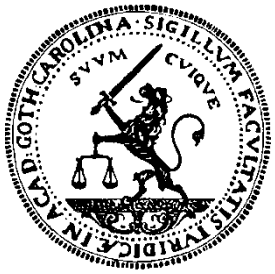

FACULTY OF LAW

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From Freezing to Seizing?

A Critical Analysis of State Immunity in Relation to Seizing Russian Central Bank Assets for Ukraine

JURM02 Graduate thesis

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Table of contents

Summary

In response to Russia's aggression and illegal use of force against Ukraine in 2022, in violation of the UN Charter, the EU and other partners adopted sanctions immobilising or freezing the assets of the National Central Bank of Russia, assets possibly amounting to over €300 billion. The war has caused enormous and incalculable damages to Ukraine and its infrastructure, economy and people. Suspected international crimes and serious violations of peremptory (*jus cogens*) norms may also be attributable to Russia.

This has led to a discussion, for example within the EU, concerning a potential seizure, or confiscation, of the frozen Russian central bank assets, and their transfer to or use for Ukraine and its people as reparations for Russia's violations of international law. While these options seem attractive at face value from a moral perspective, taking into account Ukraine's damages and right to reparations, many have been sceptical and asked whether such a measure would violate customary international law of State immunity.

This thesis, using a legal dogmatic method, critically analyses State immunity from enforcement, from a theoretic perspective of justice and accountability, to examine whether a seizure of Russian central bank assets would be incompatible with the law of State immunity or could be justified under existing or emerging exceptions, and whether State immunity from enforcement would apply to measures taken outside of judicial proceedings.

Central bank assets and foreign currency reserves specifically, are protected by near-absolute immunity under customary international law and they would not fall under exceptions for non-sovereign, or commercial, purposes. For a long time, there has been proposals for and discussions concerning an exception to State immunity for serious violations of *jus cogens,* as part of the growing emphasis on accountability and justice for individuals. Such an exception was rejected by the International Court of Justice in the *Jurisdictional Immunities* case, which was heavily criticised but is seen as authoritative. It is argued in the thesis, however, that while there is currently not enough support in State practice for an exception, the seizure of Russian assets presents an opportunity for willing States to advance a principled and reasonable exception in a contested, incoherent, and largely unsettled area of international law.

Finally, it is concluded that it is nonetheless entirely possible that State immunity from enforcement does not apply at all to a seizure of Russian assets, if it is sufficiently "non-judicial", in line with a growing practice of sanctions and freezes of central bank assets. While this potentially lawful but unexpected solution may not make as much sense as a *jus cogens* exception, from a perspective of justice and accountability, it may fit the international legal system of State-centric enforcement of human-centred interests and values.

Sammanfattning

Som svar på Rysslands aggression mot Ukraina år 2022, och överträdelse av våldsförbudet i FN-stadgan, har EU och andra likasinnade länder antagit sanktioner som har fryst den ryska centralbankens tillgångar, vilka beräknas uppgå till 300 miljarder euro. Kriget har orsakat enorma och oberäkneliga skador för Ukraina och dess infrastruktur, ekonomi och befolkning. Misstänka internationella brott och allvarliga kränkningar av tvingande *jus cogens*-normer skulle också kunna vara hänförliga till Ryssland.

Detta har föranlett en diskussion, bland annat inom EU, kring en potentiell konfiskering av de frysta, ryska centralbankstillgångarna och deras överföring till eller användning för Ukraina och dess medborgare som skadestånd för ryska överträdelser av folkrätten. Även om dessa alternativ är tilltalande ur ett moraliskt perspektiv, med tanke på Ukrainas skador och rätt till gottgörelse, har många varit skeptiska och frågande till huruvida en sådan åtgärd skulle strida mot statsimmunitet enligt internationell sedvanerätt.

Examensarbetet utgår från en rättsdogmatisk metod och analyserar kritiskt statsimmunitet mot verkställighet, från ett teoretiskt perspektiv av ansvarsutkrävande och rättvisa, för att utreda huruvida en konfiskering av frysta ryska tillgångar skulle vara oförenlig med statsimmunitet eller skulle kunna rättfärdigas under existerande eller framväxande undantag, samt huruvida statsimmunitet mot verkställighet är tillämpligt över huvud taget vad gäller åtgärder som vidtas oberoende av rättsprocesser i domstolar.

Centralbankstillgångar, särskilt valutareserver, är skyddade av nästan absolut immunitet enligt internationell sedvanerätt, och de skulle inte falla under undantag för icke-suveräna eller kommersiella ändamål. Det har länge förekommit förslag och diskussioner kring ett undantag till statsimmunitet för allvarliga kränkningar av *jus cogens*, som en del av den tilltagande vikten av ansvarsutkrävande och rättvisa för individer. Ett sådant undantag förkastades av Internationella domstolen i *Jurisdictional Immunities*, ett avgörande som blev föremål för mycket kritik men som ses som auktoritativt. Samtidigt som det i nuläget inte finns tillräckligt stöd i statspraxis för ett undantag, hävdas det i uppsatsen att en konfiskering av ryska tillgångar innebär en möjlighet för villiga stater att föra fram ett principfast och skäligt undantag i ett folkrättsligt område som är omstritt, osammanhängande och till stor del ouppklarat.

Slutligen slås det fast att det ändå är fullt möjligt att immunitet mot verkställighet inte är tillämpligt alls för en konfiskering av ryska tillgångar om den är tillräckligt ”icke-judiciell”, i enlighet med en växande praxis av sanktioner mot centralbankstillgångar. Denna möjligen lagliga men oväntade lösning är kanske inte så tillfredsställande som ett undantag för *jus cogens*, utifrån ansvarsutkrävande och rättvisa, men den skulle kunna passa det internationella systemet där det främst är stater som kan upprätthålla mänskliga intressen.

Preface

Jag vill först tacka min handledare Karol Nowak för intressanta diskussioner och många värdefulla synpunkter. Jag vill tacka min familj och naturligtvis min flickvän Elsa samt alla fantastiska vänner som har gjort tiden här i Lund till något riktigt speciellt. Slava Ukraini!

> "Peace – like war – must be waged. And justice, too, is something we must fight for."[1]

[1] Amal Clooney, quoted by Philippa Webb, 'Ukraine Symposium – Building Momentum: Next Steps Towards Justice for Ukraine' (*Lieber Institute Articles of War*, 2 May 2022) <https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/> accessed 17 May 2023.

Abbreviations

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture
CFSP	Common Foreign and Security Policy
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECSI	European Convention on State Immunity
ECtHR	European Court of Human Rights
EU	European Union
G7	Group of Seven
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
RCB	Russian Central Bank, National Central Bank of Russia
SWF	Sovereign Wealth Fund
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNCSI	UN Convention on Jurisdictional Immunities of States and Their Property
UNCSIC	Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
US FSIA	Foreign Sovereign Immunities Act
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

At the time of writing this thesis, in the spring of 2023, the horrific war in Ukraine is still raging and there is no end in sight. Europe is once again ravaged by the scourge of war, the biggest conflict on the continent since World War II. Many States, and a large majority in the UNGA, have repeatedly condemned Russia's invasion as an act of aggression in violation of the obligation in Article 2(4) of the UN Charter to refrain from the threat or use of force. The Russian aggression is a manifest violation of Ukraine's sovereignty, territorial integrity, and political independence.[2]

The Russian aggression has also enabled and unleashed the commission of grave breaches of international humanitarian law and human rights law, i.e., international crimes, by Russian forces and mercenaries. International crimes include the four core crimes, as outlined in the ICC Statute: the crime of aggression, war crimes, crimes against humanity and genocide.[3]

Russia's aggression and alleged international crimes in Ukraine have led to judicial action against Russia at both an international and national level, for example before the ICJ, ICC, ECtHR, and Ukrainian courts. Both criminal investigations and civil cases have been initiated, including the issuing of an arrest warrant by the ICC prosecutor against President Putin for suspected war crimes. More could be coming in the future, such as the proposed special international tribunal for the crime of aggression.[4]

Russia's violations have also been met by a wide range of unprecedented individual and economic sanctions, taken by a long list of economically important countries like EU member states and the US, in order to target people

[2] UNGA Res ES-11/1 (2 March 2022); UNGA Res ES-11/6 (23 February 2023); Charter of the United Nations and the Statute of the International Court of Justice (24 October 1945) 1 UNTS XVI.

[3] UN Human Rights Council, 'War crimes, indiscriminate attacks on infrastructure, systematic and widespread torture show disregard for civilians, says UN Commission of Inquiry on Ukraine' (16 March 2023) <www.ohchr.org/en/press-releases/2023/03/war-crimes-indiscriminate-attacks-infrastructure-systematic-and-widespread> accessed 12 May 2023; Article 5 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[4] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Request for the Indication of Provisional Measures: Order) General List No 182 [2022] ICJ; ICC, 'Situation in Ukraine' <www.icc-cpi.int/situations/ukraine> accessed 15 May 2023; ECtHR, 'Eastern Ukraine and flight MH17 case declared partly admissible' (25 January 2023) <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7550165-10372782%22]}> accessed 15 May 2023; European Commission, 'Statement by President von der Leyen on the establishment of the International Centre for the Prosecution of Crimes of Aggression against Ukraine' (4 March 2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1363> accessed 15 May 2023.

deemed responsible, impose severe consequences on the Russian State and hinder its abilities to continue its aggression.[5]

On 28 February 2022, the currency reserves of the National Central Bank of Russia (RCB) that were held abroad were frozen in the EU, as well as in G7 and other partner countries such as the US, the UK and Canada. EU countries have frozen around €20 billion of private Russian assets and an estimated €300 billion of the RCB's reserves are blocked in the EU and G7 countries.[6]

The adoption of the central bank asset freeze, or immobilisation, prohibits all transactions with the RCB related to the management of its reserves and assets. As a result, the RCB cannot access the assets it has stored in EU central banks and private institutions and cannot use them for monetary purposes or to limit the effects of other sanctions. A freeze criminalises any attempt to transact with or derive benefits from the assets, which destroys their economic value. However, a freeze doesn't change the ownership of the assets.[7]

The human costs of the war are of course incalculable and impossible to even imagine, while the physical, economic damages to Ukraine's infrastructure and economy are monumental and keep getting bigger every day. Ukraine's economy is shattered and its need for funds is urgent. Earlier reports by the World Bank have estimated the cost to rebuild the country at $350 billion.[8]

Western leaders have reiterated that Putin and Russia must pay a heavy price. The unprecedented sanctions and future criminal prosecutions might not be enough as Ukraine will need a massive amount of funds to defend itself, rebuild its country and alleviate the injury caused to the Ukrainian people.

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[5] Anton Moiseienko, 'Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options' (26 July 2022), 11 https://wrmcouncil.org/publications/frozen-russian-assets-and-the-reconstruction-of-ukraine-legal-options/ accessed 15 May 2023; European Council and Council of the EU, 'Timeline – EU restrictive measures against Russia over Ukraine' <www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/> accessed 15 May 2023; European Council and Council of the EU, 'EU sanctions against Russia explained' (14 April 2023) <www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/> accessed 15 May 2023.

[6] Article 5a(4) of Council Regulation (EU) 833/2014, giving effect to Council Decision 2014/512/CFSP; Jennifer Rankin, 'EU urged to use frozen Russian assets to 'cover costs of aggression' in Ukraine' *The Guardian* (Brussels, 8 February 2023) <www.theguardian.com/world/2023/feb/08/eu-urged-to-use-frozen-russian-assets-to-cover-costs-of-aggression-in-ukraine> accessed 15 May 2023.

[7] 'EU sanctions against Russia explained' (n 5); Paul Stephan, 'Giving Russian Assets to Ukraine – Freezing Is Not Seizing' (*Lawfare*, 26 April 2022) <www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing> accessed 15 May 2023.

[8] Andrea Shalal, 'Rebuilding Ukraine after Russian invasion may cost $350 bln, experts say' *Reuters* (Washington, 9 September 2022) <www.reuters.com/world/europe/russian-invasion-ukraine-caused-over-97-bln-damages-report-2022-09-09/> accessed 15 May 2023.

International lawyers, State officials and political leaders have all voiced the opinion that the international community must "make Russia foot the bill".[9]

A basic and well-established principle of international law is that when a State breaches an international obligation, it is liable to make adequate reparation.[10] In accordance with ARSIWA, a State is responsible for its internationally wrongful acts, consisting of a breach of international obligations that is attributable to the State.[11] International crimes can, depending on the circumstances, give rise to both individual criminal responsibility and State responsibility.[12] As consequences of State responsibility, the State is required to cease its internationally wrongful conduct and make full reparation for the injury caused by it, including any material or moral damage.[13] One form of reparation is monetary compensation, which shall cover any financially assessable damage.[14] Responsibility also covers indirect injury to a State, such as damage to a national of the State, which can be sought on the individual's behalf through diplomatic protection.[15]

The UNGA adopted a resolution which recognises that Russia must be held accountable for its violations of international law in or against Ukraine and bear the legal consequences of its internationally wrongful acts, including making reparation for the injury caused by them. It also recognised the need for establishing an "international mechanism for reparation" and recommended the creation of an "international register of damage".[16]

However, the UNGA's resolutions are not binding and there is of course no real prospect of Russia respecting its international obligations, as seen by the war itself, the non-compliance with the ICJ's provisional measures and track record before the ECtHR. Some have therefore voiced the opinion that the frozen Russian assets located in the EU and other Ukrainian-allied countries, especially the RCB assets, remain the only pool of assets that realistically can be used to obtain (some) compensation for Ukraine and the Ukrainian people.

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[9] Evan Criddle, 'Rebuilding Ukraine Will Be Costly. Here's How to Make Putin Pay' *Politico* (30 March 2022) <www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649> accessed 15 May 2023.

[10] Jan Wouters and others, *International Law: A European Perspective* (Hart Publishing 2019) 526.

[11] UNGA Res 56/83 (28 January 2002); ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] Supplement No 10 Ybk II(2), UN Doc A/56/10 Articles 1-2 (ARSIWA).

[12] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, Cambridge University Press 2019) 16-17.

[13] Articles 29-31 ARSIWA.

[14] Articles 35-36 ARSIWA.

[15] Wouters and others (n 10) 544-545.

[16] UNGA Res ES-11/5 (14 November 2022).

Several approaches and options have been proposed, and many can be imagined, as to how frozen Russian assets could be used for those purposes.[17]

First, there are current and future proceedings in international and national courts, and arbitral tribunals, in which Ukraine and Ukrainian natural or legal persons could be awarded damages or reparations at some point. While there is legitimacy in judgments on the merits, there are several problems with relying on just judicial proceedings or the enforcement of foreign or international judgments. Instituting national judicial proceedings and attempting to execute domestic or international judgments would *prima facie* face obstacles in relation to State immunity from jurisdiction and from enforcement respectively, just like options not related to courts. In the few courts that have or could have jurisdiction, that jurisdiction does not necessarily sufficiently or comprehensively encompass all claims for reparations or all of Russia's wrongful acts. If there are international court judgments awarding damages to Ukraine, there are no means of enforcement and Russia will not consent to or abide by any outcome against its interests. Court proceedings and enforcement may also take years. The lack of jurisdiction or partly available jurisdiction could additionally lead to an unfair or unorderly distribution among competing private claims or in relation to Ukraine's urgent public needs.[18]

Another possible solution, insofar as the right to reparation cannot be satisfied by judgments, is the total and unilateral seizure of frozen assets in order to subsequently transfer them to the Ukrainian government or otherwise disburse them for the benefit of the Ukrainian population. A successful seizure of Russian assets is for example critical to the Ukrainian proposal to establish an International Claims Commission for Ukraine, which would pool together seized assets and use them for compensation to injured parties, including States and natural and legal persons, and for financing the country's reconstruction. As an argument on timing, it has been said that accessing the funds sooner rather than later "would mitigate the risk of Ukraine becoming bankrupt and unable to defend itself militarily". Additionally, it could also alleviate the financial burden on the countries that support Ukraine.[19]

It is not difficult to see why going from freezing to seizing seems like such an attractive option, and world leaders have voiced initial optimism regarding

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[17] Moiseienko (n 5) 4-7.

[18] Scott R. Anderson and Chimène Keitner, 'Legal Challenges Presented by Seizing Frozen Russian Assets' (*Lawfare*, 26 May 2022) <www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets> accessed 15 May 2023; Paul Stephan, 'Justice and the Confiscation of Russian State Assets' (*Lawfare*, 13 March 2023) <www.lawfareblog.com/justice-and-confiscation-russian-state-assets> accessed 15 May 2023; Moiseienko (n 5) 6-10, 42-55.

[19] Chiara Giorgetti, Markiyan Kliuchovsky and Patrick Pearsall, 'Launching an International Claims Commission for Ukraine' (*Just Security*, 20 May 2022) <www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/> accessed 15 May 2023; Moiseienko (n 5) 8, 20.

a possible seizure of Russian public and private assets.[20] However, concerns have repeatedly been expressed about potential domestic and international legal obstacles that a seizure of frozen Russian assets would meet. While some progress has been achieved regarding private assets of oligarchs in the EU, US and Canada, immobilised central bank assets are a different matter.[21] When it comes to State assets, it is particularly the law of State immunity that politicians and international lawyers refer to as a major obstacle.[22]

In the EU, officials have said that, due to the law of State immunity, the EU cannot completely confiscate billions of RCB assets to fund Ukraine's reconstruction. The Commission has instead proposed, in November 2022, an "active management" option, where EU members and international partners establish a fund into which the RCB's liquid assets are transferred and used to start the reconstruction of Ukraine. The Commission proposes in the short term to manage and invest the funds, in order to give the returns from those investments to Ukraine, and in the long term to keep the assets as leverage or "collateral" for a future peace agreement that includes compensation for Ukraine's war damages. The Commission states that the reason for this different approach is that the principal eventually needs to be returned to Russia but could be offset against war reparations. The next steps are currently being discussed within EU institutions and among member states.[23]

Some States, especially Poland and the three Baltic States, have been pushing the EU to go further and urged the bloc not only to give Ukraine the returns from the frozen central bank assets but to completely seize all Russian State assets. In a letter in February 2023 to Ursula von der Leyen, Charles Michel and Swedish Prime Minister Ulf Kristersson (holding the rotating presidency

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[20] Joel Gehrke, 'US wants to confiscate frozen Russian Central Bank assets to rebuild Ukraine' *Washington Examiner* (28 April 2022) <www.washingtonexaminer.com/policy/defense-national-security/us-wants-to-confiscate-frozen-russian-central-bank-assets-to-rebuild-ukraine> accessed 15 May 2023.

[21] Government of Canada, 'Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch' (19 December 2022) <www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html> accessed 15 May 2023; David Lawder, 'Yellen says legal obstacles remain on seizure of Russian assets to aid Ukraine' *Reuters* (27 February 2023) <www.reuters.com/world/yellen-says-legal-obstacles-remain-seizure-russian-assets-aid-ukraine-2023-02-27/> accessed 15 May 2023; Daniel Franchini, 'Ukraine Symposium – Seizure of Russian State Assets: State Immunity and Countermeasures' (*Lieber Institute Articles of War*, 8 March 2023) <https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasures/> accessed 15 May 2023.

