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Confiscation of Central Bank Assets and Possible Implications on the Law of State Immunity

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Summary

This thesis examines the scope of the law of State immunity from enforcement, with the intention of determining if the frozen assets and reserves of the Central Bank of Russia can be confiscated without implicating State immunity. State immunity from enforcement has its legal basis in customary international law and is generally understood to protect State property from being subjected to pre- or post-judgment measures of constraint, including attachment and execution, but its exact scope is widely debated.

Although sanctions against central banks is not unprecedented, the scope of the sanctions imposed against the Central Bank of Russia after Russia's invasion of Ukraine is unparalleled, in terms of the amount of assets these sanctions implicate. These sanctions have in the past primarily consisted of assets freezes, but in recent years States have proposed and adopted regulations that provide a national or regional basis for confiscation of the frozen assets. Due to the political pressure and public attention such suggestions and actions have retained, and the flexibility of customary international law, it is of importance to evaluate whether a confiscation of the Central Bank of Russia assets would be permissible under the law of State immunity from enforcement.

The thesis employs a legal doctrinal method, and thus systemizes and analyzes recognized legal sources of the law of State immunity to clarify the scope of State immunity from enforcement. Since State immunity is based in customary law, the thesis primarily examines judgments from national, regional and international courts, domestic legislation and the International Law Commission's attempt to codify said customary law in the United Nations Convention on Jurisdictional Immunities of States and Their Property. The thesis also applies literature to interpret the content of customary law.

The thesis finds that central banks are granted an extensive protection from enforcement measures under the law of State immunity, and that particularly central bank assets that serve sovereign monetary purposes are provided with absolute immunity from enforcement measures before foreign courts. In addition, the thesis examines two potential exceptions to State immunity, applicable when the foreign State is designated as a supporter of terrorism or has violated peremptory norms, but concludes that no such exceptions exist under the customary international law on State immunity. Lastly, the thesis examines if State immunity from enforcement extends to non-judicial measures of constraint, including *inter alia* executively ordered sanctions. The thesis finds that a confiscation of the Central Bank of Russia assets, if undertaken independently of any court proceedings, ought to be permitted according to the rationale of State immunity, however due to the lack of State practice, the legality of this type of confiscation cannot be determined for certain.

Abbreviations

CBR	Central Bank of the Russian Federation
CSD	Central Securities Depository
ECSI	European Convention on State Immunity
ECtHR	European Court of Human Rights
EU	European Union
FSIA	Foreign Sovereign Immunities Act (1976)
ICJ	International Court of Justice
ICJ Statue	Statue of the International Court of Justice
ILC	International Law Commission
REPO Act	Rebuilding Economic Prosperity and Opportunity for Ukrainians Act
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNCSI	United Nations Convention on Jurisdictional Im- munities of States and Their Property (2004)
UN Charter	Charter of the United Nations

1 Introduction

1.1 Background

Just four days after Russia invaded Ukraine, on 28 February 2022, the European Union [hereafter EU] and seven other States holding assets owned by the Central Bank of Russia [hereafter CBR], Austria, Canada, France, Germany, Japan, the United Kingdom and the United States, commonly referred to as the G7, coordinated a freeze of these assets, hindering CBR from accessing its foreign assets.¹ At the time of the freeze, it was estimated that nearly half of Russia's foreign currency reserves were immobilized.² The total sum amounted to roughly USD 300 billion, whereof nearly EUR 210 billion were located within the EU.³ Although sanctioning central banks in itself is not unprecedented, as Cuban, Iranian, Syrian and Venezuelan central banks have previously been subjected to sanctions, the scope of the sanctions placed on the CBR are unprecedented in terms of the amount of assets these sanctions freeze.⁴

After the freeze was established, the discussions rapidly shifted to consider the possibility of confiscating the assets, with several States progressing proposals to not merely freeze, but also confiscate CBR assets, primarily for the purpose of aiding the reconstruction of Ukraine.⁵ For instance, in June of 2022 the Ministers of Finance of Estonia, Latvia, Lithuania and Slovakia issued a joint statement wherein they called for the establishment of a mechanism to

¹ Menno T Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?' (2023) 70 *Netherlands International Law Review* 1, 1-2; 'Timeline - EU Sanctions against Russia' (*Consilium*) <<https://www.consilium.europa.eu/en/policies/sanctions-against-russia/timeline-sanctions-against-russia/>> accessed 7 May 2025.

