current situation, provided certain conditions are satisfied. Such an *in extremis* measure cannot be considered a rule of customary international law as state practice is not sufficiently widespread, representative, and consistent and *opinio juris* is still lacking.

## Keywords

Compensation; confiscation; countermeasures; sanctions; seizing and freezing; sovereign assets; state immunity; state responsibility

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## Introduction

The Russian annexation of Crimea in 2014 and the destabilization of Eastern Ukraine prompted the imposition of the first set of economic sanctions targeting the Russian Federation (Russia). While the extent and scope of these sanctions initially remained limited, Russia's recognition of the self-proclaimed People's Republics of Donetsk and Luhansk, followed two days later by Russia's illegal and unprovoked armed attack on Ukraine on February 24, 2022, triggered an unprecedented "rolling program of intensifying sanctions".<sup>1</sup> Partly based on the sanctions of 2014, the United Kingdom (UK), the United States (US), and other members of the Group of Seven (G7), along with the EU and several like-minded states, imposed a series of expanding, well-coordinated sanctions on Russia.<sup>2</sup> The sanctions include measures such as the seizing of goods like yachts, aircraft, and real estate, as well as the freezing or immobilization of financial assets such as securities and funds belonging to Russian individuals, companies, financial institutions, and other entities.<sup>3</sup>

As the armed conflict between the two states grinds on and war-induced damage in Ukraine surges, impacting all aspects of Ukrainian society, the call for confiscating, and repurposing the seized Russian goods and frozen assets to support and rebuild Ukraine grows stronger.<sup>4</sup> Notably, the frozen foreign exchange reserves of the Central Bank of Russia are under scrutiny because of their value of approximately \$280 billion, which could

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<sup>1</sup> Claire Mills, "Sanctions against Russia", Research Briefing, House of Commons Library, February 28, 2024 (the briefing is updated regularly), p. 12, <<https://researchbriefings.files.parliament.uk/documents/CBP-9481/CBP-9481.pdf>>.

<sup>2</sup> The G7 is an informal forum comprising seven of the world's largest industrialized states (Canada, Germany, France, Italy, Japan, the United States, and the UK) where their leaders meet to discuss current economic and financial topics; like-minded states include Australia, Iceland, New-Zealand, Norway, Singapore, Taiwan, South Korea, and Switzerland.

<sup>3</sup> 'Seizing' refers to measures that temporarily prevent owners from selling or transferring their movable and immovable property; 'freezing' refers to measures that temporarily prevent owners from moving, accessing, transferring, or converting their liquid assets; 'immobilization' are frozen assets that others are not allowed to have dealings with (cf. Webb, "Legal Options for Confiscation of Russian State Assets").

<sup>4</sup> Claire Mills and Philip Brien, "Post-Conflict Reconstruction Assistance to Ukraine", Research Briefing, UK House of Commons Library, July 15, 2024, p. 4, <<https://researchbriefings.files.parliament.uk/documents/CBP-9728/CBP-9728.pdf>>; cf. Webb, "Legal Options for Confiscation of Russian State Assets", p. VII; unlike freezing and seizing, confiscation is a permanent measure that results in the actual change of ownership of frozen assets and seized property;

cover a larger portion of the expected \$416 billion cost for the reconstruction of Ukraine over the next ten years.<sup>5</sup>

However, international action has been tempered by legal complexities related to sovereign assets protected by the law of state immunity, making states reluctant to take drastic measures regarding Russia's frozen foreign exchange reserves. Nevertheless, in May 2022, Canada amended the 'Special Economic Measures Act', the 'Magnitsky Act', and the 'Seized Property Management Act' to allow for the confiscation of assets belonging to a foreign state located within Canada.<sup>6</sup> Two years later, the US followed suit when President Biden signed the 'Rebuilding Economic Prosperity and Opportunity for Ukrainians Act' (REPO Act) into law as part of the foreign aid package that included assistance for, *inter alia*, Ukraine.<sup>7</sup> The statute authorizes the president to confiscate Russian sovereign assets and transfer them to the 'Ukraine Support Fund' established by the same law.

This article examines the scope that international law provides for confiscating frozen Russian sovereign assets and using them to support and reconstruct Ukraine. First, Russia's responsibility under international law is discussed, along with the legal consequences it entails, including the reparation of all damage and the potential imposition of countermeasures. Following a brief discussion of national forfeiture procedures, the article continues analyzing the law of state immunity. After concluding that this doctrine does not preclude executive action against sovereign assets, the article explores the legal challenges of various options the international community is currently considering to repurpose Russian sovereign assets in support of Ukraine. Finally, the article offers a brief synthesis and conclusion.

## International responsibility of states

When a state acts or fails to act in breach of an international legal obligation, such as one arising from a treaty, customary international law, or binding decision of an international organization, it leads to its liability

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<sup>5</sup> See World Bank, *Ukraine - Third Rapid Damage and Needs Assessment (RDNA3) : February 2022 - December 2023 (English)*, (Washington, D.C.: World Bank Group), <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099021324115085807/p1801741bea12c012189ca16d95d8c2556a>>. Note that damage estimates vary considerably, however; Mills and Brien, "Post-Conflict Reconstruction Assistance to Ukraine", p. 7.

<sup>6</sup> E.g. Webb, "Legal Options for Confiscation of Russian State Assets", p. 18.

<sup>7</sup> US Congress, "Part of H.R. 815 - Making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes", 118th Congress (2023-2024).

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for such internationally wrongful act under the rules of state responsibility. The key components of these rules reflect evolving customary international law, which the United Nations International Law Commission codified in 2001 in the ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (DARS).<sup>8</sup> The DARS outlines the general conditions under which a state can be held responsible under international law and the legal consequences it entails.

It is evident that Russia—through its armed invasion of Ukraine, the occupation of Ukrainian territories and the commission of war crimes and human rights violations<sup>9</sup>—is acting in violation of its international obligations.<sup>10</sup> This means that Russia can be held responsible for these actions (Article 1 in conjunction with Article 2 DARS). Russia cannot invoke any of the justifications set out in Articles 20-25 DARS as it has violated the prohibition of the use of force (Article 2, paragraph 4 UN Charter).<sup>11</sup> As this provision is regarded as a peremptory norm of general international law (*jus cogens*), a breach of the norm cannot be justified pursuant to Article 26 DARS.<sup>12</sup>

The international responsibility of Russia creates a new legal relationship wherein Russia, in short terms, is under the duty to continue to perform its breached obligations (Article 29 DARS), cease the wrongful act and offer guarantees to prevent recurrence (Article 30 DARS), and finally, ensure full reparation for the injury caused by the internationally wrongful act. Reparation can take various forms, as set out in Articles 34 through

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<sup>8</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts” (with commentaries), United Nations, November 2001. (DARS hereinafter)

<sup>9</sup> Example of commission of war crimes: ICC, Pre-Trial Chamber II, issue arrest warrants for commission of war crimes; “Situation in Ukraine: ICC judges issue arrest warrants against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov”, International Criminal Court, June 24, 2024; examples of human rights violations: ECHR, June 24, 2024, Grand Chamber, Judgement, Case of Ukraine v. Russia (Re Crimea), (Applications nos. 20958/14 and 38334/18).