[22] Mari Peegel, 'Expert: Seizure of frozen Russian assets would undermine international law' *ERR News* (Tallinn, 1 July 2022) <https://news.err.ee/1608842938/expert-seizure-of-frozen-russian-assets-would-undermine-international-law> accessed 15 May 2023.

[23] European Commission, 'Ukraine: Commission presents options to make sure Russia pays for its crimes' (30 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311> accessed 15 May 2023; Laurence Norman, 'EU Says It Can't Seize Frozen Russian Central-Bank Assets for Ukraine' *Wall Street Journal* (Berlin, 30 November 2022) <www.wsj.com/articles/eu-says-it-cant-seize-frozen-russian-central-bank-assets-for-ukraine-11669827828> accessed 15 May 2023.

of the Council), the four countries reiterated that the frozen central bank assets "must be used as soon as possible" and that the EU "cannot wait until the war is over and a peace agreement is signed".[24]

In February 2023, the Swedish Presidency of the Council of the European Union announced that it was setting up an EU Working Group to examine the legal, financial, economic, and political possibilities of using frozen Russian assets. "In principle, it is clear-cut: Russia must pay for the reconstruction of Ukraine. At the same time, this poses difficult questions. This must be done in accordance with EU and international law, and there is currently no direct model for this," said Sweden's Prime Minister Ulf Kristersson.[25]

So far, the EU and its member states seem to be sceptical about, or at least divided on, the legal justifications for a full seizure of RCB assets and the precedent it would set. The legal concerns carry some weight as this has never been done before. There is no existing legal framework for the seizure of RCB assets and when going from freezing to seizing, there is a "gulf between political aspirations and available legal tools".[26]

The closest precedents or most similar actions can be found in the situations of post-World War II Germany, Iraq after the Kuwait war, and in relation to recent US measures against the central banks of Afghanistan, Venezuela, and Iran. However, the use of RCB assets for reparations poses somewhat different legal questions compared to Germany and Iraq. The war is not over and there is no peace treaty in place ordering a defeated Russia to pay, and even if Ukraine wins it will not be in a position where it can compel Russia to pay. UNSC resolutions are binding and override other obligations under international law but unlike Kuwait, there is no UNSC resolution mandating compensation and Russia is a permanent member with veto power. In the practice of historical war reparations, assets have been seized by and from belligerents at war, but the States that have frozen Russian assets are not at war with Russia. However, the positive side is that there actually are Russian State funds available at all. The situation, where countries that are fully supportive of Ukraine and its right to reparations already control a large part of Russia's foreign currency reserves, is unique.[27]

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[24] Rankin (n 6).

[25] Swedish Presidency of the Council of the European Union, 'EU Working Group to look at using frozen Russian assets for reconstruction of Ukraine' (14 February 2023) <https://swedish-presidency.consilium.europa.eu/en/news/eu-working-group-to-look-at-using-frozen-russian-assets-for-reconstruction-of-ukraine/> accessed 16 May 2023.

[26] Jorge Valero, Stephanie Bodoni and Alberto Nardelli, 'EU Sees Legal Grounds to Use Seized Russian Central Bank Assets' *Bloomberg* (26 January 2023) <www.bloomberg.com/news/articles/2023-01-26/eu-sees-legal-grounds-to-use-seized-russian-central-bank-assets#xj4y7vzkg> accessed 16 May 2023; Moiseienko (n 5) 4.

[27] Ingrid (Wuerth) Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (2023) Vanderbilt Law Research Paper 23-12, 30 <https://ssrn.com/abstract=4363261> accessed 11 May 2023; Moiseienko (n 5) 32-34; Philip Zelikow, 'A Legal

1.2 Purpose and Research Question

For all who have been following the discussions around the war in Ukraine and accountability for Russia, the notion that there is a lack of jurisdiction, or more generally a lack of enforcement possibilities, has become a recurring and tiring realisation. When it comes to a seizure of frozen RCB assets specifically, State immunity is sometimes referred to as an insurmountable obstacle to any action interfering with them.

The purpose of this thesis is to critically analyse the current content of customary international law of State immunity, including its scope and existing and emerging exceptions, and examine whether it really is a definitive legal obstacle for a potential seizure of frozen RCB assets. And if it is, is there not something fundamentally wrong with international law, from a perspective of justice and accountability, if it protects the sovereignty of an aggressor State that has no respect for the sovereignty of other States?

The research question of the thesis is therefore:

- Can a seizure of frozen Russian central bank assets be compatible with the customary international law of State immunity from enforcement, and to what extent?

To answer the research question, the thesis specifically addresses three issues within the law of State immunity that are primarily relevant for a seizure of RCB assets and that explain the structure of the thesis. The first issue is the current protection of central bank property and existing exceptions for property in use for non-sovereign purposes (see Chapter 2, especially 2.6). The second issue is the debated, potential exception to State immunity for serious violations of peremptory norms, and to what extent a seizure might be justified in relation to such an exception (Chapter 3). The third and final issue is the questionable applicability of State immunity to executive measures taken without any connection to judicial proceedings (Chapter 4).

1.3 Delimitations

Since a seizure of RCB assets is unprecedented and raises broad and complex issues, a value-extensive introduction and background is needed. However, the thesis focuses on the customary international law of State immunity from enforcement in relation to a potential seizure of RCB assets, which delimits the thesis in several ways.

The EU can be said to be used as the main actor relevant for this thesis, from the author's perspective, and the proposals discussed in relation to the EU are

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Approach to the Transfer of Russian Assets to Rebuild Ukraine' (*Lawfare*, 12 May 2022) <www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine> accessed 11 May 2023.

used as a background and baseline for what a "seizure" could look like. Since the thesis examines the compatibility of some form of seizure with international law of State immunity generally and not one specific proposal, however, the conclusions are relevant for other proposals and actors which have frozen RCB assets.

The term "seizure" is used in this thesis as a generic term for a "confiscatory" measure of constraint against property that would change the ownership of and transfer assets from one entity to another. While measures of constraint for immunity purposes are often called attachment, arrest or execution, seizure is used also to denote that the measure is not necessarily taken in relation to court proceedings or the satisfaction of a judgment, but rather as an executive, administrative or legislative measure by States, in line with existing proposals discussed within the EU and elsewhere. A seizure of assets could be described by a variety of terms depending on jurisdiction and context, such as confiscation, forfeiture and recovery in criminal law, and expropriation or nationalisation in international investment law.[28]

First, the thesis is delimited to the frozen foreign currency reserves of the RCB. They are the main option for reparation for Ukraine as they involve greater amounts and more liquid assets than the miscellaneous assets of individual oligarchs. The seizure or forfeiture of private assets has already begun and is also an attractive option but involves a less straightforward, case-by-case process of determining individual responsibility while leaving the responsible Russian State unaffected. Additionally, the substantial RCB assets can be used as leverage or collateral against the Russian State for a future payment of damages following a judicial settlement or peace agreement. Therefore, aspects relevant for private assets and assets of State enterprises, such as of criminal law, constitutional law, other categories of immunities, human rights, treatment of aliens, and international economic and investment law, are not dealt with in the thesis.[29]

Second, as the thesis is delimited to customary international law of State immunity, other areas of international law that could be relevant for a seizure of RCB assets are also outside the scope of this thesis, for example its compatibility with the principle of non-intervention, inviolability, human rights, or bilateral treaties on for example trade and investment.[30] The potential justification of a seizure as collective self-defence or under the regime of countermeasures is also excluded.[31] The thesis will not address issues under the law

[28] Moiseienko (n 5) 20.

[29] Zelikow (n 27); Peegel (n 22).

[30] Wuerth Brunk (n 27) 17-21; Tom Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 701.

[31] For discussions regarding countermeasures and self-defence see Zelikow (n 27); Franchini (n 21); Anderson and Keitner (n 18); Paul Stephan, 'Response to Philip Zelikow:

of armed conflict of belligerents in active hostilities instituting proceedings against each other or taking measures of constraint against foreign State property out of military necessity.[32] It will likewise not discuss whether practice supports the taking of such measures in situations of other serious tensions between States.[33] Furthermore, aspects of domestic and EU law are outside this thesis' scope. For example, domestic and constitutional law might impose limitations on confiscatory measures taken without judicial hearing.[34] The law of State immunity can, however, "take on a peculiarly domestic flavour" as international law provides a framework which is refined on the national level.[35] Domestic law is thus important for immunities and relevant for the thesis insofar as it reflects and influences customary international law.

Third, the thesis is delimited to immunity from enforcement specifically. There is an important distinction between immunity from jurisdiction (or adjudication) and immunity from enforcement (or execution), since the two regimes that States enjoy in the courts of other States are governed by different legal rules.[36] Immunity from jurisdiction bars a court from establishing adjudicatory jurisdiction in relation to a foreign State while immunity from execution bars taking measures of constraint against the property of the State. Looking at the issue of seizing RCB assets for Ukraine, it is the immunity from execution of property of the central bank which is primarily relevant. Even if jurisdiction can be established vis-à-vis Russia's wrongful acts, the question of whether RCB assets can be seized is a completely different matter. Regardless of the option pursued, such as a full seizure, active management, or the enforcement of judgments, it is thus immunity from execution that will be crucial for success. Immunity from jurisdiction will therefore only be examined insofar as it is relevant for the seizure of RCB assets.

Fourth, due to temporal and spatial limitations, details concerning State responsibility, diplomatic protection, and the right to reparation, which could be crucial aspects for a seizure, are beyond the scope of this thesis. The right to reparation of States and potentially individuals for international crimes, and the enforcement of individual's claims for compensation through diplomatic protection is thus only mentioned briefly as background and a theoretical link between a seizure of Russian assets and allegedly attributable wrongful acts of Russia in Ukraine. For the purposes of the thesis, Russia's violations of international law and Ukraine's right to reparation is in a way *prima facie*

Confiscating Russian Assets and the Law' (*Lawfare*, 13 May 2022) <www.lawfare-blog.com/response-philip-zelikow-confiscating-russian-assets-and-law> accessed 16 May 2023.

[32] See Aurel Sari, 'The status of armed forces in public international law: jurisdiction and immunity' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 361-362.

[33] See Ruys (n 30) 701.

[34] Wuerth Brunk (n 27) 20-21.

[35] Wouters and others (n 10) 500-502.

[36] ibid.

assumed, based on available reports in media and by States and international organisations. It is not a task for this thesis to examine the details or the merits of allegations of violations of international law, which is best left to competent judicial organs if and whenever they have the necessary jurisdiction.[37]

Finally, there are also a range of political, diplomatic, economic, or military aspects, consequences and arguments that are outside the scope of this thesis, which focuses on the international legal aspects. Many practical aspects, for example concerning the timing of the measures and the mechanism or fund for using and distributing assets, are also outside the scope of this thesis.

1.4 Methodology

This thesis has been written using a critical legal dogmatic method with an international perspective. Kleineman describes that the purpose of the legal dogmatic method is to reconstruct a legal rule or find a solution to a legal problem by applying the legal norms found in the generally accepted sources of law.[38] The starting point of the legal dogmatic method is usually the formulation of a problem in the form of a concrete research question, which is then analysed and corrected along the way as the research continues.[39] The task is then interpretation and problem-solving to harmonise conflicting rules or describe potential solutions.[40] The purpose is to determine and describe the general rule and its relevance in the specific context, but also to explain how that rule should be applied to the concrete problem.[41] The end result of a legal dogmatic analysis of the legal sources is a result that reflects the current content of the law or how the legal rule should be viewed in a specific context.[42] Thus, it is the connection or relationship between a concrete area of application and the more abstract legal rule, for example between the seizure of Russian assets and the law of State immunity, that characterises the method.

From an international perspective, this means that the generally recognised sources of public international law have been examined to help answer the research question. The most authoritative statement on the sources of

[37] For more on State responsibility, historical war reparations practice, diplomatic protection and the right to reparation of individuals under international humanitarian law see *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, paras 94, 99-100, 134ff; *Jurisdictional Immunities (n 37)*, Dissenting Opinion of Judge Trindade, paras 240ff; *Jurisdictional Immunities* (n 37), Dissenting Opinion of Judge Yusuf, paras 12ff. See also, on the rejection of "State criminal responsibility" and the special consequences of breaches of fundamental norms, Cryer, Robinson and Vasiliev (n 12) 17; Wouters and others (n 10) 541-546; Articles 41-42 and 48 ARSIWA.

[38] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 21. See also Aleksander Peczenik, *Juridikens teori och metod: En introduktion till allmän rättslära* (Fritzes 1995) 33ff.

[39] Kleineman (n 38) 23.

[40] Kleineman (n 38) 26; Peczenik (n 38) 44-45.

[41] Kleineman (n 38) 30.

[42] ibid 26.

international law can be found in Article 38 of the ICJ Statute.[43] Accordingly, the primary, law-creating, sources are international conventions, customary international law and general principles. The subsidiary, law-identifying, sources are judicial decisions and legal doctrine. It is important to bear in mind the difference since the law-identifying sources are not actual sources of law but instead attempt to analyse and interpret the primary sources.[44] Generally, it has thus been important to distinguish between them, and to try to understand and fairly represent opposing views on different issues in the selection of the secondary sources. Also, the more recent and relevant texts have been preferred over older and more outdated ones.

Legal arguments, and the ability to weigh arguments from different sources depending on their authority, are at the centre of a legal dogmatic method. The limits for the argumentation can depend on how allowing or unsettled the law is according to the sources, on the specific legal discipline and on whether one examines not only how a rule is applied in a specific situation but also how it should be applied in the future.[45]

The international perspective also means one must take into account that international law is a highly decentralised system where States are not only the main subjects who are bound by international law, but also the subjects who often create, enforce and interpret it.[46] The choice of a legal dogmatic method is therefore motivated due to the highly political nature of some areas of international law, including immunity law. While this means that political considerations of States are not considered, the method helps distinguish between legal aspects, which are relevant for the thesis, and extra-legal aspects.

The legal dogmatic method can also be used to criticise the current content of the law and propose changes. It is when the task of "reconstruction" has been completed that an opportunity presents itself to also examine the desirability of that solution and its consequences or alternatives. Thus, the legal dogmatic method first presents what the law is and can then become "critical" in the sense that the same method of analysis is used to criticise the results.[47]

It is important to bear in mind the traditional distinction between arguments *de lege lata*, what the law is, and *de lege ferenda*, what the law ought to be. A critical legal dogmatic method can be used to go further than only describing what the law is, by freely using *de lege ferenda* arguments as to how the law is unsatisfactory or should change. *De lege ferenda* arguments are used in this thesis, specifically, where the current state of customary international

[43] Wouters and others (n 10) 60.

[44] Anders Henriksen, *International Law* (2nd edition, Oxford University Press 2019) 22–23.

[45] Kleineman (n 38) 27–30.

[46] Henriksen (n 44) 9.

[47] Kleineman (n 38) 35–36.

law is unsettled, divergent, controversial or unsatisfactory in order to highlight how the law can or should change.[48]

The critical legal dogmatic method is suitable for the thesis since it examines the compatibility of a proposed seizure of RCB assets with current customary international law. In addition, the choice is motivated because of the unprecedented nature of the proposed measures and the high degree of controversy and uncertainty within the law of State immunity. Therefore, in addition to identifying *de lege lata*, the positive law on the basis of the generally recognised international legal sources, the thesis also uses international legal theory, for example international natural law thinking, as the main theoretic framework for a discussion and critical analysis of the content of customary international law in terms of *de lege ferenda* (see Chapter 1.6).

1.5 Sources and Current Research

State immunity is primarily regulated by customary international law, and not in legally binding international conventions. As there is little guidance from the primary sources in the form of treaties, the thesis has mostly used the subsidiary sources of case law and legal doctrine to clarify and interpret the content of customary international law.

Customary international law is defined in Article 38(1) of the ICJ Statute as "international custom as evidence of a general practice accepted as law". It consists of two elements: objective State practice and subjective *opinio juris*. Practice consists of the conscious public behaviour of subjects of international law, primarily States, which is sufficiently uniform, durable and extensive. *Opinio juris*, forming evidence of the belief or recognition by States that the practice is legally binding, is the element that distinguishes ordinary custom from legally binding customary international law.[49]

Customary law is thus largely dispositive in nature as States are free to change their behaviours or beliefs, or adopt treaties.[50] Customary international law as a primary source has the same normative power as treaties, but is inherently more uncertain as to its existence or content. The ILC therefore plays a special and authoritative role in its efforts to codify and progressively develop international law.[51] Decisions of international courts like the ICJ are only binding on the parties to the case, but they can also be seen as highly authoritative and of great legal value.[52] Both the work of the ILC and the case law of the ICJ have been crucial for the thesis.

[48] Kleineman (n 38) 36-37, 40.
[49] Wouters and others (n 10) 135-136.
[50] ibid 168.
[51] ibid 154.
[52] ibid 146, 159.

The Law of State Immunity by Fox and Webb is one of the foremost scholarly contributions in this area and has been used generally. Likewise, the textbook on international law by Wouters, Ryngaert, Ruys, and De Baere, has been useful for a range of different questions, including sources and theory. When it comes to central bank immunity, Wuerth has written the more recent and relevant articles for a seizure of Russian currency reserves.

In respect of a potential exception to State immunity for serious violations of peremptory norms, the thesis mainly uses the leading case *Jurisdictional Immunities* before the ICJ in order to analyse the content of customary international law, as interpreted by the ICJ, and the arguments for and against the Court's reasoning in legal doctrine. The research handbook on State immunity, edited by Orakhelashvili, has been particularly useful for these discussions. While a lot has been written in general about exceptions to State immunity for serious violations of fundamental norms, it has to the author's knowledge not been examined on a deeper level in relation to a seizure of Russian assets, in comparison to for example options regarding countermeasures. There have been interesting debates on international law blogs on what the best options for the RCB assets are, like the back-and-forth between Stephan and Zelikow on Lawfare, which gives a good introduction to the legal obstacles presented by an asset seizure. However, these blogposts generally do not go into a deeper analysis. Specifically, the issue of a possible exception for serious violations of international law is rarely if ever dealt with.

In respect of the material scope of the law of State immunity, the thesis focuses on the discussions in doctrine and the practice of sanctions against central bank assets. Both Ruys and Wuerth have contributed greatly to the scholarship on precisely the issue of the applicability of immunity to executive asset freezes. However, the step of going from freezing to seizing in light of these discussions has not been addressed as much.