² Brian Evans, 'The G7 and EU Are Discussing Seizures of Russian Central Bank Assets for Ukraine Aid, but the Kremlin Calls It Theft' (*Markets Insider*, 17 May 2022) <<https://markets.businessinsider.com/news/currencies/russian-central-bank-asset-seizure-g7-eu-ukraine-aid-2022-5>> accessed 7 May 2025.

³ Ingrid (Wuerth) Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (2023) 91 *George Washington Law Review* 1616, 1628; Hanna Ziady, 'Russia's Frozen Assets Are Generating Billions. The EU Is Getting Ready to Send Them to Ukraine | CNN Business' (*CNN*, 1 February 2024) <<https://www.cnn.com/2024/02/01/business/frozen-russian-assets-ukraine/index.html>> accessed 26 April 2025; European Council, 'EU Sanctions against Russia Explained' <<https://www.consilium.europa.eu/en/policies/sanctions-against-russia-explained/>> accessed 24 April 2025.

⁴ (Wuerth) Brunk (n 3), 1628 and 1632; Kamminga (n 1), 8.

⁵ Alan Rappeport and David E Sanger, 'Seizing Russian Assets to Help Ukraine Sets Off White House Debate' *The New York Times* (31 May 2022) <<https://www.nytimes.com/2022/05/31/us/politics/russia-sanctions-central-bank-assets.html>> accessed 7 May 2025; Ministry of Finance of the Republic of Lithuania, 'Minister of Finance G. Skaistė: "Russia's Frozen Assets Should Be Used for the Reconstruction of Ukraine"' (22 June 2022) <<https://finmin.lrv.lt/en/news/minister-of-finance-g-skaiste-russias-frozen-assets-should-be-used-for-the-reconstruction-of-ukraine/>> accessed 7 May 2025; Patrick Wintour, 'UK-France Tensions over Plan to Seize \$350bn Russia Assets for US Arms' *The Guardian* (3 March 2025) <<https://www.theguardian.com/world/2025/mar/03/uk-france-tensions-over-plan-to-seize-350bn-russia-assets-for-us-arms>> accessed 14 May 2025; Evans (n 2).

administrate the reallocation of the immobilized Russian assets, including the foreign reserves of the CBR, for the reconstruction of Ukraine.⁶ Concurrently, both the EU and the G7 States engaged in discussions regarding proposals on how to confiscate CBR assets in order to provide financial assistance to Ukraine.⁷ Although these proposals gained significant international attention, some States voiced concerns regarding the legal consequences of a confiscation of the foreign reserves of CBR. The primary legal obstacle was generally recognized to be State immunity, since State immunity protects foreign States and their property from measures of constraint, including confiscation, undertaken by the forum States.⁸

While the United Nations Security Council [hereafter UNSC] holds the power to impose collective sanctions aimed at maintaining international peace and security according to chapter VII of the Charter of the United Nations [hereafter UN Charter],⁹ it has refrained from doing so due to Russia being one of the permanent members of the Council and thus holding a right to veto the Council's resolutions.¹⁰ The lack of a UNSC resolution mandating confiscation of the immobilized CBR assets to pay reparations to Ukraine further complicates the legality of a potential confiscation, since sanctions that fall outside the scope of the United Nations [hereafter UN] framework are regularly accused of implicating several areas of international law, including the law of State immunity.¹¹

The United Nations General Assembly [hereafter UNGA], on the other hand, has adopted two resolutions on the matter.¹² On 2 March 2022 the UNGA adopted a resolution, with 141 votes in favor, wherein it condoned the aggression by Russia in and against Ukraine, as it was considered to be a violation of article 2(4) of the UN Charter.¹³ Later the same year, the UNGA adopted

⁶ Ministry of Finance of the Republic of Lithuania (n 5).