<sup>10</sup> For an overview of Russia’s violations of international law, see Laurence H. Tribe et al., “The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine”, Report Renew Democracy Initiative, September 17, 2023, p. 93ff.

<sup>11</sup> Articles 20-25 DARS refer to: consent, self-defense, countermeasures, *force majeure*, distress, or necessity.

<sup>12</sup> *Jus cogens* is defined in the International Law Commission’s draft conclusions on identification and legal consequences of peremptory norms of general international law as: “A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”, Chapter V of the Report of the International Law Commission, Seventy-third session (18 April–3 June and 4 July–5 August 2022), UN Doc A/77/10.

39 DARS. First of all, the state that is responsible for the internationally wrongful act has to re-establish the situation which existed before the wrongful act was committed ('restitution' or *resitutio in integram*). When restitution is not possible or does not fully cover the damage caused, the responsible state is obliged to compensate all damage. If the injury caused by the wrongful act cannot be made good by either of the two forms of reparation, the responsible state has to acknowledge its breach of the international obligation, express its regret, offer a formal apology, or employ another appropriate modality to give satisfaction for the injury caused. Taking into account the still ongoing massive destruction in Ukraine, *resitutio in integram* will be impossible, making compensation the only viable option for full reparation in addition to the general obligations to cease all hostilities and the withdrawal of the Russian troops from Ukraine.

Recognizing Russia's international responsibility, various international organizations have called for further action. Based on its emergency powers under the 1950 'Uniting for Peace Resolution'<sup>13</sup>—the UN General Assembly has adopted a number of resolutions, including Resolution A/RES/ES-11/5, in which it recognized that Russia "... must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts."<sup>14</sup> Furthermore, the General Assembly recognized the need to establish an international mechanism for reparations for damages and recommended UN member states to create an international register of damage.

The Council of Europe supports initiatives aimed at securing Russian reparations to Ukraine and, in response to the General Assembly's call in May 2023, has established a damages registry.<sup>15</sup> The registry is based in The Hague, in the Netherlands, and is open to both member states of the

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<sup>13</sup> U.N. General Assembly Resolution 377(V), Uniting for Peace (Nov. 3, 1950).

<sup>14</sup> U.N. General Assembly Resolution ES-11/5, Furtherance of remedy and reparation for aggression against Ukraine (Nov. 15, 2022), paragraph 2.

<sup>15</sup> Decisions of the Committee of Ministers of the Council of Europe, September 15, 2022 and February 24, 2023; Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Adopted by the Committee of Ministers on 12 May 2023 at the 1466th meeting of the Ministers' Deputies); Partial Agreements of the Council of Europe are not treaty-based but represent a special form of cooperation between some of the member states where the signatories commit to participating in a joint endeavor. Enlarged Partial Agreements are open to both member states and non-member states, as well as international organizations. "Partial Agreements", Council of Europe Partial Agreements, Europe's Human Rights Watchdog, <<https://www.europewatchdog.info/en/partial-agreements/#:~:text=The%20Council%20of%20Europe's%20Partial%20Agreements%20are%20not,themselves%20to%20partake%20in%20a%20specific%20joint%20project>>

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Council of Europe and non-member states, as well as international organizations.<sup>16</sup> The Council of Europe views the registry as a first step towards establishing a comprehensive system to hold Russia accountable. Furthermore, a report has been prepared proposing the establishment of a compensation mechanism in accordance with UN resolution A/RES/ES-11/5.<sup>17</sup> However, the proposal goes further by also suggesting that frozen Russian government assets be transferred to the mechanism and used for the benefit of the reconstruction of Ukraine.<sup>18</sup> The assets the proposal refers to mainly consist of the approximately \$280 billion worth of reserves frozen by G-7 countries that the Russian Central Bank had deposited abroad.<sup>19</sup>

The EU also takes the position that Russia and its leaders must be held responsible for waging a war of aggression and other international crimes. In this regard, the European Council has expressed its support for establishing a compensation mechanism and the damages registry set up by the Council of Europe.<sup>20</sup> On July 17, 2024, the newly elected European Parliament restated that Russia must compensate for the destruction in Ukraine and asked for a “sound legal regime” for confiscating Russian sovereign assets.<sup>21</sup> Moreover, the EU has adopted a number of legislative acts that go beyond merely freezing Russian sovereign assets, as will be discussed below.

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<sup>16</sup> Article 3 of the Statute of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Appendix to Resolution CM/Res(2023)3); Also, see: Host State Agreement between the Kingdom of the Netherlands and the Council of Europe regarding the Seat of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine; Strasbourg, July 14, 2023 (Dutch Treaty Series (*Tractatenblad*), 2023, 81); In principle, only non-member states that voted in favor of the UN Resolution can join the Register; Article 5 Statute of the Register.

<sup>17</sup> Parliamentary Assembly of the Council of Europe, “Support for the reconstruction of Ukraine”, Committee on Political Affairs and Democracy, February 22, 2024, para 3.

<sup>18</sup> Report, Parliamentary Assembly of the Council of Europe, para 6.

<sup>19</sup> Status as of September 2023; see “READOUT: Russian Elites, Proxies, and Oligarchs (REPO) Deputies Meeting”, US Department of the Treasury, September 7, 2023.

<sup>20</sup> European Council, *Conclusion of the meeting on December 14 and 15, 2023*, EUCO 20/23 (December 15, 2023). See also European Parliament Resolution 2022/2560(RSP) (April 7, 2022), that calls for setting up a fund for the reconstruction of Ukraine that should be financed by various sources, including frozen Russian assets (para. 22). See also para. 9 of the European Parliament Resolution Russia’s Escalation of its War of Aggression against Ukraine, P9\_TA(2022)0353, October 6, 2022.

<sup>21</sup> “Newly elected Parliament reaffirms its strong support for Ukraine”, European Parliament, July 18, 2024, <<https://www.europarl.europa.eu/news/en/press-room/20240710IPR22810/newly-elected-parliament-reaffirms-its-strong-support-for-ukraine>>.