1.6 Theory

When the President of the European Council Charles Michel called for the confiscation of Russian assets in May 2022, he stated that it is "a question of fairness, a question of justice".[53] The common thread of the multifarious issues confronted by a seizure of Russian assets, however, is the balancing between the international rule of law and ensuring justice, and between what the law is and what it ought to be. The challenge is responding to Russia's egregious breaches of international law and maintaining respect for the rule of law in the States taking the measures. This creates a paradox where an actor can

[53] David Herszenhorn, 'Charles Michel calls for confiscation of sanctioned Russian assets' *Politico* (5 May 2022) <www.politico.eu/article/michel-confiscate-sanctioned-assets-russia-oligarchs/> accessed 16 May 2023.

completely disrespect the most fundamental norms of international law and might simultaneously be shielded by international law.[54]

”We must help Ukraine while maintaining the rule of law that the EU is built on. This also applies in times of crisis and war”, said Anders Ahnlid who leads the EU Working Group.[55] Even if a seizure makes moral, economic or humanitarian sense, it may be “politically untenable” or “violate international law”. International lawyers like Criddle, for example, argue that, if a seizure is unlawful, it would send the wrong message to sink to Russia’s level.[56] Neglecting international law would undermine efforts to hold Russia accountable, as it remains the universally recognised set of rules which are actively used by Ukraine and its allies to condemn Russia’s actions. However, customary international law is not static and can change in legitimate ways. This thesis argues that a rules-based international order clearly is in the interest of the EU and other States, but that there is a limit to how legalistic or formalistic one can be in an exceptional situation. If the law really is an obstacle, that leads to absurd results in contradiction with justice and accountability, the law must change, and international law can change.

In order to critically analyse State immunity from an international perspective of justice and accountability, the thesis uses arguments and perspectives from international legal theory. International legal theories are largely theories on the legal character of international law, and they try to explain why international law is binding for sovereign States who have no authority above them.[57]

Natural law can be described as maintaining a necessary connection between law and morality. International natural law is regarded in modern natural law thinking as “the application of justice in international affairs”.[58] While natural law can be said to regard positive law as valid or legitimate only to the extent that it complies with “eternal and universal rules derived from the rational and social nature of humans”, legal positivists deny this position and instead identify law on the basis of socio-legal facts.[59] Positivism maintains that the State is the relevant representation of the moral ideal in international law and the law is what the State mandates or imposes. Only positive law is considered as actual law, under positivism, which is a clear limitation or object for criticism according to natural law theories.[60]

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[54] Moiseienko (n 5) 7, 25.

[55] Swedish Presidency of the Council of the European Union, ‘Intensive efforts to enable frozen Russian assets to reach Ukraine’ (12 April 2023) <https://swedish-presidency.consilium.europa.eu/en/news/intensive-efforts-to-enable-frozen-russian-assets-to-reach-ukraine/> accessed 16 May 2023.

[56] Criddle (n 9).

[57] Wouters and others (n 10) 31.

[58] Wouters and others (n 10) 37; Trindade (n 37) para 2.

[59] Wouters and others (n 10) 32, 37.

[60] ibid 38-39.

Rationalism, or rational natural law theories, are not based on religion but on the idea that the grounds for the legitimate authority of international law are objective standards of right and just actions and rules, which are discernible by human reason and conscience. The objective of these theories is among other things to guide interpreters or fill gaps in the absence of relevant, justified or legitimate positive law. They reject "unrestrained" sovereignty and considers that immunities must be justifiable and limited to avoid harm.[61]

Positivism normally suffices for the identification of the formal content of the law, but under exceptional or unjust circumstances, such as in Nazi Germany, one must take into consideration moral legal reasoning in order to explain law in terms of desirability, legitimacy or material justice.[62]

Peremptory norms, or *jus cogens*, for example, are an important product of natural law thinking that serves to protect human dignity and moral values and are binding for all States regardless of positivist State consent.[63] If there is a conflict between a *jus cogens* norm and a treaty rule or customary rule, the *jus cogens* norm takes precedence and the other rule becomes invalid.[64]

International legal theory is thus of foremost importance for this thesis in the determination of *lex lata* and *lex ferenda*. While some have criticised natural law theories for blurring the distinction, Wouters et al. points out how the determination of *lex lata* does not necessarily imply a rejection of moral values. One can believe in the necessity of moral values as a basis for rules without admitting that whatever moral values prescribe is or should immediately become legally binding rules. "In fact, a correct identification of the *lex lata* makes a more acute and direct criticism of the applicable rules possible."[65]

Therefore, for the purposes of this thesis, it is not denied that positive law is actual law but modern rational natural law enables a concrete criticism of the law from an international perspective of justice and accountability. This also allows, whenever the law is unsettled or undesirable, for arguments in terms what the law ought to be, with a steady ground in human morality.

When it comes to immunities specifically, they are highly controversial because they create tensions with other principles, values, and areas of the international legal order. While immunity prioritises sovereignty and stable

[61] Andreas Follesdal, 'Natural Law: Current Contributions of the Natural Law Tradition to International Law' in Jeffrey Dunoff and Mark Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2022) 41-48; Paulo de Brito, 'Towards a Natural Law Theory of International Law' (2007) 2 Phil Int'l L 111.

[62] Peczenik (n 38) 21-24, 82-85; Aleksander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Fritzes 1995) 97-98, 133ff.

[63] Wouters and others (n 10) 37.

[64] Articles 53 and 64 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[65] Wouters and others (n 10) 39.

relations, international criminal law seeks to limit impunity for serious international crimes. Immunities therefore prevent interference with States and their representatives to maintain stable relations but can also frustrate criminal prosecutions or civil suits for incredibly serious crimes and violations.[66]

This thesis is based on the view that immunities indeed does conflict with other important rules and principles, and that these tensions have led to and been part of a "human-centred development" of international law in general, and State immunity in particular. With respect to State immunity, these tensions and this evolution can be seen in the shrinking of formerly absolute immunities and the development of a restrictive doctrine (Chapter 2). It can also be seen in the efforts to take accountability concerns into account more effectively, including through an exception to State immunity for serious violations of peremptory norms (Chapter 3) and the enforcement of those fundamental norms by the international community through sanctions and a less restricted foreign policy of States (Chapter 4).

There is a risk of overextending the law of State immunity, which is not a superior principle to others but rather an "exception" to the normal rule of full territorial sovereignty and jurisdiction.[67] As judge Bennouna said, quoting judge Higgins, judges should ensure that ultimate precedence is given to law and justice, and immunity, as an exception to jurisdiction, should only be granted when international law requires it and it is consonant with justice.[68]

This thesis takes its theoretical perspective from these tensions, which all can be seen as forming part of what the ICTY called the gradual supplanting in international law of a "State-sovereignty-oriented approach" with a "human-being-oriented approach", where legitimate State interests are safeguarded but the protection of human beings becomes more and more important.[69]

> "The 'constitutionalisation' of the international legal order and the advance of human rights law and international criminal law have also been accompanied by attempts to curtail various immunity regimes."[70]

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[66] Robert Cryer, 'Immunities and international criminal tribunals' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 470; Cryer, Robinson and Vasiliev (n 12) 506.

[67] François Larocque, 'Torture, jurisdiction and immunity: theories and practices in search of one another' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 453-454.

[68] *Jurisdictional Immunities* (n 37), Separate Opinion of Judge Bennouna, para 17; Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29 Netherlands International Law Review 271.

[69] Cryer, Robinson and Vasiliev (n 12) 3; *Tadic Case* (Decision, AC) ICTY-94-1 (2 October 1995) para 97.

[70] Tom Ruys, Nicolas Angelet and Luca Ferro, 'Introduction – International Immunities in a State of Flux?' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 4.

There has, however, been a clear domestic and international "judicial scepticism" towards a *jus cogens* exception to State immunity, and the ICJ's judgment and rejection of such an exception in the leading case, the *Jurisdictional Immunities* case, has had a stabilising effect on this contested field of international law.[71] Thus, in recent years, the "accountability-inspired evolution appears to have ground to a halt".[72]

Where the human-centred evolution is unfinished and the law is undesirable from a perspective of justice and accountability, the law can change through a progressive development of international law. That development is evidently, however, "in the hands" of States who are still the primary subjects of law and mostly hold the law-creating function. Human values and fundamental norms are growing in importance, but their enforcement is still State-centric. Realist theories hold that law in general, and international law in particular, is "epiphenomenal", since States only will obey international law when it is in their interests. States are therefore rarely convinced by natural law reasoning, as it can be turned against them.[73]

Most attempts to carve out a *jus cogens* exception have also concerned individuals' civil claims against States or State officials, and immunity from jurisdiction rather than execution.[74] The potential seizure of Russian assets nonetheless presents a renewed opportunity to address the issue. The thesis therefore thoroughly analyses the *Jurisdictional Immunities* case and uses it to critique and highlight the specific issues concerning a *jus cogens* exception to State immunity in relation to a seizure of RCB assets (see Chapter 3).

Many different legal theories have been put forward to explain and justify a *jus cogens* exception to State immunity, for example: the implied waiver theory, the normative hierarchy theory, the right to a judge or to a remedy theory, the changing nature theory, the functional rationale of State immunity, and complicity theory.[75] The thesis briefly examines the normative hierarchy theory (Chapter 3.2.2.3) and right to a judge and remedy theory (Chapter 3.2.2.4), but the focus of the critique and analysis is the changing nature theory and functional rationale of State immunity (Chapter 3.3). This is done for purposes of delimitation, but also since the two latter theories are the most relevant for this thesis.

The right to a judge and remedy theory was and is one of the main bases for Italy's continued denial of Germany's immunity, but it was rejected by the ICJ and is more relevant in relation to individuals' action against States and

[71] Pierre d'Argent and Pauline Lesaffre, 'Immunities and *Jus Cogens* Violations' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 614.

[72] Wouters and others (n 10) 523.

[73] Wouters and others (n 10) 44; Cryer (n 66) 477.

[74] D'Argent and Lesaffre (n 71) 614-615.

[75] ibid.

immunity from jurisdiction, rather than a seizure of Russian assets and immunity from enforcement.[76]

While Italy did not challenge immunity from enforcement specifically, the normative hierarchy theory and functional rationale of State immunity have in fact been used to challenge immunity from enforcement. The normative hierarchy theory was however also rejected by the ICJ, but the changing nature theory or functional rationale of State immunity were not addressed sufficiently, or at all. The changing nature theory has been put forward more in relation to the functional immunity (*ratione materiae*) of State officials but is also relevant for State immunity, from a perspective of coherence, as they share underlying rationales. It was also the first to succeed in justifying an exception to functional immunity for international crimes.[77]

1.7 Outline

Chapter 2 introduces and focuses on the development of and current content of the customary international law of State immunity, especially immunity from enforcement and its potential exceptions under the restrictive doctrine for non-sovereign acts or purposes, in relation to a seizure of RCB assets.

Chapter 3 focuses on the *Jurisdictional Immunities* case before the ICJ, because it is the leading case in this contested area, to analyse the theory and development of a potentially emerging exception to State immunity for serious violations of peremptory norms. It also examines whether the seizure of RCB assets could or should be justified under such an emerging exception.

Chapter 4 deals with the question of whether customary international law of State immunity is applicable at all to non-judicial measures, i.e., measures which are unrelated to court proceedings or the satisfaction of judgments, against the background of a growing practice of autonomous sanctions against central banks. The thesis examines whether the conclusions for asset freezes could or should be true also for a seizure of RCB assets.

Chapter 5 contains the final assessments and concluding remarks of the thesis.

[76] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR); d'Argent and Lesaffre (n 71) 630ff.

[77] D'Argent and Lesaffre (n 71) 618, 623-624.

2 Law of State Immunity

Chapter 2 includes an examination of the sources and rationale of State immunity (Chapter 2.1-2), the tensions between immunity and territorial sovereignty and jurisdiction (Chapter 2.3), the important difference, especially for the seizure of RCB assets, between immunity from jurisdiction and from enforcement (Chapter 2.4) and the development of a restrictive doctrine of immunity including "commercial" exceptions (Chapter 2.5). Chapter 2.6 finally contains an analysis of central bank immunity from enforcement specifically, which is of foremost importance for the protection of the RCB assets.

2.1 Sources of Law

The international law of immunities has ancient roots and is a complex and controversial area. Immunities mean that even when States and domestic courts can establish lawful jurisdiction, the exercise of that jurisdiction may nonetheless be impeded by an immunity. They accrue under international law to States and international organisations, as well as their officials, due to their special status as subjects of international law. Immunities have been granted to enable the beneficiaries to properly carry out international activities by protecting them from policy interference by foreign States.[78]

What extent immunities have, and which sources govern the specific rules, depends on the nature of the protected persons or entities and therefore it is important to differentiate the distinct regimes applicable to different categories of beneficiaries.[79] When discussing Russia's immunity and the protection of RCB assets, it is specifically the law of State immunity, or sovereign immunity, that is relevant.[80] The plea of State immunity relates to the adjudicative and enforcement jurisdiction of one State's national courts and bars those courts from adjudicating the disputes of another State.[81]

State immunity was initially "an expression of political courtesy and reciprocity".[82] While some still see State immunity as merely a privilege or gesture of comity, the ICJ has confirmed that it is "a general rule of customary international law rooted in the current practice of States".[83] The basic principle of State immunity is quite easily understood but there are many practical difficulties in practice stemming from opposing views on its scope and its relationship with other norms of the international public order.[84]

[78] Cryer, Robinson and Vasiliev (n 12) 506-507; Wouters and others (n 10) 500, 523.
[79] Wouters and others (n 10) 500.
[80] Moiseienko (n 5) 24.
[81] Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013) 1.
[82] Larocque (n 75) 457.
[83] *Jurisdictional Immunities* (n 37) paras 55-56; Fox and Webb (n 81) 2.
[84] Larocque (n 75) 457.

The absence of a general, multilateral convention setting out the rules of State immunity "has remained a long-standing obstacle to any uniform law".[85] Two important conventions regarding State immunity have been concluded: the European Convention on State Immunity (1972) (ECSI)[86] and the UN Convention on the Jurisdictional Immunities of States and Their Property (2004) (UNCSI)[87].[88] The ECSI, however, has only eight States Parties and is only open to ratification for European States.[89] Furthermore, after more than 20 years of work to codify the customary international law of State immunity, the ILC finished its Draft Articles on Jurisdictional Immunities of States and Their Property in 1991.[90] On the basis of the Draft Articles and after lengthy debate, the UNCSI was adopted by the UNGA.[91] The UNCSI was the first international convention being an authoritative written text on State immunity, but it has not yet entered into force, as it lacks the required 30 ratifications.[92] State immunity thus continues to derive its legal authority from customary international law, even if some of the provisions of the conventions are sometimes referred to by courts and scholars as codifications.[93]

The law of State immunity is also a mix of international and national law. It is a doctrine of international law that is applied in domestic courts in accordance with national law. "Its requirements are governed by international law, but the individual national law of the State before whose courts a claim against another State is made determines the precise extent and manner of application."[94] This interaction between international and national law further complicates the content of the law and creates many tensions. Cross-fertilisation, in the form of domestic and international jurisdictions assessing the practice of other jurisdictions to assess the state of customary international law, also flourishes in the area of immunities.[95]

2.2 Rationale of State Immunity

According to the ICJ, State immunity "occupies an important place in international law and international relations".[96] As a rule of international law, it "serves to limit the exercise of jurisdiction of the forum State over acts

[85] Fox and Webb (n 81) 1.

[86] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) CETS No 74 (ECSI).

[87] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force) UN Doc A/59/508, 3 (UNCSI).

[88] Wouters and others (n 10) 501-502.

[89] ibid.

[90] Fox and Webb (n 81) 1.

[91] UNGA Res 59/38 (16 December 2004); Fox and Webb (n 81) 1.

[92] Fox and Webb (n 81) 2.

[93] Wouters and others (n 10) 501-502; Fox and Webb (n 81) 2.

[94] Fox and Webb (n 81) 1.

[95] D'Argent and Lesaffre (n 71) 629.

[96] *Jurisdictional Immunities* (n 37) para 57.

performed by, or attributed to, a foreign State".[97] State immunity derives from the principle of sovereign equality of States, which can be traced back to the 1648 Peace of Westphalia.[98] The principle means that States are not allowed to exercise jurisdiction over their peers, in accordance with the Latin adage *par in parem non habet imperium* (an equal has no authority over an equal).[99] The principle, enshrined in Article 2(1) of the UN Charter, is "one of the fundamental principles of the international legal order", as confirmed by the ICJ, and its purpose is avoiding international tension and disorder.[100]

Under Article 5 of the UNCSI, expressing the main principle of State immunity, 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 Convention. According to the ILC commentary, the formulation of the principle was "difficult" and a "delicate matter", as there are many different legal theories on the exact nature and basis of immunity. The ILC had found common agreement on the view that there is a "hard core of immunity" where there is undisputed immunity for acts performed in the exercise of sovereign authority of the State. Beyond this exists a "grey area" where opinions, case law and legislation vary. One view is that immunity is an "exception" to territorial sovereignty and therefore needs to be substantiated case-by-case. Others have referred to State immunity as a general rule or principle of international law. But the ILC confirmed that the rule in any case is not absolute, even if there are differing opinions on what the exceptions are.[101]

2.3 Tension Between State Immunity and Territorial Sovereignty and Jurisdiction

Immunities are thus closely connected to national jurisdiction. Any grant of immunity involves a decline to exercise jurisdiction, and any denial of immunity involves an assertion to exercise jurisdiction. The exercise of public authority by a State, whether unlawful or lawful under international law, involves the exercise of State jurisdiction.[102]

A State's capacity to exercise jurisdiction is a basic aspect and manifestation of its sovereignty. As a fundamental premise of international law, sovereignty "confers on every State the right to perform functions of government within its territory, in particular by establishing and enforcing its own legal and

[97] Wenhua Shan and Peng Wang, 'Divergent Views on State Immunity in the International Community' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 61.

[98] Wouters and others (n 10) 501.

[99] ibid.

[100] *Jurisdictional Immunities* (n 37) para 57; Wouters and others (n 10) 501.

[101] ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries' [1991] Ybk II(2), UN Doc A/46/10, 23 para 2 (UNCSIC).

[102] Alexander Orakhelashvili, 'State immunity from jurisdiction between law, comity and ideology' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 151.

political order". The territorial State has full prescriptive, adjudicative and enforcement jurisdiction over events, persons, or objects within its territory in accordance with the territorial principle, but sovereign equality means that a State has no authority over another, equally sovereign, State.[103]

State immunity is, in other words, "in constant friction with territorial sovereignty".[104] As the ICJ has described it, an exception to State immunity may represent a departure from the principle of sovereign equality, while State immunity "may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it".[105]

2.4 Immunity From Jurisdiction and From Enforcement

As stated earlier, it is important to distinguish between immunity from jurisdiction and immunity from enforcement. For example, a State's waiver of immunity from jurisdiction does not automatically imply that the State also waives its immunity from enforcement.[106]

Jurisdictional immunity prevents adjudication over who is right or wrong, while immunity from enforcement is "consequential" and protects property once the initial issue of right or wrong has been decided. According to Orakhelashvili, the latter protects not the sovereign authority of the State directly but rather specific property from "execution proceedings". The distinction is important because the rationale, justification and normative position behind the concepts are different.[107]

Thus, what is crucial for a seizure of RCB assets is enforcement jurisdiction, regardless of the issue of adjudicative jurisdiction. One cannot assume that, once a court has denied immunity from jurisdiction and decided that a foreign State has lost the case, a claimant can simply go ahead and attach assets of that State to enforce the judgment. This is for historical reasons since immunity from execution was never an issue or matter of law before the restrictive doctrine enabled exceptions to immunity from jurisdiction.[108]

2.5 From an Absolute to a Restrictive Doctrine on State Immunity

[103] Sari (n 32) 337.
[104] Shan and Wang (n 97) 61.
[105] *Jurisdictional Immunities* (n 37) para 57.
[106] Article 20 of the UNCSI; Wouters and others (n 10) 502.
[107] Orakhelashvili (n 102) 153-154.
[108] Xiaodong Yang, 'Immunity from execution' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 372–374.