⁷ Evans (n 2).

⁸ C.f. Rappeport and Sanger (n 5); Oona A Hathaway, Maggie M Mills and Thomas M Posten, 'War Reparations: The Case for Countermeasures' (2024) 76 *Stanford Law Review* 971, 999; Wintour (n 5).

⁹ United Nations, Charter of the United Nations 1945 [1 UNTS XVI].

¹⁰ Thomas C Baxter, 'Economic Sanctions and Central Banks: Applying the Principles Articulated in the Arbitral Decision between the Federal Reserve and Bank Markazi' in Chiara Zilioli, Régis Bismuth and Luc Thévenoz (eds), *International Sanctions: Monetary and Financial Law Perspectives* (Brill | Nijhoff 2024) <<https://brill.com/view/book/9789004705708/BP000017.xml>> accessed 20 May 2025, 231.

¹¹ Tom Ruys, 'Immunity, Inviolability and Countermeasures - A Closer Look at Non-UN Targeted Sanctions', *The Cambridge handbook of immunities and international law* (Cambridge University press 2019), 670.

¹² United Nations General Assembly, Resolution adopted by the General Assembly on 2 March 2022 [A/RES/ES-11/1]; United Nations General Assembly, Resolution adopted by the General Assembly on 14 November 2022 [A/RES/ES-11/5].

¹³ United Nations General Assembly Resolution adopted by the General Assembly on 2 March 2022 (n 12); Kamminga (n 1), 4.

an additional resolution titled *Furtherance of remedy and reparation for aggression against Ukraine* according to which it recognized that Russia:

“must be held to account for any violations of international law in or against Ukraine [...] and that it must bear the legal consequences of all its internationally wrongful acts, including *making reparation* for the [...] damages caused by such acts.”¹⁴

In the latter resolution the UNGA also recognized the need for the establishment of a mechanism for reparation for damage arising from Russia’s wrongful acts against Ukraine, but made no note of how such a mechanism should be established and what funds should be used to finance it, for instance whether the frozen assets of CBR could be used for this purpose.¹⁵ However, this resolution gained far less support, with 94 votes in favor, and several States felt the need to emphasize that the adoption of the UNGA resolution could not be used to as an excuse to confiscate frozen Russian State assets, as this would implicate Russia’s State immunity.¹⁶ Russia emphasized that “neither the General Assembly nor any mechanism can annul the sovereign immunity of State assets that is granted by international law”,¹⁷ thus implying that its frozen State property could not be used to finance such a mechanism.

Moreover, according to article 14 of the UN Charter, the UNGA may “recommend measures for the peaceful adjustment of any situation”,¹⁸ but unlike the UNSC it cannot order coercive action.¹⁹ Hence, while the UNGA resolutions may mirror States’ willingness to confiscate Russian central bank assets – although a large number of States abstained from voting on the latter resolution – they are not legally binding and therefore they cannot serve as a legal basis for confiscation. Accordingly, if the EU or individual States wishes to lawfully confiscate the CBR assets, they must observe international obligations, including the customary law on State immunity.

Immunity from enforcement has recently attracted public attention, a development Webb attributes to the international efforts to confiscate sovereign

¹⁴ United Nations General Assembly Resolution adopted by the General Assembly on 14 November 2022 (n 12) (emphasis added).

¹⁵ *ibid.*

¹⁶ Russia, Sri Lanka, North Korea and Iran were some of the States that raised concerns regarding the funding of a compensation mechanism, see United Nations General Assembly, Official Records of the Eleventh Emergency Special session 2022 [A/ES-11/PV.15], 5, 9, 19 and 25; c.f. Kamminga (n 1), 4.

¹⁷ United Nations General Assembly Official Records of the Eleventh Emergency Special session (n 16), 5.

¹⁸ United Nations, Charter of the United Nations 1945 [1 UNTS XVI], article 14.