## Countermeasures

When a state breaches its international obligations, the injured state can invoke the responsibility of that state for the internationally wrongful act and may take countermeasures to induce that state to comply with its international obligations.<sup>22</sup> Under specific circumstances, third states can also invoke another state's responsibility.<sup>23</sup> This rule applies, for instance, when the breached obligation pertains to the international community as a whole (an *erga omnes*-obligation) rather than to a specific state.<sup>24</sup> Russia's aggression against Ukraine is a case in point as it constitutes a violation of Article 4(2) of the UN Charter, thereby affecting the international community's collective interests and security. Under Article 54 DARS, any state can take third-party countermeasures to ensure cessation of the breach and reparation in the interest of the injured state. Although the latter provision is not regarded as an established rule of customary international law, some see it as a clear progression in that direction.<sup>25</sup>

Furthermore, the DARS stipulates that in the event of a serious violation of an obligation arising under a peremptory norm of international law, states must cooperate to bring it to an end.<sup>26</sup> Russia's attack on Ukraine violates the UN Charter and constitutes a violation of peremptory international law, against which the G-7, EU, and other states are coordinating action by imposing economic sanctions. Additionally, the EU is coordinating the implementation of the sanctions through the 'Freeze and Seize' Task Force<sup>27</sup>—which closely cooperates with the Russian Elites,

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<sup>22</sup> Article 42 DARS; Article 49 DARS.

<sup>23</sup> Article 48 DARS. See also: "Obligations *erga omnes* in international law", Institut de Droit International, Resolution, Krakow (August 27, 2005).

<sup>24</sup> See: ICJ February 5, 1970, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgement, ICJ Report 1940, para 34.

<sup>25</sup> Webb, "Legal Options for Confiscation of Russian State Assets", p. 25; Tribe et al., "The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine", p. 116; Menno T. Kamminga, "Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?", Netherlands International Law Review (April 2023), p. 7. See also: Institut de Droit International, Krakow session, Resolution on Obligations Erga Omnes in International Law, adopted August 27, 2005.

<sup>26</sup> Articles 40(1) and 41(1).

<sup>27</sup> Set up by the European Commission in March 2022; "Enforcing sanctions against listed Russian and Belarussian oligarchs: Commission's "Freeze and Seize Task Force steps up work with international partners", March 17, 2022.

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Proxies, and Oligarchs (REPO) Task Force of the G-7 plus<sup>28</sup>—and the US Task Force KleptoCapture.<sup>29</sup>

Countermeasures, such as the coordinated economic sanctions targeting Russia, are a self-help remedy that is allowed under international law provided certain criteria are met, as set out in Articles 49 through 53 DARS. The key criteria, summarized, are that the countermeasure must induce compliance with the breached international obligation, do not entail the use of force, and must be proportional, temporary, and, where possible, reversible. In my opinion, the present sanctions imposed on Russia satisfy these conditions as they are measures that, by their nature, inherently do not involve the use of force and aim to bring an end to a particular situation. Furthermore, the sanctions can then be lifted and, for instance, seized goods and frozen assets can be released. Also, considering the extent of destruction in Ukraine, the sanctions are unquestionably proportionate.

### Forfeiture

The international sanctions do not extend to the point where states are allowed to confiscate Russian goods or assets. Rather, they are limited to freezing, immobilizing, and seizing goods and assets. These measures prevent Russian owners, whether they be the state or individuals and other legal entities such as companies, from freely disposing of their assets and properties. As a result, they have no access to their funds or shares and cannot move, convert, or sell them. In the case of immobilization, others are also prohibited from conducting transactions related to frozen assets targeting transactions related to the management of the assets;<sup>30</sup> e.g. blocking investments associated with the assets.<sup>31</sup> Furthermore, owners cannot sell or transfer their seized goods. However, they still retain ownership of the goods and assets; the sanctions do not lead to a transfer of title.

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<sup>28</sup> Established March 17, 2022, by the G-7 along with Australia and the EU; see: “Russian Elites, Proxies, and Oligarchs Task Force: ministerial joint statement”, UK Home Office, March 17, 2022.

<sup>29</sup> E.g. “Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture”, United States Department of Justice, March 2, 2022.

<sup>30</sup> Council of the European Union, General Secretariat, WK 3926/2023 INI, AHWP Frozen Assets - Non paper by the Commission services on generation of resources to support Ukraine - Item 3 (March 21, 2023), p. 2.

<sup>31</sup> An example is article 5a(4) of Council Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (consolidated version).



Confiscating Russian frozen assets and seized goods and using them to make reparations to Ukraine would entail (involuntary) transfer of ownership or circumvention of the rights to property.<sup>32</sup> Since such actions could infringe upon the rights of the Russian rightful owners, they must be sufficiently justified under international law. Currently, however, international law does not provide for a clear legal basis for such actions.

While sanction provisions may not extend to the point of allowing states to confiscate Russian goods and assets, most national laws enable courts to order the forfeiture of private Russian assets in national criminal or other legal proceedings. For example, most EU imposed sanctions ('restrictive measures' in EU terms) include the provision that member states must criminalize violations of EU sanctions regulations and provide "appropriate measures of confiscation of the proceeds of such infringements."<sup>33</sup> Recently, the violation of these restrictive measures has become an EU-crime under Article 83(1) of the Treaty on the Functioning of the European Union with the adoption of Directive (EU) 2024/1226.<sup>34</sup> The Directive seeks to harmonize enforcement of violations of the restrictive measures by the EU member states, directing them to take necessary measures to enable freezing and confiscation. At the same time, the EU revised the Asset Recovery and Confiscation Directive, extending its scope to include offenses related to the violations of EU-restrictive measures.<sup>35</sup>

Several states have already initiated legal proceedings to forfeit Russian goods, primarily within the framework of criminal procedures.<sup>36</sup> A notable example is the United States. Under the 'International Emergency Economic Powers Act', which provides the general basis for sanctions imposed by the President, violation of sanction provisions based on that

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<sup>32</sup> Paul R. Williams and Alexandra Koch, "Invoicing Russia for Ukraine's Recovery: The Complexities of Repurposing Frozen Russian Assets", *OpinioJuris*, May 12, 2023, p. 2.

<sup>33</sup> E.g. Article 8(1)1 of the consolidated Version of the Council Regulation (EU) No 833/2014 of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine.

<sup>34</sup> Treaty on the Functioning of the European Union; Rome, March 25, 1957; entry into force: January 1, 1958; the consolidated version is published in 2012 O.J. (C 326); Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures and Amending Directive (EU) 2018/1673, 2024 O.J. (L 1226).

<sup>35</sup> Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on Asset Recovery and Confiscation, 2024 O.J. (L 1260).

<sup>36</sup> E.g.: France (Abdelhak El Idrissi, "One villa seized and multiple investigations opened: French sanctions against Russian oligarchs begin to bear fruit", *Le Monde*, March 23, 2023); Canada ("Canada's move to seize assets from Russian oligarch could test charter law: trade lawyer", *CBC News*, December 22, 2022); Germany (Hans von der Burchard, "Germany Aims to Seize \$720M of Frozen Russian Money", *Politico*, December 20, 2023).