The law of State immunity is not static and has seen huge developments in the last 100 years.[109] It is in fact undergoing constant evolution as an international rule primarily applied in national courts.[110]

Historically, State immunity *from jurisdiction* was seen as *absolute*. In modern international law, although some States still take a more conservative approach, the more common approach is that States do not enjoy absolute immunity and that there exists a number of exceptions. Most States now subscribe to the *restrictive* doctrine on State immunity, where immunity from jurisdiction attaches only to sovereign acts of the State (*acta jure imperii*), and not to commercial, or other non-sovereign, acts (*acta jure gestionis*).[111]

As States became increasingly entangled in trade and commercial activities with each other and with private parties in foreign States, immunity necessarily had to develop to a restrictive model that distinguishes between private and public acts. *Acta jure gestionis* are carried out by a State as if the State was a private person, and the differentiation is made because it is not seen as fair if States were given preferential treatment in those circumstances. Granting immunity for non-sovereign activities may lead to a reluctance by private parties to contract or interact commercially with States, thus the rule is also in the interests of States willing to engage in commercial activities.[112]

With a shift from the absolute doctrine in a considerable number of States, the restrictive doctrine has clearly become the general trend. However, according to Shan and Wang, the doctrine has yet to become the general rule of international law as States remain divided on the foundation and scope of exceptions to State immunity.[113]

Several important States like China still hold on to the absolute doctrine. There is also uncertainty persisting regarding the precise distinction between *acta jure imperii* and *jure gestionis*. The divergence in practice and *opinio juris* has raised the question of whether the restrictive rule really has attained customary status, and some have even questioned if there is an obligation whatsoever to grant State immunity under customary international law.[114]

The restrictive doctrine is, however, reflected in major legislative developments from the 1970's, including the ECSI and national legislation, and it was also embraced in the UNCSI.[115] The common exception to both immunity from jurisdiction and enforcement is some form of consent (see Articles 7-9,

[109] Fox and Webb (n 81) 3.
[110] Shan and Wang (n 97) 75.
[111] Wouters and others (n 10) 502.
[112] Fox and Webb (n 81) 32; Wouters and others (n 10) 502.
[113] Shan and Wang (n 97) 75.
[114] Ruys, Angelet and Ferro (n 70) 5.
[115] Fox and Webb (n 81) 1; Ruys, Angelet and Ferro (n 70) 4.

18-19 of the UNCSI). Everyone seems to agree that immunities may be waived by the State concerned but beyond that it gets more controversial.[116]

While the move to a restrictive doctrine has not always been uniform in practice, a number of exceptions to State immunity from jurisdiction for *acta jure gestionis*, or non-sovereign activities, have also been widely accepted.[117] The most notable is the exception for commercial transactions (reflected in Article 10 UNCSI). Other examples of exceptions to immunity from jurisdiction concern contracts of employment, ownership, possession and use of property, intellectual and industrial property, participation in companies or collective bodies, ships owned or operated by a State, and arbitration agreements.[118]

In respect of Russia's wrongful acts and immunity from jurisdiction, none of the exceptions for *acta jure gestionis* seem relevant. As shown in Chapter 3, however, the so-called territorial tort exception in Article 12 of the UNCSI, as well as other possible exceptions to both State immunity from jurisdiction and enforcement, have been heavily discussed in relation to such acts.

While the immunity of a foreign State from adjudication legitimately can be restricted by a number of exceptions, "immunity from enforcement jurisdiction in respect of such proceedings remains largely absolute". The application of coercive measures against State property, such as the RCB assets, is seen as a different and more directly intrusive mechanism than the ruling of a national court on the issue of liability. In accordance with the restrictive doctrine, some jurisdictions allow for enforcement or execution measures against "commercial" property, but the rules generally remain narrow and strict, especially in relation to central bank property, as shown in Chapter 2.6.[119]

2.6 Central Bank Immunity From Enforcement

2.6.1 UNCSI and Special Protection of Central Bank Assets

Central bank immunity reflects additional tension between immunity and commercial interests.[120] The ILC's commentary to the UNCSI recognised the meaningfulness of central bank immunity in view of the attractiveness and emerging trend in practice of private litigants or creditors seeking measures of constraint against a State's central bank assets located in another State in order to use them to satisfy judgments or large monetary awards.[121]

"Central bank" means, for the purposes of immunity, a central bank or other monetary authority of the State. There is no specific definition of a central

[116] Cryer, Robinson and Vasiliev (n 12) 509.
[117] Wouters and others (n 10) 502-503.
[118] See Articles 11, 13-17 of the UNCSI.
[119] Fox and Webb (n 81) 23-24.
[120] Wuerth Brunk (n 27) 1.
[121] UNCSIC (n 101) 55 para 1.

bank in the UNCSI and their status differs greatly from country to country, but they are usually defined with reference to their constitution and functions as banks set up by a State to be the supervisor and regulator of that State's monetary system and currency internally and internationally. They hold national reserves and sometimes also deposits and significant foreign currency reserves of other States and their central banks.[122]

In general, a central bank's assets held and frozen in foreign countries are entitled to immunity from execution under international law.[123] While State immunity broadly, and especially immunity from jurisdiction, has become less and less absolute over time, "the trend has been towards greater protection of foreign central bank assets from measures of execution".[124]

At the disposal of domestic courts are both pre- and post-judgment coercive measures. First, measures which can be taken at the start of or during litigation for the purposes of establishing jurisdiction and/or ensuring the presence of the defending party within the jurisdiction in view of a final judgment, and second, measures taken following and in execution of a judgment.[125]

Central bank assets are afforded "near-absolute" immunity from enforcement under the UNCSI.[126] First, Article 18 provides that no pre-judgment measures of constraint, such as attachment or arrest, against the property of a State may be taken in connection with a proceeding before a court of another State, unless and except to the extent the State has expressly consented to the measure or has earmarked the property for the satisfaction of the claim. Second, Article 19 provides for immunity from post-judgment measures, such as attachment, arrest or execution, with the same exceptions for consent and an additional exception in Article 19(c) for property "in use or intended for use by the State for other than government non-commercial purposes". Then, Article 21(1)(c) includes central bank property as one of the specific categories of State property that cannot come within that exception for "commercial" property.

The reasons for this extra protection of some categories are that such property often serve inherently sovereign purposes, are the most essential and sensitive, and that interference with them could have especially serious political, economic, or diplomatic consequences. The Special Rapporteur had suggested the addition of the words "and used for monetary purpose" in relation to central bank assets, but it lacked the support necessary to be included.[127]

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[122] Fox and Webb (n 81) 373-374; 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* (Cambridge University Press 2019) 267.

[123] Wuerth Brunk (n 27) 1.

[124] ibid.

[125] Yang (n 108) 372-373.

[126] Fox and Webb (n 81) 374; Wuerth (n 122) 269.

[127] UNCSIC (n 101) 58-59 paras 2, 5; Yang (n 108) 410, 416.

2.6.2 Divergence in Customary International Law on the Status and Protection of Central Banks

Wuerth points out that, under customary international law and regardless of the UNCSI's provisions, different States' approaches to central bank immunity fall on a spectrum, from a more to a less protective scope. Recent decades have seen an overall trend towards granting more generous immunity from execution for central bank assets, but the trend is not entirely uniform.[128]

Some States, the most protective on the spectrum, provide near-absolute immunity apart from a waiver or other form of consent, corresponding to the provisions of the UNCSI described above. Middle-ground States protect central bank property from execution insofar as it is used for central banking functions or other government purposes. The least protective States do not apply special protections for central banks and generally deny immunity from execution if the property is used for a commercial activity, based on the nature of that activity and not its purpose.[129]

Regarding the details of the level of protection of central bank assets from execution under customary international law, several issues remain unsolved. For example, defining "government purpose" or "commercial activity" is difficult. Another important issue is the relationship between a State and its central bank, especially as central banks have become more independent in the last decades. A central bank can be classified as either the State or one of its organs, an agency or instrumentality of the State, or as neither (see Article 2(1)(b)(i) and (iii) UNCSI). Depending on the approach on the level of protection and on the classification of central banks, the results in different States have varied greatly. Historically, some reached the conclusion that central banks were not protected by immunity at all. Some have granted central bank immunity on the same conditions as the State. Others have held that central banks are agencies and instrumentalities and thus entitled to immunity only for acts performed in the exercise of the sovereign authority of the State (see Article 2(1)(b)(iii)). The relationship has sometimes also raised questions about whether central bank assets at all can be used to satisfy obligations of the State or if they are held only for the bank's own account. It is unclear to what extent the requirement of a "nexus" between the central bank and the State, as outlined in Article 19(c), that "measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed", reflects customary international law.[130]

According to Wuerth, since States are on a spectrum, the minimum protection required by customary international law, absent a waiver, is immunity from execution for assets not used for a commercial activity. This applies to central bank property generally and is also the same level of minimum protection

[128] Wuerth (n 122) 266.
[129] ibid.
[130] ibid 266, 278, 282.

afforded to *any* State-owned assets. It applies regardless of the classification of a central bank as the State, or as an agency or instrumentality thereof. A test regarding sovereign or government purpose is, however, the more common test when it comes to immunity from enforcement, even if the differences between the tests can be subtle. The government purpose test is also the approach taken by the ICJ and in the UNCSI, so there is a "reasonably strong argument" that the protection of central bank assets is even more absolute.[131]

However, when it comes to foreign currency reserves specifically, customary international law is "best understood as also requiring an additional level of protection". According to Wuerth, foreign currency reserves held by a foreign central bank are entitled to *absolute* immunity from execution, absent a waiver. Foreign currency reserves "unquestionably" serve monetary purposes and even if States have disagreed about broader immunity issues, they were largely in agreement that such assets should be protected.[132]

While there is still some uncertainty for a few States which might not protect foreign currency reserves fully, as they use a stricter commercial activity approach, the countries affording near-absolute or middle-ground protection all protect foreign currency reserves, for example financially important countries like the US, the UK, Germany, France, Japan, Switzerland, and Belgium. These are often States which seek to attract or maintain investments by foreign central banks and therefore fall on the protective end of the spectrum.[133]

The property of a central bank held for public purposes, such as foreign reserves deposited in another central bank, must thus be distinguished from commercial funds deposited in relation to commercial transactions with States or private parties.[134] For example, as the use of central banks has been expanded by States, recent case law has increasingly limited immunity for certain kinds of sovereign wealth funds (SWFs) of central banks.[135] Sweden, for example, has taken a non-absolute approach and the Swedish Supreme Court has, in the "*Ascom*" case concerning the Kazakh central bank, denied central bank immunity for SWF assets invested and used in ways which are unrelated to monetary policy and central banking functions.[136] While customary international law is unsettled, not granting immunity for assets merely held in or invested through a central bank seems reasonable in line with the restrictive approach.[137] Wuerth argues that SWFs "controlled or held by central banks without a connection to central banking functions such as monetary

[131] *Jurisdictional Immunities* (n 37) para 118; Wuerth (n 122) 277, 280-282. See also Yang (n 108) 388-390.
[132] Wuerth (n 122) 281-282.
[133] ibid 266, 281.
[134] Fox and Webb (n 81) 375.
[135] Wuerth Brunk (n 27) 1.
[136] NJA 2021 s 850, paras 1-5, 11-24, 38-50; Wuerth Brunk (n 27) 2-3.
[137] Wuerth Brunk (n 27) 3.

policy, should not be immune from execution".[138] Nonetheless, the special protection which extends at least to foreign currency reserves and other sovereign central bank assets, makes execution measures "extremely difficult, if not impossible".[139]

In conclusion, central bank assets are generally afforded absolute immunity. In the case of RCB assets, it is possible, at least in some jurisdictions, that parts of the assets could be deemed to be in use for purposes other than government non-commercial purposes, or for a commercial activity. This needs to be further studied in detail. However, the bulk of the RCB assets and the focus of this thesis are Russia's foreign currency reserves, which are given an extremely high level of protection under international law, especially by countries that are relevant for a potential asset seizure. Therefore, the conclusion is that those assets are protected by State immunity from enforcement under customary international law and cannot be seized in relation to court proceedings or to satisfy judgments against Russia, notwithstanding the additional problem with a potential "nexus" requirement. Where central bank immunity applies, the world has reached almost global consensus that it is absolute.[140]

However, there have been other proposed solutions for Russia's foreign currency reserves, including exceptions to State immunity from jurisdiction and enforcement for serious violations of peremptory norms and the questionable applicability of State immunity from enforcement to executive measures that are unrelated to court proceedings. These issues will be discussed in Chapter 3 and 4 respectively.

[138] Wuerth Brunk (n 27) 1.
[139] Yang (n 108) 410, 417.
[140] Wuerth Brunk (n 27) 39-40.

3 An Exception to State Immunity for Serious Violations of Peremptory Norms

Chapter 3 examines whether the discussions on other potential, emerging exceptions for serious violations of peremptory norms might be relevant for the immunity from enforcement of the RCB. Chapter 3.1 introduces the tensions between immunity and accountability considering the theoretic framework in Chapter 1.6. Chapter 3.2 examines the leading case regarding a *jus cogens* exception, the *Jurisdictional Immunities* case, including the arguments concerning the normative hierarchy theory and right to a judge theory, as well as the ICJ's judgment on immunity from enforcement specifically (Chapter 3.2.3). Chapter 3.3 is the main focus of the critical analysis, based on arguments concerning the changing nature theory and functional rationale of State immunity, which did not directly form part of the ICJ's judgment but could be relevant for immunity from enforcement and the seizure of RCB assets. Finally, Chapter 3.4 concludes on what the implications are for a seizure of RCB assets, including what the current state of the law is following the ICJ's judgment and if, how and why the law could change in the future.

3.1 Tension Between State Immunity and Peremptory Norms

The tension between State immunity and the peremptory character of certain international law prohibitions has been a hot topic for many decades, as part of the increasing demand for accountability and justice.[141] *Jus cogens* norms include at least the prohibitions of the use of force and aggression, genocide, torture, and crimes against humanity, which are some of the least controversial examples.[142] Beyond the exceptions to State immunity from jurisdiction for disputes over non-sovereign matters and to State immunity from execution for property used for commercial purposes, there have therefore been several attempts to carve out exceptions to State immunity for international crimes, including serious human rights abuses and violations of international humanitarian law.[143]

The increased emphasis on accountability in the international order has created pressures on immunity which have not yet been resolved, for example

[141] D'Argent and Lesaffre (n 71) 614.

[142] Wouters and others (n 10) 115; Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and Human Rights Law* (Oxford University Press 2008) 306.

[143] Wouters and others (n 10) 523.

with respect to activities of armed forces.[144] According to Wouters et al., this explains why exceptions to immunities have gradually been carved out:

> "In a time when international actors are expected to account for their acts, especially those that affect individuals, the importance of immunities may be waning."[145]

Shan and Wang ask whether the regime of State immunity is "flexible enough to accommodate and address new issues beyond the commercial exception" or if new regimes are needed for "regime-challenging events".[146] They see the advance of international criminal law and human rights law and the exercise of extraterritorial jurisdiction for terrorism offences as such regime-challenging events.[147] Arguably, the same can be said for the Ukraine war.

First, the developments can be seen with respect to international criminal law and the functional immunity (*ratione materiae*) of State officials. State immunity trickles down to the person performing State acts in an official capacity, in the form of functional immunity. The purpose is to avoid circumvention of State immunity since States are abstract entities that rely on natural persons to carry out their activities, and the State can be seen as being indirectly sued if its officials are sued before foreign courts in respect of official acts. State officials no longer enjoy functional immunity in criminal proceedings with respect to alleged international crimes. That position, originating from the seminal *Pinochet* case, is now settled, "albeit for reasons that are not universally agreed".[148]

When it comes to State immunity specifically, a "notable" and "controversial" development in this area is that the US and Canada both apply a "terrorism exception" to State immunity from jurisdiction and from enforcement.[149]

In 1996, the US amended its Foreign Sovereign Immunities Act (US FSIA) to allow civil suits and execution measures against States designated by the executive as "State sponsors of terrorism" in cases involving for example torture and extrajudicial killing. This approach, which has been upheld by the US Supreme Court, has resulted in individuals bringing legal actions and execution litigation, worth billions of dollars, against Iran, and its central bank. This also led Iran to initiate proceedings against the US before the ICJ, alleging violations of treaty obligations and of Iran's immunity. The ICJ ruled in

[144] Sari (n 32) 335.
[145] Wouters and others (n 10) 523.
[146] Shan and Wang (n 97) 75.
[147] ibid.
[148] Cryer (n 66) 470; Wouters and others (n 10) 509, 523. See Chapter 3.3.
[149] Jean-Marc Thouvenin and Victor Grandaubert, 'The Material Scope of State Immunity from Execution' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 246; Shan and Wang (n 97) 75; Ruys, Angelet and Ferro (n 70) 4.

March 2023, however, that it did not have jurisdiction to consider claims concerning customary international law of State immunity.[150]

Since the terrorism exception is an isolated approach, it is doubtful if it can be seen as reflecting the current state of customary international law. Apart from the "nexus" that might be needed between the central bank and the State, the US may have further violated customary international law if the property was in use for non-commercial purposes, such as if the assets really were part of Iran's foreign currency reserves as Iran maintained.[151]

As stated earlier, there have also in fact been many different proposals for an additional exception to State immunity for *jus cogens* violations, gross human rights violations or international crimes, similar to the exception to functional immunity. Such efforts have, however, been mostly unsuccessful so far. Important cases have fairly recently come before national courts, the ICJ, and the ECtHR, where additional exceptions largely have been rejected. The seminal case came in 2012, when the ICJ reviewed the legality of Italy's refusal to grant Germany immunity in its courts in relation to war crimes and crimes against humanity committed by the Nazi regime in Italy during WWII. In its landmark judgment *Jurisdictional Immunities*, the ICJ "reaffirmed a broad and conservative interpretation of State immunity from jurisdiction".[152]

3.2 Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)

3.2.1 Background

A number of Italian and Greek domestic courts had found that Germany could not rely on immunity and that victims of Nazi atrocities could sue Germany before foreign courts. The Italian Court of Cassation upheld this approach in the *Ferrini* case, and eventually Greek victims started seeking execution of Greek judgments against German property in Italy. Germany then, arguing that it enjoyed State immunity and that no exceptions applied, filed an application against Italy with the ICJ.[153]

The primary illegality of the relevant acts of the German military, as international crimes, had been admitted by Germany and was not one of the issues at hand before the ICJ. Instead, the Court had to determine "whether or not,

[150] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) General List No 164 [2023] ICJ paras 25, 48; Wuerth (n 122) 282.