¹⁹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion)* [1962] International Court of Justice 262, ICJ Rep 1962 151, 163.

Russian assets, including the frozen CBR assets, with the intention of securing reparations and provide financial support for military efforts in Ukraine.²⁰ This type of State immunity protects certain categories of foreign State property from measures of execution, and foreign central bank assets are generally considered to enjoy extensive immunity from enforcement measures.²¹ Thus *prima facie* a confiscation of the frozen CBR assets appears to implicate the law on State immunity. Yet, several States have proposed to impose additional sanctions on the CBR. These proposals range from outright confiscation of the CBR reserves to confiscation of specifically the interest earned on the immobilized CBR assets to fund the reconstruction of Ukraine.²² The United States, for instance, adopted the Rebuilding Economic Prosperity and Opportunity for Ukrainians Act [hereafter REPO Act] in the spring of 2024. The Act grants the president power to confiscate CBR assets within the territory of the United States, these are then to be transferred to a fund in favor of Ukraine.²³ Moreover, Canada is at present taking steps to pass a Bill that would allow confiscation of Russian sovereign assets, including central bank reserves.²⁴ Meanwhile, the EU has taken an, arguably, more cautious approach. In May 2024 the Union adopted a regulation according to which the EU confiscates the net profits of the accumulated interest on the frozen CBR assets.²⁵

Evidently, the political pressure to take action against Russia in the favor of Ukraine, has prompted a rapid, and on-going, evolution of State practice. As noted above, it is not unprecedented to sanction central banks, but confisca-

²⁰ Philippa Webb, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm D Evans (ed), *International law* (Sixth edition, Oxford University Press 2024); European Council, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Support Ukraine's Self-Defence and Reconstruction' (*Press Releases*, 21 May 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/extraordinary-revenues-generated-by-immobilised-russian-assets-council-greenlights-the-use-of-windfall-net-profits-to-support-ukraine-s-self-defence-and-reconstruction/>> accessed 13 April 2025.

²¹ Webb (n 20); European Council, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Support Ukraine's Self-Defence and Reconstruction' (n 20).

²² Ingrid Brunk, 'Economic Sanctions and Central Bank Immunity' in Chiara Zilioli, Régis Bismuth and Luc Thévenoz (eds), *International Sanctions: Monetary and Financial Law Perspectives* (Brill | Nijhoff 2024) <<https://brill.com/view/book/9789004705708/BP000014.xml>> accessed 20 May 2025, 184; Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) no 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2024 [ST/9554/2024/INIT].

²³ C.f. Rebuilding Economic Prosperity and Opportunity for Ukrainians Act 2024 [P.L. 118-50], sec. 2(6)(A)(i), 104(b)(1), 104(2)(b)(1).

²⁴ Canada, BILL S-278: An Act to amend the Special Economic Measures Act (disposal of foreign state assets) 2023 [BILL S-278:].

²⁵ Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) no 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2024 [ST/9554/2024/INIT].

tion of central bank property nonetheless remains unusual and highly controversial, especially in relation to State immunity. As such, this raises questions concerning the scope of State immunity from enforcement and its compatibility with a potential confiscation of the frozen CBR assets.

1.2 Purpose and Research Questions

The purpose of this thesis is to examine the scope of the international law on State immunity from enforcement, so that it can be determined if, and how, the assets and reserves of the CBR could be subjected to measures of constraint, in particular confiscation, without implicating the law of State immunity from enforcement. The thesis takes a particular interest in EU's efforts to confiscate the CBR assets, due to how the vast majority of the immobilized CBR assets are held within the EU. Nonetheless, the primary focus of the thesis remains on determining whether confiscation of the CBR assets in general is permitted under the laws of State immunity.

To achieve this purpose, the thesis will address the following research question:

- Is a confiscation of the immobilized assets of the CBR compatible with the law of State immunity, specifically State immunity from execution?