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law is punishable.<sup>37</sup> The proceeds from these actions are then subject to forfeiture.<sup>38</sup> In addition, the ‘Oligarch Assets for Ukrainian Victory Act’ has recently been enacted, which enables the US Attorney General to transfer the proceeds from forfeited Russian goods and assets to the Department of State.<sup>39</sup> The Department of State can then utilize these proceeds as Foreign Assistance under the ‘Foreign Assistance Act’ to support Ukraine.<sup>40</sup> This statute aligns with earlier Canadian legislation of similar intent. In early 2023, the US Attorney General exercised that authority to transfer forfeited assets worth \$5.4 million to the Department of State.<sup>41</sup> These assets belonged to a Russian oligarch who was charged with violating US sanctions by financing certain individuals involved in promoting the secession of Crimea. Currently, multiple forfeiture procedures are ongoing in the US concerning Russian goods<sup>42</sup>—including machinery,<sup>43</sup> luxury apartments,<sup>44</sup> and a superyacht worth \$300 million.<sup>45</sup>

The proceeds from the often lengthy and complex forfeiture procedures are relatively low. However, expanding the procedures to include all seized goods and assets of Russian oligarchs and companies (those not involved in criminal proceedings) is not possible as it lacks legal grounds in most states.<sup>46</sup> It would potentially infringe upon the fundamental rights

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<sup>37</sup> 50 United States Code (U.S.C.) §§1705(a)-(c).

<sup>38</sup> 18 U.S.C. §981(a)(2)(A). The forfeiture procedure can also be initiated in the absence of a criminal conviction. Justin C. Pfeiffer, “‘Pry before you buy’: Cheap planes may come with a hidden sanction”, *WorldECR* (Issue 127), March 2024, p. 23.

<sup>39</sup> Congressional Record, Senate, December 22, 2023, S10073; “Whitehouse-Graham Amendment to Transfer Liquidated Russian Oligarchs’ Assets to Aid Ukraine Clears Senate”, Sheldon Whitehouse, January 4, 2023.

<sup>40</sup> ‘Foreign Assistance Act of 1961’ (22 U.S.C. 2151 et seq.); Williams and Koch Williams, “Invoicing Russia for Ukraine’s Recovery 2023”, p. 4.

<sup>41</sup> Paul Grant, “U.S. attorney general OKs transfer of forfeited funds from Russia oligarch for use in Ukraine”, *Reuters*, May 10, 2023; Williams and Koch Williams, “Invoicing Russia for Ukraine’s Recovery 2023”, p. 4.

<sup>42</sup> See “Task Force KleptoCapture Announces Array of New Charges, Arrests, and Forfeiture Proceedings in Advance of Second Anniversary of Illegal Invasion of Ukraine”, United States Department of Justice, February 22, 2024.

<sup>43</sup> See “Justice Department Transfers Approximately \$500,000 in Forfeited Russian Funds to Estonia for Benefit of Ukraine”, United States Department of Justice, February 17, 2024. As in this particular case, the funds could not be transferred to Ukraine directly the transfer was made through Estonia.

<sup>44</sup> See “Justice Department Seeks Forfeiture of Two Bal Harbour Condos for Violations of Russia-Related U.S. Sanctions”, (Case 24-cv-20687), United States Attorney’s office Southern District of Florida, US Department of Justice, February 22, 2024.

<sup>45</sup> See “Justice Department Files Civil Forfeiture Complaint Against \$300 Million Superyacht”, United States Department of Justice, October 23, 2023; Complaint 23 oktober 2023, USA v. The M/Y Amadea, District Court Southern District of New York, Case 1:23-cv-09304.

<sup>46</sup> Kamminga, “Confiscating Russia’s Frozen Central Bank Assets”, p. 11. Canada has amended the ‘Special Economic Measures Act’ to enable confiscation of frozen private

of the rightful owners, such as the right to property,<sup>47</sup> and the freedom to conduct business.<sup>48</sup> Moreover, certain assets may be considered foreign investments subject to a bilateral investment treaty with Russia.<sup>49</sup> Under such a treaty, expropriation is generally only permissible under certain conditions, including "...provisions for payment of just compensation".<sup>50</sup>

## State immunity

Since the proceeds from the forfeiture procedures are relatively modest compared to the value of the frozen Russian sovereign assets, it is understandable that the call for confiscation of these assets grows louder. However, these assets are protected by the right of state immunity, for which there is no universally accepted exception mechanism under international law.<sup>51</sup> Only the warring parties in an armed conflict may have such a right under the laws of war.<sup>52</sup> In the present situation, only Ukraine could confiscate Russian foreign assets under this title.

State immunity is a universally accepted principle of customary international law arising from the sovereign equality of states.<sup>53</sup> The

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assets and seized goods. Estonia has introduced similar legislation; Webb, "Legal Options for Confiscation of Russian State Assets", pp. 18-19.

<sup>47</sup> Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedom, as amended by Protocol 11; Paris, March 20, 1952, Article 21 of the American Convention on Human Rights; San José, November 22, 1969, and Article 17 of the Charter of Fundamental Rights of the European Union, 2016 O.J. (C 202).

<sup>48</sup> Article 17 of the Charter of Fundamental Rights of the European Union.

<sup>49</sup> E.g. see: Paola Tamma, "Brussels' Uphill Battle to Confiscate Russian Assets", *Politico*, November 22, 2022. For a list of investment treaties with Russia, see: "Russian Federation", International Investment Agreements Navigator, UNCTAD Investment Policy Hub, accessed July 19, 2024, <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation>>. Note, the US is the only G7 member that does not have a bilateral investment treaty with Russia (the 1992 agreement never went into effect).

<sup>50</sup> E.g. Article 6 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics; Moscow, October 5, 1989; in force: July 20, 1991 (Dutch Treaty Series (*Tractatenblad*) 1989, 162).

<sup>51</sup> E.g., see the statement of the US Secretary of the Treasury Janet Yellen in May 2023; "US to end Russia debt servicing allowance, says Treasury chief Janet Yellen", *POLITICO*, accessed July 19, 2024, <<https://www.politico.eu/article/us-end-russia-debt-servicing-allowance-treasury-chief-janet-yellen/>>.

<sup>52</sup> As can be deduced from Article 53 Regulations concerning the Laws and Customs of War on Land annexed to Convention (IV) respecting the Laws and Customs of War on Land; The Hague, October 18, 1907; entry into force: January 26, 1910.

<sup>53</sup> Unless stated otherwise, the following paragraphs are based on: Joop Voetelink, *Status of Forces, Criminal Jurisdiction over Military Personnel Abroad* (The Hague: T.M.C. Asser Press, 2015), Chapter 7.