[151] Thouvenin and Grandaubert (n 149) 246; Wuerth (n 122) 282-284.

[152] Fox and Webb (n 81) 3; Ruys, Angelet and Ferro (n 70) 5; Cryer, Robinson and Vasiliev (n 12) 508.

[153] Court of Cassation (IT), *Ferrini v Germany*, 11 March 2004, Case No 5044/4; Wouters and others (n 10) 506.

in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity".[154]

Germany wanted the ICJ to find that Italy was internationally responsible, because Italy (1) had failed to respect Germany's immunity from jurisdiction by allowing civil claims to be brought against it in Italian courts, (2) had violated Germany's immunity from enforcement by taking measures of constraint against German property in Italy, and (3) had breached Germany's immunity from jurisdiction again by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany.[155]

Italy had two main arguments for why Germany was not entitled to immunity from jurisdiction, the first based on the territorial tort principle and the second on *jus cogens* and the exceptional circumstances.[156]

3.2.2 Immunity From Jurisdiction

3.2.2.1 Territorial Tort Exception

Italy's first argument was that immunity for *acta jure imperii* does not extend to torts for death, personal injury or damage to property committed on the territory of the forum State.[157] The "territorial tort principle", reflected in Article 12 of the UNCSI, means that a State cannot invoke immunity in a proceeding relating to "pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission".

While Article 31 of the ECSI explicitly excludes foreign armed forces from the principle's scope, a similar provision was not included in the UNCSI. Some States expressed their reservations about the broad scope of the article and its potential consequences for State responsibility. The ILC commentary highlights that the principle appears to be confined in practice to "insurable risks", such as traffic accidents, but admits that the wording is wide enough to also cover "intentional physical harm", for example assault, damage to property, arson, homicide, and even political assassination.[158]

One would think that the territorial tort principle could be applicable to death and injury caused by Russia during its aggression in Ukraine. However, the ICJ concluded that customary international law "continues to require that a State be accorded immunity in proceedings for torts allegedly committed on

[154] *Jurisdictional Immunities* (n 37) paras 53, 60, 81.
[155] ibid para 37.
[156] ibid para 61.
[157] ibid para 61.
[158] UNCSIC (n 101) 46 para 11, 45 para 4.

the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict".[159]

3.2.2.2 Gravity of International Crimes

Italy's second argument was that immunity does not extend to acts, irrespective of where the acts took place, involving the most serious violations of norms of a peremptory character for which no alternative means of redress was available.[160] The argument was based on three strands and their combined effect. Italy argued: (1) that the acts giving rise to the claims were serious violations of international law principles applicable to the conduct of armed conflict, in particular war crimes and crimes against humanity, (2) that the rules breached were peremptory norms (*jus cogens*), and (3) that the jurisdiction of Italian courts was "necessary as a matter of last resort" because of the fact that the claimants had been denied all other forms of redress.[161]

The ICJ first discerned a logical problem in lifting State immunity. Immunity from jurisdiction is "necessarily preliminary in nature" since it is an immunity not only from an adverse judgment but also from being subject to court proceedings in the first place. A mere allegation of international crimes would suffice for the denial of a State's immunity without the court having been able to inquire into the merits and determine whether international crimes had actually taken place. "This speaks to a legitimate concern over frivolous, but long drawn-out lawsuits being filed against States that ultimately may turn out to be baseless, while tarnishing the States' reputations."[162]

Furthermore, the Court found that, with the exception of the Italian and Greek judgments, there was "almost no State practice" in support of Italy's proposition that immunity is dependent on the gravity of the acts or the peremptory character of the rules breached. Instead, with reference to a "substantial body" of national case law, the Court concluded that an exception to State immunity for serious violations of international human rights law, war crimes and crimes against humanity had been largely rejected.[163]

The Court pointed specifically to the fact that the ECtHR in *Al-Adsani v United Kingdom*, "by the admittedly narrow majority of nine to eight", had concluded that it was unable to find firm basis for the proposition that State immunity from civil suit did not apply to allegations of acts of torture.[164] A similar conclusion was made by the ECtHR in *Kalogeropoulou and Others v Greece and Germany* relating to allegations of crimes against humanity and

[159] *Jurisdictional Immunities* (n 37) paras 77-79; Wouters and others (n 10) 503, 507.
[160] *Jurisdictional Immunities* (n 37) para 61.
[161] ibid para 80.
[162] *Jurisdictional Immunities* (n 37) para 82; Wouters and others (n 10) 507.
[163] *Jurisdictional Immunities* (n 37) paras 83-85.
[164] *Jurisdictional Immunities* (n 37) para 90; *ECHR* 2001-XI 101 para 61.

immunity from enforcement.[165] It was also noted that there were no such limitations on State immunity in national legislation or in the ECSI or UNCSI, with the exception of for example the terrorism exception in the US FSIA.[166] In fact, no States had suggested the addition of a *jus cogens* or international crimes exception at the time of the adoption of the UNCSI.[167]

Based on the above, the Court concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict".[168]

3.2.2.3 Jus Cogens and the Normative Hierarchy Theory

The Court then turned to the second strand of the argument concerning *jus cogens*. In addition to the lack of State practice, the Court forcefully rejected the normative hierarchy theory. This perceived hierarchy is based on the premise that there is a conflict between *jus cogens* rules and State immunity and since *jus cogens* prevail over any inconsistent rule of international law without the status of *jus cogens*, State immunity must be set aside.[169]

According to the normative hierarchy theory, "*jus cogens* norms take precedence over any other international obligations, including those, such as immunity rules, relating to the (non-)existence or (non-)exercise of jurisdiction by domestic courts."[170] A *jus cogens* norm is, under Article 53 VCLT, "a norm accepted and recognised 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". Therefore, such norms "stand at the highest position in the international normative hierarchy".[171]

The ICJ concluded, however, that no such conflict exists because the two set of rules "address different matters".[172] The Court repeated its stance from the *Arrest Warrant* case, that "the law of immunity is essentially procedural in nature".[173]

> "The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not

[165] *Jurisdictional Immunities* (n 37) para 90; *ECHR* 2002-X 417 9.
[166] *Jurisdictional Immunities* (n 37) paras 88-89.
[167] ibid para 89.
[168] ibid para 91.
[169] ibid para 92.
[170] D'Argent and Lesaffre (n 71) 617.
[171] ibid.
[172] *Jurisdictional Immunities* (n 37) para 93.
[173] *Jurisdictional Immunities* (n 37) paras 58, 95-96; *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 25 para 60.

> bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[174]

The same logic was also applied by the ICJ to the separate obligation of reparation, which exists independently of rules concerning "the means by which it is to be effected". Immunity only concerns the latter and does not conflict with the duty to make reparation.[175] In conclusion, the *jus cogens* status of the rules did not affect the applicability of the customary international law of State immunity.[176]

Judge Trindade objected, in his dissenting opinion, that a perceived lack of conflict between substantive and procedural rules, which totally deprives *jus cogens* of its effects and consequences, is "wrongfully assumed and formalist". In other words, a tension and conflict does exist, and primacy must be given to "absolute prohibitions" of *jus cogens* over "the prerogative or privilege" of State immunity, in order to avoid denial of justice and impunity.[177]

Cryer, Robinson and Vasiliev, on the other hand, hold that the normative hierarchy argument is a "flawed argument" dependent on a false conflict, as the norms operate at different levels. *Jus cogens* prohibits committing the crimes but the norms regarding procedure or prosecution do not cease to apply.[178]

Accordingly, a State respecting the procedural immunity of another State is not acting in conflict with the substantive *jus cogens* norm and is not in violation of Article 41 ARSIWA either, which stipulates non-recognition and prohibition of rendering assistance in maintaining a situation resulting from such a breach. This is the same reason as for why the ICJ could apply the contemporary law of State immunity to acts committed in the 1940's without violating the principle that law should not be applied retrospectively.[179]

Orakhelashvili holds that Article 41 requires non-recognition of situations created after a breach of *jus cogens*, such as impunity, lack of any other remedy for victims, and the denial of the capacity of the *jus cogens* rule to operate. Immunities do not abolish *jus cogens*, but to abolish is not the same as to derogate, which is to prevent the norm from operating. What differentiates a legal rule from a moral or ethical one is its ability to produce a binding effect relating to the relevant subject matter and legal consequences from a breach of it. Orakhelashvili sees it as a clear derogation of *jus cogens* to contend that the unlawful act is unlawful on a general, theoretical plane and that the norm is in force, but that the unlawful act is excused in relation to a particular case.

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[174] *Jurisdictional Immunities* (n 37) para 93.
[175] ibid para 94.
[176] ibid para 97.
[177] Trindade (n 37) paras 315-316.
[178] Cryer, Robinson and Vasiliev (n 12) 506-507.
[179] *Jurisdictional Immunities* (n 37) para 93.

The derogation would thus prevent the *jus cogens* rule from operating or applying as a legal rule at all in specified situations.[180]

Larocque thinks that international law makes no straightforward distinction between procedural and substantive rules. A norm is either a *jus cogens* norm that cannot be derogated from, or it is not. Once a norm is accepted as *jus cogens* by the international community, it should be given full effect and be interpreted and applied consistently with its characterisation.[181]

3.2.2.4 "Last Resort" Argument and the Right of Access to a Court and an Effective Remedy

Finally, Italy's "last resort" argument was also rejected. The Court could find no basis for the proposition "that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress".[182] The cumulative effect of the different strands of Italy's argument was also dismissed and the decisions of Italian courts to declare enforceable in Italy judgments by Greek courts against Germany was found to be a violation by Italy of Germany's immunity from jurisdiction.[183]

This has led some to wonder whether the ICJ is taking the individual's fundamental human rights to a remedy and of access to justice sufficiently seriously.[184] Trindade means that access to justice in cases of international crimes must outweigh State immunity, in order to abide by the imperatives of justice, to avoid impunity and to guarantee non-repetition.[185] Without the right of access to justice, and the right to reparation for international crimes, "there is no credible legal system at all, at national or international levels."[186]

The ECtHR has recognised that State immunity does impact an applicant's right of access to a court under Article 6(1) of the ECHR, but the limitation does not constitute a breach of the ECHR as it pursues a legitimate aim and is proportionate. The right is not absolute and not *jus cogens* either.[187]

Italy initially enacted legislative measures to comply with the ICJ's judgment, but in April 2022 Germany again instituted proceedings against Italy before the ICJ. The reason for this was that a number of new legal actions in court, and enforcement measures, have been taken against Germany following a decision by the Italian Constitutional Court, which held that compliance with the ICJ's judgment was unconstitutional as a disproportionate limitation on

[180] Orakhelashvili (n 102) 179-181.
[181] Larocque (n 67) 463-464.
[182] *Jurisdictional Immunities* (n 37) paras 101, 103.
[183] *Jurisdictional Immunities* (n 37) paras 122-133; See Article 6(2) of the UNCSI.
[184] Wouters and others (n 10) 507–508.
[185] Trindade (n 37) para 303.
[186] ibid para 308.
[187] *McElhinney v Ireland* (2002) 34 EHRR 322 paras 35-37; Sari (n 32) 349; D'Argent and Lesaffre (n 71) 632.

the right of access to a court. It is hard to say what will happen next but if the issue is not solved diplomatically the ICJ would most likely render a similar judgment against Italy for a second time, since not much else has changed.[188]

3.2.3 Immunity From Enforcement

The ICJ also separately tested the legality of Italian measures of constraint against German property in Italy. A Greek judgment, ordering Germany to pay compensation to Greek victims, had been declared enforceable in Italy by an Italian court. The Greek claimants had then entered a legal charge against "Villa Vigoni", a property of the German State near Lake Como. At the time of the proceedings before the ICJ, the measure had been temporarily suspended but not cancelled.[189]

Germany argued, with reference to Article 19 of the UNCSI, that the measure violated its immunity from enforcement, and notably, Italy did not seek to justify the measure. Italy did not put forward any arguments seeking to establish the legality of the measures. However, Italy had not admitted their wrongfulness either, so the ICJ held that a dispute still existed.[190]

The ICJ confirmed that the rules governing immunity from enforcement and those governing immunity from jurisdiction "are distinct and must be applied separately". It also confirmed that the immunity from enforcement enjoyed by States, with respect to its property in foreign territory, in fact goes further than the jurisdictional immunity by States before foreign courts.[191]

The Court found it "unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 of the UNCSI reflect current customary international law".[192] However, the ICJ could conclude that at least one of three conditions had to be satisfied before a measure of constraint may be taken against the property of a foreign State: (1) that the property in question must be in use for an activity not pursuing government non-commercial purposes, or (2) that the State which owns the property has expressly consented to the taking of a measure of constraint, or (3) that that State has allocated the property in question for the satisfaction of a judicial claim.[193] Since the

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[188] Constitutional Court (IT), *Simoncioni and others v Germany and President of the Council of Ministers of the Italian Republic (intervening)*, 22 October 2014, Decision No 238/2014; *Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-Owned Property (Germany v Italy)* (Withdrawal of the Request for the Indication of Provisional Measures) General List No 183 [2022] ICJ; Lorenzo Gradoni, 'Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?' (*EJIL:Talk!,* 10 May 2022) <www.ejiltalk.org/is-the-dispute-between-germany-and-italy-over-state-immunities-coming-to-an-end-despite-being-back-at-the-icj/> accessed 17 May 2023; Fox and Webb (n 81) xi.

[189] *Jurisdictional Immunities* (n 37) paras 109, 111.

[190] ibid paras 110, 112.

[191] ibid para 113.

[192] ibid para 117.

[193] ibid para 118.

property in question was used for governmental purposes, and Germany had not consented, the registration of a legal charge on Villa Vigoni also constituted a violation by Italy of its obligation to respect Germany's immunity.[194]

It is interesting, as Thouvenin and Grandaubert point out, that Italy did not even challenge the German claim that Italy had breached its immunity from execution. The explanation is probably Italy's heavy reliance on the conflict between immunity from jurisdiction for international crimes and the constitutional right to a judge. While domestic Italian courts have continued to challenge the ICJ's judgment in relation to immunity from jurisdiction with reference to its constitutional law, it has "remained silent on the possible tensions between immunity from measures of constraint and human rights concerns". For the moment, it therefore appears that immunity from execution remains "the last bastion" of State immunity.[195]

Crucially for a potential seizure of RCB assets, the exceptions to State immunity from enforcement are thus, in the view of the Court, limited to consent and property in use for an activity not pursuing government non-commercial purposes. Unfortunately, since Italy did not provide any similar argument as to why its lifting of jurisdictional immunity was lawful, the Court did not mention any other potential exceptions to State immunity from enforcement or review the legality of an exception for serious violations of *jus cogens*.

While the ICJ firmly rejected an extensive scope of the territorial tort principle, as well as any exception to immunity from jurisdiction for international crimes based on the normative hierarchy theory and the right to a judge theory, it did not satisfactorily address the nature of the acts, indisputably constituting international crimes, in relation to State immunity from jurisdiction *and* enforcement, and in light of the restrictive doctrine and the very rationale behind immunity. The thesis therefore turns to address the merits and relevance of these arguments for a seizure of RCB assets in Chapters 3.3 and 3.4.

3.3 The Changing Nature Theory and the Functional Rationale of State Immunity

According to the "changing nature theory", violations of *jus cogens* cannot be considered *acta jure imperii*, "because a sovereign State could not possibly command such a reprehensible action in the normal exercise of its power". Such violations should, according to the theory, be considered as non-sovereign, or *acta jure gestionis,* and should not be protected by immunity. While the changing nature theory so far has not succeeded in gaining much support in the context of State immunity, it was the first theory to be invoked in relation to setting aside functional immunity of State officials. Applicants have successfully argued that *jus cogens* violations necessarily constitute private

[194] *Jurisdictional Immunities* (n 37) paras 119-120.
[195] Thouvenin and Grandaubert (n 149) 246-247; UNCSIC (n 101) 56 para 2.

acts because they could never be part of an official's functions, most famously in the first and third *Pinochet* judgments by the British House of Lords.[196]

Another argument against immunity for *jus cogens* violations is based on the functional rationale for State immunity. It was advanced by the Italian Court of Cassation in *Germany v Prefecture of Voiotia*. Drawing inspiration from the *Arrest warrant* case, the Court focused on the goal pursued by the granting of State immunity. Immunity from execution, in particular, is enjoyed by States in order for them to perform "functions and activities in their mutual interests and in the interests of the international community". Taking into account the "new international and European public order" after WWII, the Court therefore permitted the enforcement of Greek judgments in Italy. Granting immunity would have "run counter to the immunity goal of protecting the international community's interests".[197]

However, in *Jurisdictional Immunities*, the acts of the German armed forces "clearly constituted *acta jure imperii*" for which immunity generally applies, in the words of the ICJ, and the Court then went on to pose the question "whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict".[198]

Acts of armed forces are often "in sweeping terms" used as prime examples of sovereign or public acts that attract immunity. However, not all acts carried out by or relating to the armed forces have an inevitably sovereign character. Under the restrictive doctrine, private law transactions could just as well be entered into by armed forces and then not be immune. As the ICJ also concluded, the law of State immunity distinguishes between public and private acts even in times of war.[199]

In a joint separate opinion to the *Arrest Warrant* case, judges Higgins, Kooijmans and Buergenthal held that the notion of *jure imperii* is continually evolving to reflect the changing priorities of society.[200] But Italy had actually conceded that German war crimes and crimes against humanity were still acts *jure imperii*, which Larocque finds both "unusual" and "unfortunate".[201] To

[196] D'Argent and Lesaffre (n 71) 623–625; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 1)* [1998] UKHL 41, [1998] 119 ILR 50, per Lord Nicholls, 98 and per Lord Steyn, 105; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)* [1999] UKHL 17, [1999] 119 ILR 136, per Lord Hutton, 115 and 116, and per Lord Browne- Wilkinson, 154, 155 and 156.

[197] D'Argent and Lesaffre (n 71) 623-624; Supreme Court of Cassation (IT), *Germany v Prefecture of Voiotia, representing 118 persons from Distomo village and Presidency of the Council of Ministers of Italy*, 20 May 2011, Case No 11163/2011, paras 45-50.

[198] *Jurisdictional Immunities* (n 37) paras 60-61.

[199] Sari (n 32) 346, 361; *Jurisdictional Immunities* (n 37) para 78.

[200] *Arrest Warrant* (n 173), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 72.