Each primary chapter of the thesis is dedicated to address a specific sub-question, with the objective to provide a clearer understanding of the legal reasoning supporting the answer to the principal research question. The sub-questions addressed in each chapter are as follows:

- Does central bank property enjoy State immunity from enforcement measures? If so, to what extent? (Chapter 2)
- Does customary international law contain any exceptions to State immunity from enforcement, under which otherwise immune central bank assets may be subjected to enforcement measures? (Chapter 3)
- Does the scope of customary international law on State immunity extend to non-judicial measures of execution, so to include confiscation unrelated to judicial proceedings? (Chapter 4)

1.3 Delimitations

While immunity from jurisdiction protects State from being subjected to judicial proceedings before a foreign State's courts, immunity from enforcement protects the property of the State from being subjected to executive

measure by foreign courts, including confiscation.²⁶ The distinction provides that even if a lawful judgment has been rendered against a foreign State, it does not follow *ipso facto* that the State against which the judgment has been given, can be subjected to measures of constraint to enforce the judgment.²⁷ Thus, to answer to posed research question of whether or not central bank assets, in particular CBR assets, could be confiscated without implicating State immunity, it is primarily immunity from enforcement that is of interest. Immunity from jurisdiction is only briefly discussed within the scope of the thesis, and only insofar it is relevant to interpret the scope of immunity from enforcement or provide and understanding of State immunity as a whole.²⁸

Moreover, the present paper is exclusively concerned with legal issues in relation to State immunity related to a possible confiscation of sovereign Russian assets, specifically the CBR reserves. It does not address measures of constraint taken against the assets of other natural or legal persons, who, like the CBR, are also subjected to asset freezes. Although the frozen private non-sovereign assets are estimated at EUR 28 billion within the EU, it remains substantially lower than the EUR 210 billion in frozen CBR assets.²⁹ Additionally, a confiscation of private assets raises a whole set of different legal questions, such as issues of property rights and the difficulty of proving criminal conduct.³⁰

The thesis intends to examine if confiscation of CBR assets is permissible under international law on State immunity. Domestic and regional legislation is accounted for only as evidence of State practice to identify current customary international law.³¹ As mentioned in subchapter 1.2, the thesis takes a particular interest in EU's efforts to confiscate CBR assets. This is attributed to how the EU sanctions against CBR have been especially impactful, since Russia reduced its foreign central bank reserves in *inter alia* the United States before its attack on Ukraine and instead increased its reserves in Europe, seemingly not expecting the EU to take actions against its foreign central bank.³² Nevertheless, EU regulations will only be studied insofar they relate directly to the union's possibility to confiscate CBR assets in accordance with

²⁶ Hazel Fox and others, 'The Institution of Proceedings and the Nature of the Plea of State Immunity', *The Law of State Immunity* (3rd edn, Oxford University Press 2015), 23; Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021), 645.

²⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] International Court of Justice Rep 99, para 113.

²⁸ C.f. subchapter 2.1 and 3.2.2.

²⁹ European Council (n 4); 'Sanctions against Individuals, Companies and Organisations' (*European Commission*) <https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine/sanctions-against-individuals-companies-and-organisations_en> accessed 13 April 2025.

³⁰ Kamminga (n 1), 3.

³¹ C.f. Shaw (n 26), 68.

³² Brunk (n 22), 183.

the laws of State immunity. Accordingly, the findings made in this thesis regarding if a confiscation of CBR assets would be permissible, according to the customary law of State immunity from enforcement, can be applied to situations concerning other foreign central banks.

Chapter 3 of the thesis is delimited to an examination of two potential exceptions to State immunity. First, it is examined if central bank assets could be deprived of immunity from enforcement if the foreign State is designated as a supporter of terrorism. Second, it is examined if central bank assets could be subjected to confiscation if the foreign State has violated peremptory norms. These are not only two of the most widely discussed potential exceptions to State immunity, but also of particular interest for the purpose of this thesis since there is wide consensus that Russia has violated *jus cogens* norms and several States has recognized Russia as a sponsor of terrorism.³³