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principle entails that a state and its organs are immune from the adjudicative and enforcement jurisdiction of another state. This immunity also applies to the organs of that state, such as financial institutions like the national central bank and its assets.<sup>54</sup>

Today, under the restrictive doctrine of state immunity, the immunity of a state is not absolute and only applies with respect to acts carried out in a typical sovereign capacity (*acta jure imperii*). In the field of private law, it means that when a state engages in commercial activities in the same manner as a natural or legal person (acts of private character: *acta jure gestionis*), it does not enjoy immunity in another state's court. In such cases, a state cannot invoke immunity in disputes involving certain employment contracts, commercial transactions, and investments in legal entities. Particularly in the sphere of adjudicative jurisdiction, a state's immunity is restricted.

As the exercise of enforcement jurisdiction over the property of another state can be a greater breach of its sovereignty than being involved in a proceeding before a local court, the immunity of a foreign state is less restricted in that regard. Therefore, the property a foreign state uses for its sovereign, public purposes (the sovereign assets) is exempt from the jurisdiction of other states. This distinction between the exercise of adjudicative and enforcement jurisdiction is illustrated, for example, in a situation where a judge in a civil dispute rules against a foreign state, but the opposing party is not allowed, based on the judicial decision, to take measures of forced execution or conservatory measures concerning the property of the foreign state.<sup>55</sup>

Thus, the immunity of a state is a procedural bar that limits the jurisdiction of the courts of another state, as the report of the Council of Europe acknowledges: "Sovereign immunity operates as a principle preventing one state's domestic courts from adjudicating on the governmental actions of another state or seizing that state's assets."<sup>56</sup> Consequently, when a state's executive branch or government targets the sovereign assets of a foreign state based, for example, on an administrative measure, regulation, or governmental decision taken within the

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<sup>54</sup> Ingrid (Wuerth) Brunk, "Immunity from Execution of Central Bank Assets", in *The Cambridge Handbook on Immunities and International Law*, eds. T. Ruys, N. Angelet, and L. Ferro (Cambridge: Cambridge University Press, 2019), pp. 266-284. Artikel 21(1)(c) UN Convention on Jurisdictional Immunities of States and Their Property; New York, December 2, 2004 (not yet in force).

<sup>55</sup> See: Article 23 of the European Convention on State Immunity; Basle, May 16, 1972; Articles 18 and 19 of the UN Convention on Jurisdictional Immunities of States and Their Property.

<sup>56</sup> Report, Parliamentary Assembly of the Council of Europe, para 76.

framework of international law, the foreign state cannot invoke state immunity.<sup>57</sup> The economic sanctions imposed on Russia are a case in point: the sanctions are third-party countermeasures accepted under international law and imposed by the executive branch.<sup>58</sup>

Both Canada<sup>59</sup> and the US<sup>60</sup> have incorporated a specific exception to state immunity in their national laws, which does not otherwise have a basis in international law. When a foreign state has been designated as a sponsor of terrorism, it cannot claim state immunity before Canadian or US courts with regards certain acts. Currently, neither state has designated Russia as such. While such a designation might burden Russia, it would contribute little to Ukraine's recovery as the Canadian and US laws limit the right to file claims to their citizens and businesses, meaning any awarded damages would benefit the claimants, not Ukraine.<sup>61</sup>

The idea of designating Russia as a state sponsor of terrorism appears to be gaining some international support. Although there is no universally accepted definition of terrorism, the European Parliament has stated that "...the deliberate attacks and atrocities committed by Russian forces and their proxies against civilians in Ukraine, the destruction of civilian infrastructure, and other serious violations of international and humanitarian law amount to acts of terror...".<sup>62</sup> Consequently, in November 2022, the European Parliament recognized Russia as a state

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<sup>57</sup> Report, Parliamentary Assembly of the Council of Europe, para 76; Kamminga, "Confiscating Russia's Frozen Central Bank Assets", p. 5; Tom Ruys, "Immunity, Inviolability and Countermeasures—a Closer Look at Non-UN Targeted Sanctions", in *The Cambridge Handbook on Immunities and International Law*, eds. T. Ruys, N. Angelet, and L. Ferro (Cambridge: Cambridge University Press, 2019), p. 712.

<sup>58</sup> Ingrid (Wuerth) Brunk, "Central Bank Immunity, Sanctions, and Sovereign Wealth Funds", Vanderbilt University Law School Legal Studies Research Paper Series, Working Paper Number 23-12, 2023, p. 14 ff.

<sup>59</sup> "State Immunity Act" (Revised Statutes of Canada (R.S.C.) c. S-18), Justice Laws Website, Government of Canada; Based on the statute, Iran and Syria have been designated as state sponsors of terrorism; "Order Establishing a List of Foreign State Supporters of Terrorism", Justice Laws Website, Government of Canada, < <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-170/page-2.html#h-784158> >.

<sup>60</sup> 'Foreign Sovereign Immunities Act of 1976' (28 U.S.C. 1602 e.v.); Cuba, North Korea, Iran, and Syria have been designated a state sponsor of terrorism, "State Sponsors of Terrorism", United States Department of State, accessed July 19, 2024, < <https://www.state.gov/state-sponsors-of-terrorism/> >.

<sup>61</sup> See "European Parliament declares Russia to be a state sponsor of terrorism", News, European Parliament, November 23, 2022.

<sup>62</sup> See "European Parliament declares Russia to be a state sponsor of terrorism", November 23, 2022.

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sponsor of terrorism<sup>63</sup>—following the lead of several European countries and the Council of Europe.<sup>64</sup> However, this recognition currently has no legal consequences regarding the law of state immunity as under EU law, the designation as a state sponsor of terrorism does not affect the immunity of the designated state, and such a designation is not a generally accepted exception under international law.<sup>65</sup>

### Options

Although the law on state immunity cannot protect the frozen and immobilized Russian sovereign assets from foreign executive action, no international legal mechanisms currently exist that allow for the confiscation of these assets. However, given their value, it remains attractive for the G-7, EU, and like-minded states to explore options to repurpose the assets for the benefit of Ukraine.<sup>66</sup> Such options include initiatives to link the lifting of sanctions and freezing measures to reparations payments by Russia, or to use the frozen assets as collateral for loans to Ukraine. For instance, the UK recently amended the ‘Russia (Sanctions) (EU Exit) Regulations 2019’ to create a legal basis for continuing to freeze or immobilize certain assets until Russia pays compensation for the damage it caused.<sup>67</sup> The Belgian government made a slightly different proposal, suggesting the use of frozen Russian reserves as collateral for loans to Ukraine. After the war, Russia could choose to repay the debt through compensations or agree to confiscating of the reserves.<sup>68</sup> Since the UK legislation and Belgian proposal do not involve a change in ownership, they do not qualify as confiscation and can be considered lawful countermeasures.

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<sup>63</sup> European Parliament Resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism ((2022/2896(RSP)), <[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0405\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0405_EN.pdf)>.