[201] Larocque (n 67) 461-462.

find that an act of for example torture cannot be, for immunity purposes, a sovereign act of a state, is now "immeasurably more difficult".[202]

The question of whether acts that violate *jus cogens* can be considered sovereign in the light of the prevailing restrictive doctrine has thus been settled by the ICJ, but "on the basis of reasoning that strains both logic and credibility", in Larocque's view.[203] With the growing emphasis on peremptory norms, accountability and human rights, the peremptory illegality should be taken into account when characterising an act as sovereign or non-sovereign, thereby granting or denying immunity.[204]

According to Larocque, this creates bizarre consequences for "the most fundamental norms of international law" and an "untenable situation" from a perspective of justice and accountability.[205] As judge Trindade pointed out in his dissenting opinion on "the decision as a whole", it is a "juridical absurdity" to admit the removal of State immunity for routine commercial transactions and in local torts involving traffic accidents, and simultaneously insist on shielding States in cases of the most serious international crimes pursuing criminal State policies.[206] International crimes are, in Trindade's view, not *acta jure gestionis* or *acta jure imperii*, they are "*delicta imperii"* for which there can never be State immunity. International crimes are "anti-juridical acts" and breaches of *jus cogens*, which means that they cannot simply be "removed or thrown into oblivion" because of State immunity.[207]

Additionally, according to Trindade, the gravity of the breaches removes the bar to jurisdiction because crimes "are not to be covered up by the shield of State immunity".[208] The purpose of immunities was never to be a shield for a State pursuing criminal policies, which would go against the very rationale of State immunity.[209] As Trindade states in his dissenting opinion: "What jeopardizes or destabilizes the international legal order, are the international crimes, and not the individual suits for reparation in the search for justice."[210]

Orakhelashvili criticises the ICJ for granting absolute immunity for activities of armed forces, in contradiction to the restrictive doctrine, without sufficient proof of State practice. One conceptual justification for State immunity is that national courts should not be the judge over the conduct of another State without its consent, but immunity not being absolute makes it evident that this is not generally accepted. The various rationales behind immunity are

[202] Larocque (n 67) 458.
[203] ibid 455.
[204] ibid 466.
[205] ibid 465.
[206] Trindade (n 37) paras 1, 312.
[207] ibid para 306.
[208] ibid para 303.
[209] ibid para 305.
[210] ibid para 305.

sometimes legal, sometimes political or ideological. Arguing that the grant of immunity is politically or empirically desirable is different from arguing a grant of immunity is required or allowed by national or international law.[211]

The UNCSI distances itself from the absolute doctrine but does not subscribe to the restrictive doctrine's focus on the extent of sovereign authority, according to Orakhelashvili. The nature of the act is irrelevant under the UNCSI, and instead one needs to examine whether the subject matter is covered by an exception. The restrictive doctrine focuses on the nature of the act and not the purpose or context around it. In other words, if the territorial tort exception is not applicable to armed forces, that should revert the issue back to the restrictive doctrine and not "general immunity versus specific exceptions".[212]

Orakhelashvili holds that State immunity is more international comity, than international law. Some States, such as China, subscribe to an absolute doctrine, while others, such as the US, see immunity as a privilege it can withhold, for example in relation to terrorism-related judgments. States have in different directions been reluctant to fully subscribe to the "restrictive" doctrine in the UNCSI or as interpreted by the ICJ or ECtHR. Immunity is indeed not a *jus cogens* norm itself, and Orakhelashvili even goes so far as to ask whether State immunity can even be said to fulfil the strict requirements for being customary international law. Since States cannot agree on one general rule on the scope of State immunity, "it is more than likely that the doctrine of state immunity does not, in any shape, have the force of binding law".[213]

> "The view presenting state immunity as an inherently superior value compared to other competing values, such as the territorial jurisdiction and sovereignty of forum states, their policy choices, or values related to justice and accountability in general, is therefore fallacious."[214]

The absolute immunity doctrine, which dominated until the mid-twentieth century, is based on sovereign equality and reciprocity and it enabled States and State officials to evade foreign proceedings on the basis of their identity. To Orakhelashvili, the transition to the restrictive doctrine from the absolute, was not done by admitting exceptions to absolute immunity and preserving the rest residually, like the approach in the UNCSI, but rather a complete redefinition of the rationale and scope of immunity. Under the restrictive

[211] Orakhelashvili (n 102) 154–157.

[212] Alexander Orakhelashvili, 'Treaties on state immunity: the 1972 and 2004 Conventions' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 286, 293.

[213] Orakhelashvili (n 102) 165–166.

[214] ibid 154–155.

doctrine, immunity and sovereign equality only applies to acts that are exercises of sovereignty.[215]

From Orakhelashvili's perspective, human rights violations can never be considered as sovereign acts, under the restrictive doctrine, and are instead private acts that can be committed by both State and private entities. Thus, all pertinent judicial practice granting immunity to States in civil proceedings for serious violations of human rights and humanitarian law, fail to focus on the restrictive doctrine's requirements. In *Jurisdictional Immunities*, the ICJ did not examine the restrictive doctrine sufficiently and instead relied on Italy's concession that German war crimes were sovereign acts. The ICJ focused on the identity of the perpetrators, as part of the armed forces, and not the nature of the acts. Immunity was granted to Germany essentially based on the conservative and outdated absolute immunity doctrine.[216]

The ICJ did not consider the *Pinochet* judgment relevant even if it had been relied upon by the Italian Court of Cassation in *Ferrini*. *Pinochet* concerned the functional immunity of a former Head of State from criminal jurisdiction, and not State immunity in civil proceedings, and the rationale in *Pinochet* was also based on specific language of the 1984 UN Convention against Torture (CAT), according to the ICJ.[217]

Larocque points out that while specific language and universal criminal jurisdiction as outlined by the CAT was important for the removal of immunity from criminal jurisdiction in *Pinochet*, the judgment was also based on other theories including *jus cogens*. It is unclear why *jus cogens* can't have the same effect in civil proceedings and why there should be a theoretic distinction at all.[218] "If *jus cogens* prevails over immunities in criminal cases, it does inevitably have the same procedural effect in relation to civil cases as well."[219]

The sovereign or non-sovereign nature of the act, as a matter of the restrictive doctrine, is applicable to civil and criminal immunities alike, according to Orakhelashvili. Functional immunity covers only acts an official has perpetrated in the exercise of that official's State's public and sovereign authority. The only reason an official is immune is thus that the State would enjoy immunity for the act in the first place. How could torture then be exempted from functional immunity due to the act having a non-sovereign nature, under the restrictive doctrine, while State immunity cannot fit such an exception?[220]

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[215] Orakhelashvili (n 102) 158–159.

[216] ibid 163, 167.

[217] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); *Jurisdictional Immunities* (n 37) para 87; *Pinochet* (No 3) (n 232).

[218] Larocque (n 67) 464-465.

[219] Orakhelashvili (n 102) 180.

[220] ibid 167, 171, 174.

While it is "well-nigh impossible" to find the common *ratio decidendi* in the different majority opinions in *Pinochet*, Van Alebeek holds that it was specific terms in the CAT on the definition of torture that was crucial for the lifting of functional immunity.[221] "The Lords argued that there could be no immunity in regard to the crime *only* because it is *by definition* committed in an official capacity."[222] If *jus cogens* violations were private acts, then they could not be attributable to the State. In other words, functional immunity applies only when a suit against an official is in fact a suit against the State and when officials are sued for international crimes they cannot say that they performed the acts as the arm of the State.[223]

Furthermore, an act does not become private or *jure gestionis* simply because it is illicit or exceeds sovereign authority, according to d'Argent and Lesaffre. Domestic law determines an officials' functions and State immunity would be meaningless if it only protected lawful conduct. Also, an *ultra vires* action is still an official action as made clear by Article 7 ARSIWA.[224]

3.4 Consequences and Future Change

The ICJ's judgment is seen as authoritative by many, and it was also subsequently accepted by the ECtHR in the *Jones* case.[225] There was, however, considerable disagreement on the outcome and the majority's reasoning, which some saw as a missed opportunity. By twelve votes to three, on the issue of a potential exception to State immunity from jurisdiction, the ICJ found that Italy had violated Germany's jurisdictional immunity. By fourteen votes to one, the ICJ found that Italy had violated Germany's immunity from enforcement. Judge Trindade was dissenting on both.[226]

The judgment has also been heavily criticised in legal doctrine from different perspectives, as shown above. To Orakhelashvili, the ICJ's judgment effectively endorses an equation between immunity and impunity in order to prioritise stable international relations.[227] Others hold that the ICJ is not blind to the need for accountability, even if it prioritised the stability of inter-State relations.[228] Thouvenin and Grandaubert emphasise that State immunity from execution, specifically, continues to play a necessary "pacifying and stabilising" role between States, despite the frustrations experienced by individuals trying to hold States accountable.[229]

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[221] Van Alebeek (n 142) 2.
[222] ibid 362.
[223] ibid 364.
[224] D'Argent and Lesaffre (n 71) 631-632.
[225] *Jones and others v UK* App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) paras 196-197; D'Argent and Lesaffre (n 71) 620.
[226] *Jurisdictional Immunities* (n 37) para 139.
[227] Orakhelashvili (n 102) 183.
[228] Wouters and others (n 10) 507.
[229] Thouvenin and Grandaubert (n 149) 265.

Since immunity is a procedural obstacle to jurisdiction, it does not mean that a State substantively is not responsible for any act of aggression or international crimes it is complicit in.[230] It means that the responsibility of that State can be enforced in other non-judicial ways, on a traditional, "Westphalian" State-to-State basis and not by individual victims in domestic courts. The ICJ proposed that unsettled claims of Italian victims "could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue".[231] The remedy that remains and that the ICJ suggests is thus peace agreements and diplomatic protection pursued by the victims' State of nationality.[232] While one could also think of victims initiating proceedings against responsible States before those States' courts, none of these options seem realistic in Ukraine's current situation vis-à-vis Russia.[233]

While some see *Jurisdictional Immunities* as a definitive, plain and straightforward statement of the law on this matter, Orakhelashvili holds that State practice remains divided. Since the customary international law of State immunity is at least unsettled, the "real question" to Orakhelashvili is whether granting immunity would violate other competing norms under international law, such as the right to reparations or the right of access to a court.[234]

Judge Yusuf also criticised the Court's approach in reaching its conclusions in this area, basing them on a lack of practice, and not on international law principles. Yusuf points to the uncertainties in customary international law and the "considerable divergence" in the extent and scope of immunity in State practice, which can't be resolved by "a formalistic exercise of surveying divergent judicial decisions", looking at relative numbers. Instead, the Court should have considered the specific circumstances and nature of the case and could have resorted to general principles of human rights and humanitarian law. It might give the impression of "cherrypicking" to characterise some exceptions as customary, despite continuing emergence of conflicting judicial decisions, for example regarding *acta jure gestionis*, and to characterize other exceptions as non-customary, based on a similar divergence in domestic court decisions. Thus, it would be better to find that there is a lacuna and that State immunity in relation to international crimes "remains an uncertain and unsettled area".[235]

However, it is again important to note the distinction between immunity from jurisdiction and from enforcement. The ICJ found that domestic courts do not have jurisdiction over civil claims against foreign States relating to acts by their armed forces constituting international crimes. On the question of whether State property could be seized as reparations or to satisfy a judgment

[230] *Jurisdictional Immunities* (n 37) para 100; Wouters and others (n 10) 507.
[231] *Jurisdictional Immunities* (n 37) para 104.
[232] Bennouna (n 68) para 30.
[233] Wouters and others (n 10) 507.
[234] Orakhelashvili (n 102) 172, 181.
[235] Yusuf (n 37) para 23–27.

for that State's commission of such acts, the ICJ did not review the possibility of some form of exception and instead simply said that for State property to be seized, there must exist consent or the property must be in use for other than government non-commercial purposes. Additionally, Italy did not challenge this by claiming that there is an additional exception and immunity from enforcement has not been challenged as much as immunity from jurisdiction in general. Even if, in accordance with the changing nature theory and a restrictive rationale, the commission of international crimes were seen as *acta jure gestionis* in relation to immunity from jurisdiction or as "other than government non-commercial purposes" in relation to immunity from enforcement, that does not mean that the RCB assets could be seized. Adjudicative and enforcement jurisdiction are different, and the RCB assets are arguably not *in use for* non-sovereign "commercial", nor "criminal", purposes. For a seizure of RCB assets to be compatible with immunity from enforcement, a general exception like the US terrorism exception is needed, along the lines that States no longer enjoy immunity from jurisdiction *or enforcement* in respect of civil proceedings for alleged serious violations of *jus cogens*.

Drawing conclusions from Chapter 3.3, serious breaches of *jus cogens* norms are "State crimes", in the sense that violations of the most fundamental norms of international law often by definition involve the approval or complicity of the State machinery. State and functional immunity in civil proceedings *should* also be coherent with the exception for international crimes to functional immunity in criminal proceedings, as they involve the same underlying, reprehensible acts. This does not mean that State immunity would lose its relevance for sovereign acts of a State and the furtherance of international stability and equality. In the limited and exceptional circumstances where a State is clearly complicit in such violations in a foreign State's territory, completely disregarding stability and sovereignty, the reasons for granting immunity are outweighed by the reasons for ensuring justice and accountability. In Ukraine's case, the circumstances are exceptional since the aggressor State is a permanent member of the UNSC and since there are no other remaining, realistic means of redress or enforcement for Ukraine and individual victims.

While a general exception to State immunity for serious violations of peremptory norms might be desirable from a *de lege ferenda* perspective of justice and accountability, the better view, as a frank statement on the state of international law, is that there currently is no such exception and that the ICJ has settled the issue for now.[236] Whereas immunity from jurisdiction may still be somewhat contested, there is simply no support in practice for a general exception that would apply to the seizure of RCB assets. As Van Alebeek concludes, there is a difference between state of the law arguments (what the law is), such as the argument that immunity cannot be invoked in cases of international crimes, and policy arguments (what the law should be), such as

[236] Wouters and others (n 10) 509.

saying that immunity rules are incompatible with human rights.[237] Proponents of an exception generally fail to acknowledge that their views "do not fit the international legal order as it *is* but rather ague that that order *should change*", while opponents "fail to discuss these arguments on the merits, reasoning in a formalistic vein instead".[238] The law of State immunity has not been affected by the human-centred developments, but there are clearly tensions, which is a forceful policy argument.[239]

Even if one accepts the ICJ's judgment as reflecting the current state of international law, a new exception to State immunity from jurisdiction, from enforcement, or from both, can still emerge.[240] In that way, the possible seizure of RCB assets presents an opportunity for the international community to pursue a principled, general exception that better takes into account justice and accountability. In the words of judge Koroma, "nothing in the Court's Judgment today prevents the continued evolution of the law on State immunity" and it is possible that further exceptions develop in the future.[241] Customary international law, in the form of views and practice of States, can and does change over time. States entering into treaties has been suggested as a way to establish new custom or to give weight to an exception, and the UNGA's resolutions can play a role and give legitimacy to any exception since they can have normative force and constitute evidence of *opinio juris*.[242]

Yusuf also points to the fact that evolution of the law often has occurred through isolated domestic court decisions that gradually have become mainstream, such as in *Pinochet*. The exceptions that have emerged could have been seen in the beginning as unlawful under existing State practice but have then been accepted as part of the law.[243]

An interesting recent development can be seen in Ukrainian courts, where the Ukrainian Supreme Court has confirmed an approach where Russia has been denied State immunity in several cases. This has been done with reference to Russia's full-scale aggression, which has disregarded Ukrainian sovereignty and the stability of international relations, in contradiction to the rationale of immunity. The cases also refer to the territorial tort exception as well as an exception for violations of *jus cogens* norms. While this practice does not necessarily mean that a new exception is emerging, a trend could gain

[237] Van Alebeek (n 142) 312.
[238] ibid 416.
[239] ibid.
[240] Moiseienko (n 5) 26.
[241] *Jurisdictional Immunities* (n 37), Separate Opinion of Judge Koroma, para 7.
[242] Webb (n 1); Anderson and Keitner (n 18).
[243] Yusuf (n 37) paras 43–44.

momentum if the approaches taken by Ukrainian domestic courts can somehow be replicated elsewhere.[244]

There is no inherent legal reason for why State immunity cannot be restricted further. The main problem for an international crimes or *jus cogens* exception to State immunity is, however, that States in general do not want such an exception. Courts have declined exceptions for human rights violations since they have not been directed to do so by the national legislator.[245] Since courts generally seem frozen in 1970's legislation and the UNCSI, any change to customary international law must necessarily come from national legislators.[246] Challenges to immunity will continue to be put forward by international lawyers, activists and in national courts, but what is really required to change immunity is a significant change in policy by governments.[247]

How likely it is that an exception to State immunity will be successful, how it will be structured, or if it even will be pursued at all, thus depends on the States concerned. It is admittedly difficult to see how the EU and/or a large group of diverse States like the US, the UK, France, Germany, Italy, Sweden, and Poland will be able to find a general exception to State immunity.

In conclusion, as it stands today, immunity from jurisdiction protects Russia from the initiation of proceedings and from an adverse judgment in respect of its internationally wrongful acts. While immunity from jurisdiction is heavily debated and very well could change in the future, immunity from enforcement remains almost absolute and will protect the RCB's assets from being used to satisfy any judgment against Russia, unless the States concerned commit in the future to changing State immunity. However, other "State-centric" solutions than diplomatic protection and negotiations for a peace agreement have also been proposed in legal doctrine, in relation to the Ukrainian quest for reparations, such as countermeasures. Additionally, what the ICJ really reviewed in *Jurisdictional Immunities*, was State immunity from jurisdiction and from enforcement – *in relation to court proceedings or judicial measures*. It did not, however, give a general statement on the legality of non-judicial measures of constraint in relation to State immunity from enforcement.

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[244] Ielyzaveta Badanova, 'Jurisdictional Immunities v Grave Crimes' (*EJIL:Talk!,* 8 September 2022) <www.ejiltalk.org/jurisdictional-immunities-v-grave-crimes-reflections-on-new-developments-from-ukraine/> accessed 17 May 2023 ; Chimène Keitner, 'Expert Q&A on Asset Seizure in Russia's War in Ukraine' (*Just Security*, 3 April 2023) <www.justsecurity.org/85299/expert-qa-on-asset-seizure-in-russias-war-in-ukraine/> accessed 17 May 2023; Supreme Court of Ukraine, 14 April 2022, Case No 308/9708/19.

[245] Orakhelashvili (n 102) 166.

[246] Larocque (n 67) 456.

[247] Craig Barker, 'Shared foundations and conceptual differentiation in immunities from jurisdiction' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 203.

4 Applicability of State Immunity From Enforcement to Non-Judicial Measures

As central bank assets are afforded near-absolute immunity from execution, Chapter 4 addresses the question of whether the scope of State immunity nonetheless might not extend to some measures unrelated to judicial proceedings. Chapter 4.1 provides the context for these discussions on the material scope of State immunity in relation to asset freezes. The Chapter contains a discussion on the interpretation of the language and scope of the UNCSI (Chapter 4.2), the practice (or lack thereof) on immunity in relation to executive measures (Chapter 4.3), the concept of inviolability (Chapter 4.4), and the principled arguments on the scope of immunity and sovereign equality (Chapter 4.5). This is followed by an analysis of the scope of State immunity specifically in relation to a non-judicial seizure of RCB assets, focusing on the uncertain distinction between judicial and executive action (Chapter 4.6).