The term "confiscation" is used to describe an executive measure of constraint which changes the ownership of an asset. A confiscation entails that the State or entity, in this case Russia or more specifically the CBR, who owns the assets at the time of the confiscation lose all rights to the property in question, without any compensation.³⁴

The terms "freezing" and "immobilization" are used interchangeably within the thesis, and refers to a measure of constraint imposed on assets that prevents the owner from moving, accessing and transferring the said assets. When assets are frozen or immobilized, also the interest accrued by the assets remain immobilized and inaccessible for the owner. However, it differs from confiscation in that it does not change the ownership of the assets.³⁵

The term "sanctions" is used broadly to describe the restrictive measures imposed on Russian State assets, regardless of whether these are lawful or unlawful under international law. It should be noted, however, that there is a vital difference between restrictive measures that violate obligations under international law and measures that, while they may injure the foreign State,

³³ C.f. 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), 282–284; Philippa Webb, *Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine* (European Union 2024), 14–16 and 42–44; European Parliament, 'European Parliament Declares Russia to Be a State Sponsor of Terrorism' (*News*, 23 November 2022) <<https://www.europarl.europa.eu/news/en/press-room/20221118IPR55707/european-parliament-declares-russia-to-be-a-state-sponsor-of-terrorism>> accessed 28 April 2025; United Nations General Assembly Resolution adopted by the General Assembly on 2 March 2022 (n 12).

³⁴ Webb (n 33), VII.

³⁵ C.f. *ibid*, VII.

does not implicate any legal obligations. The latter form of measures classifies as “retorsions”.³⁶

1.4 Methodology

To address the posed research question, the thesis employs a legal doctrinal method. As observed by Smits, the legal doctrinal method views the law as a system, meaning it does not merely describe existing legislation and case law, but seeks to combine relevant elements of the law to examine and resolve internal inconsistencies.³⁷ To achieve this, the doctrinal method systemically describes and analyzes the sources of law, including principles, rules and customary law, to then determine the current legal system.³⁸

The doctrine method aligns well with the purpose of the thesis, which intends to describe and assess the legal sources of the international law of State immunity, to then determine the current scope of State immunity, so that it can be examined if a confiscation of central bank assets is compatible with State immunity. Article 38(1) of the Statue of the International Court of Justice [hereafter ICJ Statue] is regarded as the most authoritative source on what constitutes legal sources of international law,³⁹ and lists international conventions, customary international law and general principles of international law as the primary sources of international law, while judicial decisions and scholarly work constitute subsidiary sources.⁴⁰

The general perception is that law of State immunity is regulated by customary international law, which consists of two elements, namely *State practice* and *opinio juris*.⁴¹ Thus, to assess the scope of immunity from enforcement the thesis describes and systematically analyzes evidence of State practice, including *inter alia* judgments from national, regional and international courts; domestic legislation and the commentary of the International Law Commission [hereafter ILC]. Also, evidence of *opinio juris* is addressed *inter alia* by examining in what circumstances States claim they are entitled to

³⁶ Marco Gestri, ‘Sanctions, Collective Countermeasures and the EU’ (2023) 32 The Italian Yearbook of International Law Online 67, 70–71.

³⁷ Jan M Smits, ‘What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research’ in Rob van Gestel, Hans-Wolfgang Micklitz and Edward L Rubin (eds), *Rethinking scholarship: a transatlantic dialogue* (1st edn, Cambridge University Press 2017) 211–212.

³⁸ *ibid.*, 210–213.

³⁹ Shaw (n 26), 59.

⁴⁰ United Nations, Statue of the International Court of Justice 1946, article 38(1).

⁴¹ ‘Yearbook of the International Law Commission’ (1980) Vol. II(2), 147; *North Sea Continental Shelf (Federal Republic of Germany/Denmark v Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 1969 (International Court of Justice), para. 77; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 55.