<sup>64</sup> E.g. the Baltic states and Poland, see: Beatrix Immenkamp with Gabija Leclerc, “Russia’s war on Ukraine: Designating a state as a sponsor of terrorism”, European Parliamentary Research Service, PE 738.218, November 11, 2022; “Further escalation in the Russian Federation’s aggression against Ukraine”, Resolution 2463 of the Parliamentary Assembly of the Council of Europe of October 13, 2022.

<sup>65</sup> E.g. Daniel Franchini, “State Immunity as a Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets”, *Virginia Journal of International Law*, Vol. 60, No. 2 (Winter 2020), pp. 433-483 and Webb, “Legal Options for Confiscation of Russian State Assets”, pp. 15-16.

<sup>66</sup> See also the call of the Parliamentary Assembly of the Council of Europe in Resolution 2539/(2024), Support for Reconstruction of Ukraine, para. 12.3.

<sup>67</sup> See Explanatory Memorandum to the Russia (Sanctions) (EU exit) (Amendment) (No. 2) Regulations 2023, 2023 No. 665; see also: Paul Stephan, “Response to Philip Zelikow: Confiscating Russian Assets and the Law”, *Lawfare*, May 13, 2022.

<sup>68</sup> “België wil Russische miljarden als Onderpand om Herstel Oekraïne te Betalen”, *De Tijd*, February 5, 2022.

A further step involves measures aimed at directing certain revenues from frozen assets to benefit Ukraine or actually confiscating the assets. When sanctions were imposed in 2022, a significant portion of the Russian Central Bank's assets were in the form of securities held by Euroclear, a Central Securities Depository in Belgium.<sup>69</sup> This financial service company holds an estimated €210 billion in frozen Russian reserves. These assets generate a substantial amount of interest, but due to the sanctions, this interest cannot be paid to Russia or used by Euroclear.<sup>70</sup> However, blocked Russian funds that become available, such as from maturing bonds, can be reinvested by Euroclear for its own account.<sup>71</sup> In 2023, this activity generated €4.4 billion for Euroclear.<sup>72</sup> Belgium then collected over €1 billion in windfall taxes from this amount, which Belgium has stated will be used to support Ukraine.<sup>73</sup> Since the unexpected and extraordinary revenues Euroclear make from reinvestments of the cash balances belong to Euroclear rather than the Russian Central Bank, Belgium can use the tax revenue as it sees fit without potentially violating Russia's rights.<sup>74</sup>

The EU also takes the position that these revenues are not Russian sovereign assets and can be subjected to EU-imposed restrictions.<sup>75</sup> Consequently, early 2024, the EU passed legislation regarding the obligations of securities depositories concerning the extraordinary cash balances accumulated due to restrictive measures.<sup>76</sup> Under this legislation, depositories are prohibited from disposing of net revenues, and the Council may decide to allocate a portion of these revenues as

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<sup>69</sup> Daniel Franchini, "Immobilised Assets, Extraordinary Profits: The EU Council Decision on Russia's Central Bank Reserves and Its Legal Challenges", *EJIL:Talk*, March 1, 2024. See also "Immobilised Russian assets: Council decides to set aside extraordinary revenues", Press Release, Council of Europe, February 12, 2024.

<sup>70</sup> In the form of coupon payments and bond redemptions; see Franchini, "Immobilised Assets, Extraordinary Profits".

<sup>71</sup> Daan Ballegeer, "Geblokkeerd Russisch Geld Brengt Euroclear Miljarden op: "Er lopen tientallen rechtszaken tegen ons in Rusland", Interview with Lieve Mostrey, CEO Euroclear", *De Standaard*, March 7, 2024. This also dependent on the precise terms of the contract (not published) that applies to Euroclear's services; e.g. Franchini, "Immobilised Assets, Extraordinary Profits".

<sup>72</sup> Ballegeer, "Geblokkeerd Russisch Geld" and Franchini, "Immobilised Assets, Extraordinary Profits".

<sup>73</sup> Ballegeer, "Geblokkeerd Russisch Geld".

<sup>74</sup> E.g. Webb, "Legal Options for Confiscation of Russian State Assets", p. 41.

<sup>75</sup> E.g. recital 16 of Council Regulation (EU) 2024/1469 of May 21, 2024 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, 2024 O.J. (L 1469).

<sup>76</sup> Council Decision (CFSP) 2024/577 of Feb. 12, 2024 Amending Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, 2024 O.J. (L 577) and Council Regulation (EU) 2024/576 of Feb. 12, 2024 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, 2024 O.J. (L 576).

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contributions towards the recovery and reconstruction of Ukraine. These contributions may be transferred to the newly established 'Ukraine Facility',<sup>77</sup> a support mechanism agreed upon by the Council and the European Parliament in February 2022.<sup>78</sup> However, several restrictions may apply, given that depositories are private enterprises in which foreign parties may have interests.<sup>79</sup> It is essential to consider the right to property of these institutions and potentially applicable provisions of investment treaties.

On May 8, 2024, the EU member states made a further move and agreed to seize €3 billion of the €5 billion profit made by Euroclear and allocate it to Ukraine.<sup>80</sup> Legislation to this effect followed shortly thereafter, ordering central securities depositories to make a financial contribution to the EU of 99.7% of the net revenues.<sup>81</sup> Starting in July 2024, the EU will distribute 90% of the revenues received to the 'European Peace Facility', which was established to fund the purchase of weapons for Ukraine, and 10% to other EU programs to fund the reconstruction of Ukraine. In June 2024, the G7 leaders announced the launch of the Extraordinary Revenue Acceleration (ERA) Loans for Ukraine. The \$50 billion loan will be financed using future extraordinary revenues from the immobilization of Russian sovereign assets held in the EU and elsewhere.<sup>82</sup>

As the options discussed above do not entail a change of title to the frozen Russian sovereign assets, it can be argued that they are all countermeasures meeting DARS requirements for such actions. An even more drastic step would be the confiscation of the revenues generated by the frozen assets, such as the accrued interest. However, these revenues also belong to the Russian state, meaning that confiscating them would present the same issues as confiscating the frozen assets. Nevertheless,

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<sup>77</sup> Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on establishing the Ukraine Facility - Analysis of the final compromise text with a view to agreement*, 6380/24 (February 9, 2024).

<sup>78</sup> The instrument seeks, *inter alia*, to support Ukraine's recovery, reconstruction, and modernisation; see the "Ukraine Facility: Council and Parliament agree on new support mechanism for Ukraine", Press Release Council of the EU, February 25, 2024.

<sup>79</sup> Franchini, "Immobilised Assets, Extraordinary Profits".

<sup>80</sup> Paola Tamma and Laura Dubois, "EU Agrees to Arm Ukraine Using Profits from Russian State Assets", *Financial Times*, May 8, 2024.