4.1 Tension Between State Immunity and Sanctions

In addition to the above-mentioned pressures on State immunity of competing sovereign interests, and individual's commercial and accountability interests, growing pressure has also been put on assets of foreign central banks due to the increased recourse to unilateral sanctions seeking to achieve a State's political objectives and to enforce fundamental norms of international law.[248]

The adoption of so-called "autonomous" or "non-UN" sanctions, by for example the EU and US, has increased in recent decades and their legality under international law has been questioned, for example in relation to human rights law, countermeasures, and the principle of non-intervention. Their compatibility with the law of immunities has been more overlooked.[249]

Sanctions are administrative, or executive, measures and of a non-criminal nature, even if they are sometimes perceived as punitive by foreign States, individuals, or businesses.[250] They are often meant to respond to violations of and induce compliance with communitarian or *jus cogens* norms.[251]

Financial sanctions against State-owned companies that engage in commercial activities (*jure gestionis*), such as companies in the energy sector, usually do not breach immunity law, in accordance with Art 19(c) UNCSI. Financial sanctions, such as EU-imposed asset freezes, sometimes also target third-

[248] Wuerth Brunk (n 27) 1.
[249] Ruys (n 30) 670.
[250] Wouters and others (n 10) 458.
[251] Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) 112-113.

State agencies like central banks without there being an exception. The precedents for such financial sanctions against central banks, in addition to Russia, include for example Iran, Afghanistan, Syria, Venezuela and Cuba.[252]

The increasing frequency of these sanctions have raised questions about the relationship between executive measures and the near-absolute immunity of central bank assets, and whether and to what extent a freeze itself is compatible with State immunity.[253] The EU and G7 provide little information on the international legal basis for the freeze of Russia's foreign currency reserves.[254] The Council simply states on its website that the measures are "fully compliant with obligations under international law".[255]

"The conventional wisdom", as Ruys describes it, has long been that unilateral coercive measures, involving a freeze of central bank assets of a responsible State, have *prima facie* violated the law of State immunity, as codified in Article 21(1)(c) of the UNCSI, but that their wrongfulness has been precluded in many cases since the measures fulfilled the conditions for lawful countermeasures under the law of State responsibility.[256]

As shown above, all options pursuing a seizure of RCB assets in some connection with court proceedings would imply State immunity. The "active management proposal" discussed within the EU does not obviously avoid immunity implications either. It might also violate State immunity since it inevitably involves a transfer of assets, a measure of constraint, and since an investment carries a risk of devaluation. In such a scenario, the principal intended to be returned to Russia has not only been transferred and changed ownership but also lost its value.[257]

Thus, when it comes to seizing and specifically the "active management proposal" discussed within the EU, it seems like the intent is not to avoid immunity implications, but rather to try to be able to justify a breach of immunity as a temporary and reversible countermeasure, in line with the "conventional wisdom", ARSIWA and the current framework of the CFSP.[258] A full

[252] Wuerth Brunk (n 27) 10; Ruys (n 30) 671-672.
[253] Wuerth Brunk (n 27) 1; Ruys (n 30) 672.
[254] Franchini (n 21).
[255] 'EU sanctions against Russia explained' (n 5).
[256] Ruys (n 30) 672-673; Dawidowicz (n 251) 112-113.
[257] Eleanor Runde, 'Why the European Commission's Proposal for Russian State Asset Seizure Should be Abandoned' (*Just Security*, 23 March 2023) <www.justsecurity.org/85661/why-the-european-commissions-proposal-for-russian-state-asset-seizure-should-be-abandoned/> accessed 17 May 2023.
[258] Articles 48-54 ARSIWA; Paola Tamma, 'EU looks at investing frozen Russian state assets to raise cash for Ukraine' *Politico* (24 March 2023) <www.politico.eu/article/eu-looks-at-investing-vladimir-putin-russia-state-assets-to-raise-cash-for-ukraine/> accessed 17 May 2023.

seizure is permanent and non-reversible while the active management approach might not be.

Notwithstanding the many problems with qualifying any seizure or measure breaching immunities as a countermeasure, which is outside the scope of this thesis, one might ask whether this conventional wisdom really is substantiated? On one hand, authors like Ruys and Wuerth have questioned if measures that violate immunity could even be justified as lawful countermeasures, for example due to the contested permissibility of so-called "third-party countermeasures" and the strict conditions the measures would need to fulfil. On the other hand, a measure such as an asset freeze or seizure would not need to rely on countermeasures at all if it does not violate any primary rules of general international law, such as State immunity, in the first place.[259]

According to Ruys, "the applicability of, and incompatibility with, immunity rules is often taken for granted" when discussing sanctions against States and their instrumentalities. The authors in favour of the conventional wisdom often fail to explain why and how a freeze, in the absence of any link to judicial proceedings, triggers the application of immunity rules.[260]

Ruys and Wuerth have therefore further argued that not all sanctions against central banks violate State immunity. They hold that State immunity only applies to "measures of constraint in connection with proceedings before a court", which thus excludes application of State immunity to freezing in the form of an executive or legislative measure.[261] The possibility of the next step has therefore also been raised, that "sanctions-like" executive or legislative action, unrelated to judicial proceedings, may be able not only to freeze but seize frozen assets without breaching the law of State immunity.[262]

The opposing view is that State immunity from execution applies to all measures of constraint, "regardless of their judicial, legislative, or administrative nature, and therefore extends to asset freezing".[263] Thouvenin and Grandaubert hold that the principle of immunity from execution or enforcement is more accurately termed "immunity from constraint" as it covers "all kinds of public constraint the forum State could exercise over the foreign State's property, including those which are independent to any judicial proceedings, to the extent that infringes the foreign State's sovereignty".[264]

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[259] Wuerth Brunk (n 27) 30ff; Ruys (n 30) 701ff.

[260] Tom Ruys, 'Non-UN Financial Sanctions against Central Banks and Heads of State: in breach of international immunity law?' (*EJIL:Talk!*, 12 May 2017 <www.ejiltalk.org/non-un-financial-sanctions-against-central-banks-and-heads-of-state-in-breach-of-international-immunity-law/> accessed 17 May 2023; Ruys (n 30) 673-674.

[261] Franchini (n 21); Wuerth Brunk (n 27) 10.

[262] Webb (n 1); Moiseienko (n 5) 25; Anderson and Keitner (n 18).

[263] Franchini (n 21); Stephan (n 18).

[264] Thouvenin and Grandaubert (n 149) 247.

4.2 Language of the UNCSI

The interpretation that State immunity requires a nexus to court proceedings is first and foremost based on the language of the UNCSI. The articles "apply to the immunity of a State and its property from the jurisdiction of the courts of another State", according to Article 1.

Ruys points to the consistent framing of both immunity from jurisdiction and from enforcement in the UNCSI and the ILC commentary.[265] For example, the ILC commentary on the scope of the UNCSI refers to immunity from jurisdiction "in relation to a judicial proceeding" and immunity from enforcement "in respect of property from measures of constraint, such as attachment and execution in connection with a proceeding before a court of another State (…)".[266] The commentary on enforcement immunity further asserts that "Article 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding".[267] The nexus to court proceedings also features in national legislation, legal doctrine, and was affirmed in passing by the ICJ in *Jurisdictional Immunities*.[268]

According to Wuerth, the order to freeze Russian assets is not the same as "attachment", "arrest" or "execution" which is "language that refers to various measures that are related to or arise out of judicial proceedings".[269] The ILC commentary does not define the term "measures of constraint", which is used in a "generic" way, and instead gives easily understood examples which are common to many domestic systems.[270]

Asset freezes against central banks clearly "affect the property" in the words of Article 6(b) UNCSI. The "constraining nature" and purpose of financial sanctions is also undisputed. Their temporary character per se does not prevent them from qualifying as "measures of constraint" that could violate immunity either, as the ILC commentary makes clear.[271]

While a freeze or seizure thus easily could qualify as a measure of constraint, that is not sufficient to trigger the application of the rules according to Ruys. The ILC commentary states again that part IV of the Convention refers to all measures of constraint in respect of State property, but "in connection with proceedings before a court of another State".[272] As shown in Chapter 4.6 below, however, there is still some disagreement on what "proceedings before a court" really entails, and whether executive measures could still be "quasi-

[265] Ruys (n 30) 677.
[266] UNCSIC (n 101) 13 para 2.
[267] ibid 56 para 1.
[268] *Jurisdictional Immunities* (n 37) para 93; Ruys (n 30) 677-679.
[269] Wuerth Brunk (n 27) 14.
[270] Ruys (n 30) 676; UNCSIC (n 101) 55-56 para 2.
[271] Ruys (n 30) 675-676; UNCSIC (n 101) 56 para 4.
[272] Ruys (n 30) 676; UNCSIC (n 101) 56 para 3.

judicial" by involving "judicial functions" that are normally exercised by a State's judicial powers.

4.3 Precedents, State Practice and *Opinio Juris*

First, it can be argued that the "exclusionary" interpretation places too much emphasis on the language of the UNCSI. On one hand, Thouvenin and Grandaubert concede that the UNCSI can be said to be authoritative and reflect customary international law in some of its provisions, especially on immunity from execution, and the Convention is indeed limited in its scope to civil proceedings before a court. On the other hand, the Preamble acknowledges that customary international law may go beyond the Convention's provisions and, since the Convention has not yet even entered into force, it is regardless not a legally binding convention as such and customary international law in fact continues to govern all issues.[273]

In response to the argument that immunity under customary law stretches further than the UNCSI, Ruys argues that this ignores the fact that the UNCSI sought to codify the law of State immunity and that national legislation often requires a nexus to court proceedings.[274]

Since the UNCSI is limited to civil proceedings and has not yet entered into force, and since a general State practice is often difficult to determine, "the exact content of customary international law on the material scope of immunity from execution is not clear", according to Thouvenin and Grandaubert. Domestic practice is sometimes pointing in different directions since judges, legislators and ministries of foreign affairs are driven by different concerns. Reciprocity between States, for example, is a more important concern for the executive and legislative branches than for judges.[275]

According to Thouvenin and Grandaubert, earlier examples in practice of executive or legislative measures against a foreign State's property have been rare and exceptional because of what appears to be compliance with the principle of sovereign equality and reciprocity. But the increasing use of such measures in later years, such as the freezing of Iranian central bank assets, has revived the issue. Using Iran as an example, Thouvenin and Grandaubert conclude that the measures were contrary to the law of State immunity since the existence of State immunity was not contested by the States taking the measures and instead the taking States seemed to justify them under the regime of countermeasures.[276]

Concerning the point that there is a lack of State practice, Ruys' thinks that it is questionable whether a lack of practice can be said to settle customary

[273] Franchini (n 21); Thouvenin and Grandaubert (n 149) 250.
[274] Ruys (n 30) 685.
[275] Thouvenin and Grandaubert (n 149) 265.
[276] ibid 251-252.

international law. The relevance of omissions, which are ambiguous, must depend on the existence of *opinio juris* in order to ascertain the content of customary international law.[277] Wuerth also argues that, on the contrary, practice shows how the US and EU adopt sanctions against central banks of countries like Syria and Venezuela, without any protests based on immunity.[278]

States have only "on rare occasions" protested sanctions on central bank assets as violating State immunity, for example in relation to the US seizure of Iranian central bank assets and the related case in the ICJ. However, Iran complained not about the executive freezing or seizing of assets per se but about "measures of execution to enforce judgements rendered in terrorism-related cases". Unlike such court-ordered measures, which do involve immunity in Wuerth's view, sanctions do not involve judicial proceedings. Thus, it is clear that some but not all measures against foreign central bank property involve judicial constraint which implies State immunity.[279]

In addition, the apparent lack of case law concerning immunity and executive asset freezes against central banks is remarkable. This is despite of abundant legal proceedings in for example EU courts where other issues concerning financial sanctions have been addressed.[280]

Ruys also points out how the EU are diligent to carve out exceptions to asset freezes for payments to or from diplomatic or consular posts and to travel bans to allow high-ranking officials to participate in international conferences. This illustrates a certain consciousness of and respect for diplomatic immunity (or inviolability) and personal immunity, which have different rationales and normative positions in comparison to State immunity from enforcement. At the same time, the EU does not seem to see any problems with asset freezes against central banks in its practice.[281]

4.4 Inviolability

The fact that EU sanctions regularly exempt diplomatic personnel and property, and high-ranking officials, might be explained by the concept of inviolability. In the limited circumstances where any judicial or executive interference with a State's property is deemed unacceptable, explicit rules to that effect are adopted. The best example of that is diplomatic immunities, or

[277] Ruys (n 30) 685.
[278] Wuerth Brunk (n 27) 15-16.
[279] *Certain Iranian Assets* (n 150); Wuerth Brunk (n 27) 16-18.
[280] Ruys (n 30) 674-675.
[281] Ruys (n 30) 674; Council of the EU, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU CFSP' (15 June 2012) <https://data.consilium.europa.eu/doc/document/ST-11205-2012-INIT/en/pdf> accessed 17 May 2023.

rather diplomatic inviolability, in accordance with the 1961 Vienna Convention on Diplomatic Relations (VCDR).[282]

Ruys stresses that international law indeed draws a distinction, which is often blurred and conflated, between immunity and inviolability. The difference between the concepts seems to be that immunity implies a negative duty on the State not to institute proceedings against a beneficiary, while inviolability also encompasses a positive duty to protect the beneficiary from all interference. The co-existence of both concepts could in Ruys' view be seen as an argument confirming that immunity does not, and need not, extend to measures unrelated to court proceedings while inviolability is a separate, needed concept for such measures. If immunity covered all "constraining" measures, inviolability would in other words be meaningless.[283]

Thus, constraining financial sanctions may not breach immunity but that does not automatically mean they do not contravene inviolability rules under international law. There are several specific treaties that provide inviolability for certain categories of State property, persons, and entities, but there are no conventions that cover *all* State property or central bank property specifically. The question then becomes whether there is such a protection under customary international law. While inviolability itself is outside the scope of this thesis, Ruys nonetheless confirms that State practice supports the view that there is no general inviolability attached to State property abroad that would prohibit asset freezes against central banks.[284]

4.5 Immunity and the Principle of Sovereign Equality

Thus, numerous, often western, States have taken measures against State property and protesting States, often non-western, have generally not opposed them in terms of State immunity specifically. While unilateral coercive measures, or autonomous sanctions, have been met with concern or even strong opposition, the concerns "have ostensibly never been framed by reference to relevant immunity rules".[285] A general dissatisfaction with some sanctions, or their potential to violate other international norms, does not mean that State immunity should be expanded to prohibit any sanctions directed at any foreign government property located in the forum State.[286]

In addition, States like Russia and China have also generally put an emphasis on the importance of sovereign equality and State immunity. At the same time

[282] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, in force 24 April 1964) 500 UNTS 95 (VCDR); Ruys (n 30) 690-693; Moiseienko (n 5) 25.
[283] Ruys (n 30) 686, 690.
[284] ibid 680-700.
[285] ibid 675, 685.
[286] Wuerth Brunk (n 27) 18.

and in the same context, however, it can be noted that Russia also emphasised the importance of the prohibition of the use of force.[287]

Thouvenin & Grandaubert argue that State immunity should protect State property against any measure of constraint, regardless of a lack of practice, because all such measures are inconsistent with the principle of sovereign equality. They admit that most measures of constraint are judicial in practice, but non-judicial measures to freeze or seize can in their view still hinder the foreign State's management of its property and "should in principle be covered by immunity from execution under customary international law".[288]

The first problem with the principle, however, is that it is too broad and difficult to define for the purposes of the scope of the law, according to Wuerth:

> "That it provides part of the basis for the law of immunity does not mean that the law of immunity should be expanded to cover any conduct that scholars may argue is inconsistent with a general (and ill-defined) understanding of sovereign equality."[289]

Expanding the principle without support in State practice could also contravene another fundamental aspect of sovereign equality, which is State consent. If immunity is "implied directly from sovereign equality", that would also raise questions about the current content of immunity, based on the restrictive doctrine, where there are exceptions and different rules for different entities, and also about whether immunity then should be absolute in respect of other "interfering" actions against States such as trade embargoes.[290]

Ruys holds that just because State immunity rules are inspired by the principle of sovereign equality doesn't mean that any breach of the principle is a simultaneous breach of immunity law. State immunity is not inspired only by that principle either and sovereign equality must be balanced with for example the principle that States enjoy full, exclusive territorial jurisdiction.[291]

Orakhelashvili likewise sees the relevance of the principle of immunity as "broad" in one sense, because it protects almost all acts and all property of the entire State, but also "narrow" since it specifically protects the rights and interests of States, their property, and their officials, only when they are directly impleaded before foreign courts.[292] In fact, this view coincides and fits

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[287] Ministry of Foreign Affairs of the People's Republic of China, 'The Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law' (26 June 2016) <www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201608/t20160801_679466.html > accessed 17 May 2023.

[288] Thouvenin and Grandaubert (n 149) 250-251.

[289] Wuerth Brunk (n 27) 18.

[290] ibid 19.

[291] Ruys (n 30) 685–686.

[292] Orakhelashvili (n 102) 153.

well with the rationale of State immunity from enforcement, being consequential to immunity from jurisdiction. When the ILC called immunity from execution "the last bastion of State immunity", it did so because the question of immunity from execution "does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgement in favour of the plaintiff".[293] At the same time, on the matter of principle, the ILC commentary states that:

> "If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property."[294]

Another argument, from a policy perspective, is that it would be illogical if measures "taken by fiat of the executive" are subject to fewer limitations than measures taken pursuant to the guarantees of a judicial process.[295] Ruys' conclusion admittedly creates a paradox, where certain persons and types of property are immune from judicial measures but have no protection against executive or administrative measures.[296] "Yet, international law is no stranger to paradoxes. It may well be that immunity law was never intended to curtail the foreign policy powers of States' executive or legislative branches."[297]

4.6 Distinguishing Between Executive and Judicial Powers

Ruys' questions, and answers, "carry repercussions beyond the sanctions context" and touch upon fundamental questions concerning the scope of State immunity.[298] However, the fact that a freeze might not be covered by the law of State immunity, does not necessarily mean that the same conclusion can be drawn for an asset seizure. The remaining main argument for treating executive measures as implicating immunity is that it is difficult to distinguish between judicial and executive action and functions.[299]

The conclusion by Ruys does not mean that the imposition of sanctions by the executive branch never can be linked to judicial or quasi-judicial proceedings. The situation is for example fundamentally different when there is civil litigation before US courts seeking compensation from third States, such as Iran, based on the controversial terrorism exception. Furthermore, the steps taken beforehand by the executive or legislative branch to ensure that blocked

[293] UNCSIC (n 101) 56 para 2.
[294] ibid.
[295] Franchini (n 21).
[296] Ruys (n 260).
[297] Ruys (n 30) 708-709.
[298] ibid 675.
[299] Wuerth Brunk (n 27) 19.

assets of a State are available for satisfaction of a judgment in favour of those civil litigants may similarly violate State immunity.[300]

The US has also transferred parts of frozen Afghan central bank assets to a fund in Switzerland with the purpose of eventually disbursing them to aid the Afghan people. According to Wuerth, that seizure does not implicate or violate immunity, however. The measures touch more upon issues of recognition since the US does not recognise the Taliban as the legitimate government and would turn over the assets to the US-recognised government. The same is true for similar US actions against Venezuelan central bank assets. But, if the US were to pursue an approach where Afghan assets are used to satisfy terrorism-related judgments against the Taliban and in favour of private litigants, that would violate State immunity in Wuerth's view. In that case, like with Iran, the measures would clearly involve judicial proceedings and functions.[301]

Measures that go beyond freezing, such as changing the ownership of foreign central bank assets, often require judicial action under domestic law. While domestic law might be an obstacle in practice, it does not mean that an asset seizure is impossible with reference to State immunity under international law. According to Wuerth, when it comes to the US for example, the authority to seize Russian State assets does not currently exist but new legislation could be adopted to allow the executive or an administrative agency to make confiscation decisions, which could avoid the issue of judicial power and thus also the issue of State immunity.[302]

Canada's new legislation, which gives authority to seize Russian private *and* State property, requires a judicial decision to give effect to the forfeiture, and could thus implicate State immunity. This authority has not yet been used, however, and its international legal basis has not been explained.[303]

As seen in the cases of US asset seizure against for example Iran, the first requirement for an executive measure to fall outside of the scope of immunity is that the measure taken is unrelated to judicial proceedings. This minimum requirement, that it cannot be linked in any way to court proceedings, such as by being used to satisfy an actual judgment, finds sufficient support in the practice surveyed by Ruys and Wuerth. This could easily be achieved when pursuing a seizure of RCB assets, just like a freeze. However, it might not be enough. A measure could also be seen as falling within immunity's scope, regardless of a direct connection to judicial proceedings, if it is "quasi-

[300] Ruys (n 30) 684.