State immunity and in what situations they object to executive action taken against their property by foreign States.⁴²

Moreover, the method does not only intend to describe *lex lata*, including recent case law,⁴³ but seeks to resolve the “internal inconsistencies among seemingly contradictory materials”.⁴⁴ Indeed, case law and literature within the field of State immunity is riddled with inconsistencies. Thus, the thesis will attempt to systemize the sources to customary law, to interpret and clarify the content of customary law on State immunity from enforcement. It is by clarifying and resolving the internal inconsistencies concerning the scope of State immunity from enforcement, that the question of whether confiscation is permitted under said law, can be answered.

1.5 Material and Previous Research

Fox and Webb claim that “[a]t one time or another, any international lawyer worth his or her salt has seen fit to express views on some aspects of the law of State immunity [...]”.⁴⁵ True, a lot has been said about the customary law of State immunity, including immunity from enforcement. Nonetheless, legal doctrine and State practice is riddled with inconsistencies regarding the scope of State immunity from execution, especially in relation to central banks, and its possible exceptions.⁴⁶ In addition, State practice and *opinio juris* is ever evolving, which is of particular relevance at present in the context of the already heavily sanctioned CBR and the growing political pressure to take further action in the form of confiscation.⁴⁷ Moreover, scholars and States seem increasingly eager to justify potential confiscation of foreign central bank assets as third-party countermeasures, instead of examining its compatibility with the laws on State immunity.⁴⁸ Hence, due to the rapid development in the political context, and the flexibility of customary international law, it is of importance to evaluate whether a confiscation of the CBR assets would be permissible under current customary international law of State immunity from enforcement.

⁴² C.f. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 55.

⁴³ C.f. Smits (n 37), 213.

⁴⁴ *ibid*, 212.

⁴⁵ Hazel Fox and Philippa Webb, ‘Introduction’ in Hazel Fox and Philippa Webb (eds), *The Law of State Immunity* (3rd edn, Oxford University Press 2015), 2.

⁴⁶ C.f. 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), 251–252; (Wuerth) Brunk (n 3), 1635.

⁴⁷ C.f. Wintour (n 5); Canada BILL S-278: An Act to amend the Special Economic Measures Act (disposal of foreign state assets) (n 24).

⁴⁸ C.f. Webb (n 33), 24–31 and 49; Rebuilding Economic Prosperity and Opportunity for Ukrainians Act (n 23), section 101(a)(7); Ingrid Brunk, ‘The Controversial REPO Act Is Now Law’ (*Lawfare*, 25 April 2024) <<https://www.lawfaremedia.org/article/the-controversial-repo-act-is-now-law>> accessed 4 May 2025.

State immunity has its legal basis in customary international law, as listed in article 38(1)(b) in the ICJ Statute.⁴⁹ Yet Fox and Webb argue in *The Law of State Immunity*, that sovereign immunity falls under a number of sources listed in the article 38(1) of the ICJ Statute. For instance, judicial decisions produced by domestic and regional courts is encompassed by subparagraph (d) as “a subsidiary means of determination of rules of law” and, once enforced, these judgments would qualify “as evidence of a general practice accepted as law”, namely customary international law according to subparagraph (b).⁵⁰ Thus, the thesis heavily relies on case law from domestic, regional and international courts.

Also the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 [hereafter UNCSI]⁵¹, which is not yet in force,⁵² and the International Law Commission’s commentary to the Convention is used to assess the content and limits of State immunity from enforcement. The Convention and its commentary is used primarily to examine the protection afforded to central banks under State immunity, and to determine if non-judicial measures of constraint such as non-judicial confiscation falls under the scope of State immunity.⁵³ Since the Convention is not in force yet, Roger O’Keefe and Christian J. Tams’ book *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*,⁵⁴ has proven helpful in interpreting the articles of Convention and shed lights on States’ positions and reservations to its content.

Judgments of the International Court of Justice [hereafter ICJ], in particular *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* are applied both to determine the content and limits of customary law of State immunity from enforcement in general, but also to help interpret to what extent the UNCSI represents State immunity and what constitutes State practice and *opinio juris* of particular significance in the context of State immunity.⁵⁵

⁴⁹ United Nations Statute of the International Court of Justice (n 40).