<sup>81</sup> Decision (GBVB) 2024/1470 of the Council of May 21, 2024 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, 2024 O.J. (L 1470) and Council Regulation (EU) 2024/1469 of May 21, 2024 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, 2024 O.J. (L 1469).

<sup>82</sup> Apulia G7 Leaders' Communiqué, accessed July 19, 2024, <<https://www.consilium.europa.eu/media/ftjqncg/apulia-g7-leaders-communication.pdf>>.



it appears that some countries are willing to explore the boundaries of the law to see if confiscation is nonetheless feasible.<sup>83</sup>

Canada was one of the first countries to draft legislation that allowed for the confiscation of assets belonging to a foreign state located within Canada<sup>84</sup>—followed by the US, which enacted the ‘Rebuilding Economic Prosperity and Opportunity for Ukrainians Act’ (REPO Act).<sup>85</sup> The REPO Act grants the President the authority to confiscate Russian sovereign assets, transfer them to the specially established ‘Ukraine Support Fund’.<sup>86</sup> It also prohibits the release of funds belonging to sanctioned Russian entities until Russia withdraws from Ukraine and agrees to make reparations. Additionally, the President must, in cooperation with others, establish an international compensation mechanism to manage frozen and seized sovereign assets.

The Canadian and US initiatives do not have a legal basis under international law, even though they appear to be similar to the (third-party) countermeasures discussed earlier. However, neither initiative meets the requirement of reversibility as is required by Article 49(3) DARS, as confiscation cannot be undone once the proceeds have been used for the reconstruction of Ukraine. However, the requirement of reversibility is less stringent than the other conditions, as it states that the measure must be reversible “as far as possible.” In its commentary on this term, the International Law Commission notes that if a state has a choice between different countermeasures, it should select the measure that allows for the resumption of the performance of the suspended obligations resulting from the countermeasures.<sup>87</sup>

In the case of Russia’s unlawful invasion of Ukraine, imposing sanctions in the form of freezing assets and seizing property was the appropriate choice of countermeasures. When Russia again complies with its international obligations, these measures can be reversed by releasing the Russian assets. One could argue that since Russia continues its wrongful actions while the damage to Ukraine is mounting, the initial

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<sup>83</sup> Cf. Chimène Keitner, “Sovereign Immunity and Reparations in Ukraine”, *Just Security*, February 21, 2024.

<sup>84</sup> To this end, in May 2022, Canada amended the ‘Special Economic Measures Act’, the ‘Magnitsky Act’, and the ‘Seized Property Management Act’; e.g. Webb, “Legal Options for Confiscation of Russian State Assets”, p. 18.

<sup>85</sup> See “S.2003 - 118th Congress (2023-2024): REPO for Ukrainians Act”, US Congress, accessed July 19, 2024, < <https://www.congress.gov/bill/118th-congress/senate-bill/2003>>.

<sup>86</sup> “McCaul, Risch, Kaptur, Whitehouse Reintroduce Legislation to Repurpose Sovereign Russian Assets for Ukraine”, Foreign Affairs Committee, Chairman McCaul, June 15, 2023.

<sup>87</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN 2008, p. 131.

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countermeasure has failed, and the international community is compelled to adopt an irreversible measure. While this reasoning has some appeal, it contradicts the spirit of the DARS. As such, confiscation cannot be considered a countermeasure as defined by the DARS<sup>88</sup>—rendering national legislation to that effect incompatible with international law. This situation could lead to extensive, protracted legal battles in national and international courts, for which Russia appears to have already prepared plans.<sup>89</sup>

In addition to the legal questions it raises, confiscating Russian sovereign assets may also entail economic, financial, and political risks. While a comprehensive analysis of these risks is beyond the scope of this article, it is important to highlight a few key points. In Europe, there are serious concerns about potential damage to the reputation of the Euro and the European capital market<sup>90</sup>—and the erosion of trust in Euroclear.<sup>91</sup> Furthermore, confiscating state assets without a solid basis under international law could set a precedent with uncertain and potentially dangerous long-term effects.<sup>92</sup> It might also deter other countries, such as China, from holding assets in the West in the future.<sup>93</sup> Additionally, it could prompt other states to confiscate Western assets.<sup>94</sup>

Russia itself has already taken initial steps<sup>95</sup>—and further measures will, no doubt, follow. It has placed countries that have seized and frozen Russian goods and assets on a list of unfriendly nations, which primarily includes Western countries against which additional measures may be taken.<sup>96</sup> Although many Western companies have independently decided

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<sup>88</sup> E.g. Webb, “Legal Options for Confiscation of Russian State Assets”, pp. 27-28.

<sup>89</sup> Ballegeer, “Geblokkeerd Russisch Geld”; Sam Boocker, Alexander Conner, and David Wessel, “Why do the US and Its Allies Want to Seize Russian Reserves to Aid Ukraine?”, Brookings Research, April 25, 2024.

<sup>90</sup> Webb, “Legal Options for Confiscation of Russian State Assets”, 2024, p. 41; Ballegeer, “Geblokkeerd Russisch Geld”.

<sup>91</sup> Ballegeer, “Geblokkeerd Russisch Geld”.

<sup>92</sup> Boocker et al., “Why Do the US and its Allies Want to Seize Russian Reserves to Aid Ukraine?”.

<sup>93</sup> Boocker et al., “Why do the US and Its Allies Want to Seize Russian Reserves to Aid Ukraine?” and Eamonn Noonan and Anastasia Chernova, “Confiscating Russian Sovereign Assets to Fund Ukraine's Reconstruction: Mission impossible?”, European Parliamentary Research Service, October 2022.

<sup>94</sup> Noonan and Chernova “Confiscating Russian Sovereign Assets to Fund Ukraine's Reconstruction: Mission Impossible?”.

<sup>95</sup> “Russian countersanctions: New measures targeting foreign investors in Russia,” A&O Shearman, May 11, 2023.

<sup>96</sup> Gabriel Gavin, “Get out of Russia While You Still Can, Ex-Oligarch Warns Western Energy Giants”, *Politico*, May 2, 2023; On May 2, 2023, Putin signed a decree that allows the government to take control over assets of foreign persons and businesses: Gavin, “Get out of Russia While You Still Can”.

to cease operations in Russia, Russian media reports that approximately \$290 billion in Western assets remain in the country.<sup>97</sup> Some companies have already experienced Russian actions, such as the state ‘temporarily’ taking over management<sup>98</sup>—or making it impossible to transfer proceeds from the sale of businesses or their assets out of the country.<sup>99</sup> In May 2024, as a response to the REPO Act, Putin signed Degree No. 422 allowing Russia to seize US assets held in Russia and use them to compensate Russians whose assets were seized in the US.<sup>100</sup>

### Final reflection

Further research into the financial and political risks associated with implementing additional measures against Russia’s sovereign assets seems warranted. Should those prove to be acceptable, I do not recommend that the international community abstain from adopting more extensive measures, primarily for legal reasons. In my view, given the exceptional circumstances at hand, the confiscation of Russian sovereign assets, even in the absence of a clear legal basis, can be justified as an *in extremis* measure.