[301] Wuerth Brunk (n 27) 1, 11-12, 24-26.

[302] ibid 19-20.

[303] Wuerth Brunk (n 27) 20. Information about the legislation (Bill C-19, Part 5 Division 41, amending Special Economic Measures Act (SEMA) and Justice for Corrupt Foreign Officials Act (Sergei Magnitsky Law)), can be found on Government of Canada, <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c19_2.html> accessed 20 May 2023.

judicial", in other words if it is normally a "judicial function" or a part of a State's judicial power.

The ILC commentary states that judicial functions can be exercised "in connection with a legal proceeding at different stages", in other words prior, during or after a legal proceeding.[304] However, Article 2(1)(a) of the UNCSI defines a "court" as "any organ of a State, however named, entitled to exercise judicial functions". The ILC Commentary further provides that "judicial functions" vary between different constitutional and legal systems and may "cover the exercise of the power to order or adopt enforcement measures (sometimes called "quasi-judicial functions") by specific administrative organs of the State".[305]

> "The expression "jurisdictional immunities" in this context is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system of the territorial State, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State, in relation to a judicial proceeding."[306]

According to Ruys, this quote from the commentary clarifies, on one hand, that measures taken by domestically classified executive or administrative powers, and not just measures that are typically taken by the judiciary, can still come within the application of State immunity. On the other hand, it also confirms that this will only be the case if they are somehow related to judicial proceedings or the enforcement of the judicial power of the State.[307]

Wuerth argues that the freeze of foreign central bank assets, including the current measures against RCB assets, do not implicate immunity as they are unrelated to assertions of judicial power. Some proposals to confiscate RCB assets would, however, violate State immunity, depending on how they are structured. Proposals to turn over RCB assets to Ukraine through executive action, in order to avoid immunity, "go well beyond blocking or freezing assets", according to Wuerth. The proposals may not only be limited by domestic and international law requiring some form of judicial process for property deprivation, which is outside this thesis' scope, but it will also be difficult to draw a line between judicial and executive action.[308]

The potential problems with distinguishing between executive and judicial functions has not really arisen in practice yet, so the problems have so far

[304] UNCSIC (n 101) 14 para 3.
[305] ibid.
[306] ibid 13 para 2.
[307] Ruys (n 30) 677.
[308] Wuerth Brunk (n 27) 1, 19.

been mostly theoretical. But some of the proposals to seize RCB assets could now put immunity to the test in real life.[309] The issue of State immunity from enforcement in relation to an executive seizure was however dealt with in the case *Timor-Leste v Australia* before the ICJ.[310] The case was eventually terminated, but the position that immunity only applies with respect to judicial proceedings before a national court was forcefully defended by Australia.[311]

The scope of State immunity, in particular the meaning of "court proceedings" and "judicial functions", was at the heart of the written proceedings, in relation to the disputed seizure of Timor-Leste's data and documents pursuant to a search warrant issued by Australian executive authorities. While Timor-Leste held that this was a function normally exercised by the judicial authorities of a State in accordance with domestic law, Australia held that a search warrant could just as well be issued by members of the executive government and be regarded as a non-judicial power in many other jurisdictions.[312]

Timor-Leste argued that what matters under customary international law is not the title of the issuing authority or whether the issuing authority "looks like a court", but rather "the function and nature of the act and procedures in question". Furthermore, the issuing of a warrant for search and seizure is a judicial or quasi-judicial function since it involves a State organ being vested with authority to determine whether coercive action may lawfully be taken in respect of property. If this was not the case, States could disregard immunity obligations by simply "re-hatting their officials".[313]

Australia, on the other hand, argued against this based on the ILC's commentary that "judicial functions are determined by the internal organizational structure of each State" and "vary under different constitutional and legal systems".[314] The domestic legal framework thus decides whether a body constitutes a court for the purposes of immunity. Additionally, the exercise of judicial power normally entails dispute resolution involving determining the rights and obligations of parties by applying law to ascertained facts.[315]

Notwithstanding whether Timor-Leste's "judicial functions" test is the requirement under customary international law, financial sanctions in the form of asset freezes are regardless hard to fit into the framework put forward by

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[309] Wuerth Brunk (n 27) 23.

[310] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Order of Discontinuance) [2015] ICJ Rep 572 (terminated).

[311] Ruys (n 30) 679-681.

[312] ibid 681-682.

[313] *Questions relating to the Seizure and Detention of Certain Documents and Data* (n 310), (Memorial of Timor-Leste) [2014] <www.icj-cij.org/sites/default/files/case-related/156/18698.pdf>, paras 5.26, 5.34, 5.41; Ruys (n 30) 682.

[314] UNCSIC (n 101) 14 para 3.

[315] *Questions relating to the Seizure and Detention of Certain Documents and Data* (n 310), (Counter-Memorial of Australia) [2014] <www.icj-cij.org/sites/default/files/case-related/156/18702.pdf>, para 5.115; Ruys (n 30) 682-683.

the ILC commentary and UNCSI. Ruys thinks that they are clearly unrelated to "adjudication of litigation or dispute settlement" or to "determination of questions of law and fact". Sanctions are not a function "normally exercised by, or under the judicial authorities of a State" either. The adoption of sanctions is rather a matter primarily for the executive or legislative branch which "falls squarely within the foreign policy of the acting State".[316]

Autonomous sanctions in general, and asset freezes in particular, are dictated autonomously by the executive or legislative branch, normally at the highest levels of government, while measures of constraint follow or are connected to a judgment imposed by the judicial branch. The fact that a person or entity targeted by an executive, sanctions-like measure may challenge the legality of the measure before a court does not change the fact that the measure itself normally does not result from any court proceeding. It does not mean either, that the measure is a pre-judgment measure of constraint. Ruys therefore concludes that the adoption of autonomous financial sanctions, absent any link to legal proceedings, does not trigger or breach the rules on State immunity. Precedents giving immunity (or inviolability) a broader scope of application are lacking.[317]

Since the proceedings in *Timor-Leste v Australia* were terminated, the ICJ did not rule on the issue and it is unclear to what extent the arguments have a bearing on the seizure of RCB assets. The arguments highlight, however, that what might be a deciding factor, at least according to one view, is not only the judicial nature of the organ taking the measure, but also the judicial nature of the measure itself. It could be relevant to ascertain whether the functions concerned are "normally exercised by, or under the judicial authorities of a State".[318] "The function of changing title to property located in the forum might accordingly be considered "judicial" whether undertaken in the first instance by an administrative agency or by a court."[319]

Wuerth also concludes that asset freezes against central banks, involving executive action and not judicial proceedings, do not violate immunity. However, handing over frozen RCB assets to Ukraine could raise significant immunity issues. Immunity from enforcement does not apply to many sanctions but would normally apply to measures of confiscation if they involve judicial power. According to Wuerth, the current proposals to transfer RCB assets to Ukraine "would likely violate foreign sovereign immunity *unless structured to avoid any judicial action*" (emphasis added).[320]

[316] Ruys (n 30) 683; UNCSIC (n 101) 14 para 3.
[317] Ruys (n 30) 680-683, 708.
[318] UNCSIC (n 101) 14 para 3.
[319] Wuerth Brunk (n 27) 23.
[320] ibid 11, 27, 39-40.

A seizure does not necessarily involve the assertion of jurisdiction by domestic courts or relate to the enforcement or execution of a judgment, but it could perhaps be seen as involving judicial functions. It could be argued that a seizure that involves a permanent change in ownership of assets, like forfeiture or confiscation, is a more typically "judicial" measure or power that is perhaps more commonly decided by judicial authorities under domestic law.

How judicial or executive a seizure might be could thus depend on how it is framed. A seizure of RCB assets to "satisfy" Ukraine's right to reparation for Russia's wrongful acts would indeed come closer to "judicial functions" than a temporary freeze with the purpose of putting pressure on Russia to cease them. If the measure is framed too closely in line with an actual legal judgment on Russia's behaviour, in order to ensure Ukrainian individuals' right to reparation for Russia's unlawful acts, it might come dangerously close to "adjudication of litigation or dispute settlement". Paradoxically, the loophole might thus allow States to take executive measures against RCB assets, as long as they do not frame the measures in terms of the Ukrainian people's legitimate rights and Russia's corresponding legal obligations.

However, a measure being closely connected to foreign policy, with the purpose of putting pressure on an adversary and providing support for an ally in times of war, might be sufficiently political and unrelated to normal judicial powers exercised by domestic courts. The fact that there even is a discussion about going from freezing to seizing is dependent on the initial executive power to freeze the assets as a measure of coercive sanctions. Accordingly, a seizure of the bulk of a foreign State's currency reserves would normally never be possible under State immunity from enforcement in relation to domestic court proceedings and the satisfaction of judgments, which could serve as an argument that the measure is not judicial at all. It is also possible that carefully providing a link between seized assets and using them as "collateral" or a security for damages in a future peace agreement, along the lines of the EU's active management proposals, also could make the measures sufficiently "non-judicial" and more closely related to foreign policy powers.

Furthermore, even if the Timor-Leste case concerned a form of seizure, a search warrant issued by the Australian Attorney-General for documents and data related to some form of domestically unlawful conduct, it cannot really be compared to an EU or G7 seizure of Russian assets to ensure reparation for Ukraine, decided at the highest levels of government. While a search warrant for some documents can be said to be a typically judicial function, it is hard to say the same for an international agreement between a group of States to seize a foreign State's currency reserves which are frozen during and due to war by those States through autonomous sanctions. It is also difficult to compare a "special administrative agency", such as administrative courts or the office of an Attorney-General, empowered to issue a search warrant under

domestic private or criminal law, with the political foreign-policy-related agencies that would be involved in a decision to seize Russian assets.

In conclusion, the issue of whether State immunity from enforcement applies to a seizure through executive action is largely unsettled in international law. The arguments and the relatively substantial body of State practice and *opinio juris*, as surveyed by Ruys and Wuerth, strongly indicates, however, that a purely executive or sanctions-like measure, such as an asset freeze, does not violate customary international law of State immunity. The better view in legal doctrine is that an executive measure, unrelated to court proceedings or the satisfaction of a court judgment, would not be incompatible with State immunity. This is true for an asset freeze through autonomous financial sanctions, and it could be true for an asset seizure depending on how it is structured to avoid judicial action or functions.

On one hand, drawing conclusions from the practice of US asset seizure against Iran, Afghanistan and Venezuela, as well as the asset freezes against central banks by for example the EU, it might suffice if a seizure of RCB assets is pursued by executive or legislative organs and is entirely unrelated to actual judicial proceedings. Like an executive freeze of assets, it is then possible it is not in breach of State immunity at all. On the other hand, the crucial issue for the application of State immunity might be whether a seizure is a "judicial function", even if the measure is unrelated to judicial proceedings or the satisfaction of judgments. *Timor-Leste v Australia* shows that it can be argued that the measure would need to be framed closer to sanctions and further away from judicial functions to fall outside the scope of immunity.

However, the disagreement in that case was not so much based on diverging interpretations of State practice and the actual content of the law, but rather a disagreement in principle on the scope of State immunity.[321] The case was not settled by the ICJ either, so it is unclear to what extent that requirement is necessary or how it should be interpreted. In other words, customary international law is unsettled on this issue because of a lack of practice. It all depends on the interpretation of the UNCSI and its commentaries, and how much weight is given to the principle of sovereign equality. A seizure of RCB assets might be seen as "too judicial" to fall outside of State immunity's scope. In my view, however, the framing of such a measure as an executive measure to which immunity does not apply is nonetheless entirely possible in theory.

Thus, since the proposed measures are completely unprecedented and the law is unsettled, it yet again comes down to arguments in principle on the scope of State immunity, and the political will of the States involved. As Wuerth points out, if the law of State immunity is limited to judicial actions, the doctrine largely rests on "a formal, technical, and unstable distinction between executive and judicial power". That is not a good reason to expand immunity

[321] Ruys (n 30) 682.

to pure executive measures either, however, and immunity, conceptualised as immunity specifically from the jurisdiction of courts and from the execution of judgments, "hardly renders it fundamentally unclear or uncertain".[322]

State immunity rules were created primarily to avoid the courts of one State sitting in judgment of another State, and to prevent litigation by private persons against foreign States before domestic courts. It is possible, as Ruys concludes, that it was not created to curtail States' executive and legislative foreign policy powers.[323] Just like with a potential exception to State immunity for international crimes, a new custom concerning the application of State immunity to non-judicial measures might emerge in the future or in direct connection to a seizure of Russian assets. However, if the EU continues to repeat statements that it cannot confiscate assets due to State immunity, that might have the opposite effect of serving as evidence of *opinio juris* against such a solution.[324] Thus, the measures under consideration by western States against Russia might be lawful, but their adoption would probably depend more on other political factors, such as a risk of increasing global political and economic divisions.[325]

[322] Wuerth Brunk (n 27) 23.
[323] Ruys (n 30) 708-709.
[324] Wuerth Brunk (n 27) 35.
[325] ibid 39-40.

5 Final Reflections and Conclusions

A seizure of Russia's frozen foreign currency reserves, in response to its aggression and alleged complicity in serious international crimes in Ukraine and/or to ensure support or reparation for Ukraine and its nationals, would be an unprecedented measure. Pursuing an asset seizure, regardless of how it is pursued, would represent a dramatic development of international law. It raises a number of fundamental questions for the international community, including in regard to State immunity.

The customary international law of State immunity is a complex, controversial and largely unsettled area of international law, somewhere between comity and law, between principle and practice, and between state of the law and policy arguments. States and legal scholars disagree on many issues, including the very rationale behind immunity and the move from an absolute to a restrictive doctrine. On two of the most relevant issues for this thesis, however, States have largely agreed. They seem to be the most sensitive and important from States' perspectives, and the interests of States' have so far stood rigid against attempts to curtail them in the tension with individual interests.

The first issue is the near-absolute protection of central bank assets under the law of State immunity from enforcement. Early on, private commercial entities saw the attractiveness in using significant central bank assets of a State, located in another State, to satisfy judgments against that State. Whereas immunities in general were shrinking, the trend has been towards greater protection of central bank assets, as seen in the UNCSI. Under current customary international law, central bank assets could only be seized, in relation to court proceedings or the satisfaction of judgments, if the State has consented or they are used for other than government non-commercial purposes. It is also unclear whether a central bank's assets could be used to satisfy judgments against the State. While the approaches of States differ and some jurisdictions might allow measures of constraint against "commercial" property, Russia's foreign currency reserves are protected by immunity from enforcement.

The second important issue is the proposed exception to State immunity for serious violations of *jus cogens* norms, such as the prohibitions of the use of force and international crimes. Numerous attempts, using different theories, have been made in domestic and international courts and by legal scholars, to provide justification for such an exception. From a perspective of *de lege ferenda*, an exception can easily be justified from different theories and perspectives, and combinations of them. This thesis has argued that States *should* not be protected when they violate international law's most fundamental norms. It is absurd to deny immunity in cases concerning traffic accidents and employment disputes, while shielding States in cases concerning the most serious crimes and thereby denying individuals' rights. International crimes *should* not be seen as sovereign acts deserving of either functional or State

immunity, in criminal or civil proceedings, and they threaten the stability of inter-State relations more than attempts to ensure reparation. The combined use and denial of the theories and policy arguments in courts and in the adoption of the UNCSI ultimately highlight their weakness, however, which is that they have no coherent force as to the current state of the law and are dependent on changes in behaviour and beliefs of States. There is currently no exception to State immunity from jurisdiction, and especially not from enforcement, for serious violations of *jus cogens*. The thesis also concludes that the law can and should change. Whether the time is right is difficult to say, but the Russian aggression against Ukraine is a regime-challenging event that nonetheless presents an opportunity for States to reconsider their positions concerning the application of immunities. For the time being, the enforcement of fundamental norms continues to rely on States and traditional mechanisms such as diplomatic protection, peace negotiations and countermeasures.

However, another "State-centric" possibility has emerged in legal doctrine. It has been argued by legal scholars, and by this thesis, that State immunity does not apply at all to some executive or legislative "constraining" measures, such as asset freezes against central banks, which are unrelated to judicial proceedings or the satisfaction of judgments. This is supported by the language of the UNCSI, which sought to codify customary international law, and especially by the sanctions practice of the EU and US, where measures are taken against central bank property without the taking States referring to State immunity and without protests based on State immunity by targeted States. Immunity not being absolute also supports the view that the principle of sovereign equality is not all-encompassing as a matter of law, and that it is possible that State immunity was never intended to completely curtail the executive or legislative foreign policy powers of States. A seizure, changing the ownership of State assets, is arguably a more intrusive measure than a freeze, and it might be viewed as "too judicial" to fall outside of immunity's scope. There is, however, a lack of precedents or practice giving immunity a broader scope, which leads to the conclusion that the law is unsettled. This thesis argues that it is entirely possible that a seizure of RCB assets would be lawful under the law of State immunity, depending on how it is framed. This "loophole" and the high degree of legal uncertainty once again shows how international law is still primarily the arena of States and that any measure will depend more on other factors, such as the political will of the States concerned.

Other possible legal justifications or solutions, which are outside the scope of this thesis, should be investigated, especially the doubtful classification of a seizure as a permissible third-party countermeasure. It is possible that pursuing an "active management proposal" in terms of a countermeasure, as discussed within the EU, is the safer and more likely option in comparison to a total asset confiscation, but it will regardless need to face, and overcome, fundamental questions regarding the content and scope of the customary international law of State immunity.

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