In that regard, I consider it important to recognize that Russia, through its actions, has violated and continues to violate significant international obligations, including the prohibition of interstate use of force, the territorial integrity of Ukraine, and the respect for human rights and the laws of war.<sup>101</sup> The ongoing war and unlawful conduct by Russia continue to cause enormous damage to Ukraine. Additionally, Russia’s veto power as a permanent member of the UN Security Council prevents the international community from imposing binding measures to end the breaches of international peace and security that have an impact felt far beyond the region. Another critical factor is that Russia has not hesitated

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<sup>97</sup> Boocker et al., “Why do the US and Its Allies Want to Seize Russian Reserves to Aid Ukraine?”.

<sup>98</sup> In June 2024, the G7 leaders condemned “... the seizures of foreign companies..” and called on Russia “.. to reverse these measures and seek acceptable solutions with the companies targeted by them”. Apulia G7 Leaders’ Communiqué.

<sup>99</sup> Boocker et al., “Why do the US and Its Allies Want to Seize Russian Reserves to Aid Ukraine?”.

<sup>100</sup> Grace Burns, “Russia Signs Decree allowing Seizure of US Assets in Russia”, *JURISTnews*, May 24, 2024.

<sup>101</sup> E.g. the reports on the human rights situation in Ukraine issued by the Office of the High Commissioner for Human Rights based on the work of the UN Human Rights Monitoring Mission in Ukraine (HRMMU); latest report of March 26, 2024 covering the period December 1, 2023 – February 29, 2024, <<https://ukraine.un.org/sites/default/files/2024-03/2024-03-26%20HCHR%2038th%20Periodic%20Report.pdf>>.

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to hint at using nuclear options. In addition, in February 2023, Russia suspended its participation in the recently extended nuclear disarmament treaty with the US<sup>102</sup>—and six months later, it withdrew from the Comprehensive Nuclear-Test-Ban Treaty.<sup>103</sup> In my view, given the current circumstances and the lack of indication that Russia is willing to compensate for the damages in the near future, these factors taken together justify the confiscation of Russian sovereign assets.

Legislative initiatives in Canada and the US demonstrate that countries are willing to take this step. However, in my view, certain conditions must be met. The proceeds from the confiscated properties must be used for the restoration and reconstruction of Ukraine. To this end, these proceeds should be placed in a fund from which an international compensation mechanism, as the UN General Assembly proposed, would pay out claims after investigation. Additionally, the proceeds should be credited against the final amount that Russia will be required to pay as reparations.<sup>104</sup> This requirement would somewhat mitigate concern about the countermeasure's irreversibility.<sup>105</sup> Moreover, given the amounts mentioned in the introduction, the compensation amount is not expected to be lower than the value of the seized properties and frozen assets.

The confiscation of sovereign assets is a significant step, challenging accepted legal limits, which can nevertheless be justified as an *in extremis* measure considering the exceptional situation and subject to certain conditions. Some emphasize the evolving political willingness of states to explore the boundaries of what is legal<sup>106</sup>—and view this as a potential catalyst for the development of customary international law.<sup>107</sup> Indeed, international law is not static and sufficiently widespread, representative, and consistent state practice combined with a sense of legal right or *opinio juris*, can result in the emergence of new customary rules.<sup>108</sup> Nonetheless, asserting that customary law is currently in the making

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<sup>102</sup> The New START treaty: Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms; Prague, April 8, 2010, entry into force: February 5, 2011 (*Treaties and other International Agreements Series, TIAS 11-205*); extended to February 4, 2026: Agreement between the United States of America and the Russian Federation Amending the Treaty of April 8, 2010; Moscow, January 26, 2021 (*TIAS 21-203*).

<sup>103</sup> Comprehensive Nuclear Test Ban Treaty (CTBT); New York, September 10, 1996, not in force.

<sup>104</sup> "...making a down payment on a massive war reparations debt it would be legally obligated to pay anyway, ...."; Harold Hongju Koh, "Past Time to Liquidate Russian Assets", *Just Security*, March 5, 2024.

<sup>105</sup> Webb, "Legal Options for Confiscation of Russian State Assets", pp. 27-28.

<sup>106</sup> Keitner, "Sovereign Immunity and Reparations in Ukraine".

<sup>107</sup> Kamminga, "Confiscating Russia's Frozen Central Bank Assets", p. 11.

<sup>108</sup> Webb, "Legal Options for Confiscation of Russian State Assets", p. 14.

seems premature as the present circumstances are unique, and international support is still insufficient for such a conclusion.

## Conclusion

After the annexation of Crimea and Sevastopol and the destabilization of Eastern Ukraine in 2014, and the further invasion of Ukraine in 2022, the G-7, EU, and like-minded states, felt compelled to impose a wide array of sanctions on Russia independent of the UN. A significant component of these autonomous sanctions includes the seizure of certain goods and the freezing and immobilization of Russian assets. The imposition of these measures is permitted under international law as Russia's actions have breached its international obligations, allowing Ukraine and third countries to invoke Russia's liability based on the principles of state responsibility, which are largely customary in nature and codified in the DARS.

Russia's international responsibility under international law entails that it must compensate Ukraine for the damages resulting from its unlawful actions. It is evident that the costs of Ukraine's recovery and reconstruction will be enormous, and Russia is currently unwilling to make reparations. As the conflict grinds on, states are exploring ways to repurpose the seized assets and frozen funds to support Ukraine's recovery and reconstruction efforts.

Despite the sanctions, these goods and assets remain the property of Russian individuals and companies, as well as the Russian state. This creates legal challenges in taking these assets from their rightful owners and repurposing them for the reconstruction of Ukraine. In general, goods and assets can only be forfeited in the context of criminal proceedings before a national court. States and their organs, such as central banks, enjoy immunity from such judicial proceedings in another state, so sovereign assets cannot be confiscated in this manner.

A state cannot invoke immunity if it is not the court but the executive or legislative branch of another state takes action. In this context, several countries and the EU have taken the first steps to allocate certain revenues from frozen assets of the Russian Central Bank to Ukraine. Additionally, the first legislative processes have begun to actually proceed with the confiscation of Russian sovereign assets. However, the latter measures are without a widely accepted basis under international law. Nevertheless, given the exceptional circumstances of the present situation and provided certain conditions are met, I strongly believe the confiscation of Russian sovereign assets is justifiable as an *in extremis* measure. However, it is still too early to speak of a customary right under

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international law for states to confiscate sovereign assets in certain situations. State practice and *opinio juris* will need to further develop and expand for that to occur.