⁵⁰ Hazel Fox and Philippa Webb, *The Law of State Immunity* (Third edition, Oxford University Press 2013), 13–14; United Nations Statute of the International Court of Justice (n 40), article 38(1)(b) and (d).

⁵¹ United Nations General Assembly, United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 [A/RES/59/38].

⁵² ‘United Nations Treaty Collection’ <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 21 March 2025.

⁵³ C.f. ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries’ (1991) II, Part Two.

⁵⁴ Roger O’Keefe and Christian Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013) <<http://opil.ouplaw.com/view/10.1093/law/9780199601837.001.0001/law-9780199601837>> accessed 5 May 2025.

⁵⁵ C.f. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), paras. 55, 117 and 118.

Literature has been relied upon partly as a means of interpretation of customary law, both to emphasize the aspects of State immunity that appears to be generally accepted, but also to highlight the aspects of State immunity in which State practice and legal scholars are divided as to what constitutes customary law. In particular two chapters from *The Cambridge Handbook of Immunities and International Law* by Tom Ruys, Nicolas Angelet and Luca Ferro is frequently referenced. First, Jean-Marc Thouvenin and Victor Grandaubert's chapter on *The Material Scope of State Immunity from Execution* is a well-versed complement to State practice when examining the scope of State immunity from enforcement.⁵⁶ Second, Ingrid Wuerth's chapter on *Immunity from Execution of Central Bank Assets*, is helpful in interpreting State practice and *opinio juris* specifically in the context of central bank immunity from enforcement.⁵⁷ It should be highlighted that literature is applied carefully, since interpretation of State practice and primarily *opinio juris* is a delicate matter and thus easily misinterpreted

1.6 Structure

The thesis is, apart from the introductory chapter, structured into three substantive chapters, and a final chapter presenting the concluding remarks.

Chapter 2 begins by presenting the legal sources of State immunity and analyzing the existing scope of immunity from enforcement granted to State property. Subsequently, it is assessed if and to what extent central bank property is considered as State property and thus granted immunity from enforcement measures.

Chapter 3 examines if current customary international law of State immunity contains any exceptions by which central bank property could be confiscated without implicating State immunity. This chapter is divided into two subchapters. The first subchapter examines if central bank assets could be deprived of State immunity, if the State owning the assets is designated as a financier of terrorism. The second subchapter examines if central bank assets could be deprived of its State immunity if the owner State has violated *jus cogens* norms.

Chapter 4 analyzes the relationship between State immunity and non-judicial measures of constraint. The chapter examines customary international law, arguments made by legal scholars and contemporary State practice to determine whether State immunity protects central bank property from non-judicial enforcement measures, including confiscation.

⁵⁶ Thouvenin and Grandaubert (n 46).

⁵⁷ Wuerth (n 33).

Chapter 5 provides a few concluding remarks, with the intention to address the primary research question.

2 State Immunity

The following chapter presents the legal sources of State immunity (subchapter 2.1), assess the scope of State immunity from enforcement according to customary law (subchapters 2.2 and 2.3) and examines if and to what extent central banks and their property is afforded State immunity from enforcement (subchapters 2.4.1 and 2.4.2). The chapter is finalized with some concluding remarks on central banks' protection from executive measures under State immunity (subchapter 2.4.3).

2.1 The Law of State Immunity and its Legal Sources

The international law governing sovereign immunity prevents a State from exercising its judicial and enforcement jurisdiction over a foreign State and its property in its national courts.⁵⁸ Hence, State immunity includes two forms of immunity, namely immunity from jurisdiction and immunity from enforcement.⁵⁹ While jurisdictional immunity protects the State itself from judicial proceedings before a foreign State's courts, immunity from enforcement protects the foreign State property from pre- and post-judgment measures of constraint, including attachment, arrest and execution, with a view of enforcing the judgment. Thus, immunity from jurisdiction bars a foreign State from pronouncing verdicts on who is right and wrong on a matter, and immunity from enforcement then protects the property of a State from being subjected to measures of constraint, including confiscation, once the question of who is right and wrong has been settled.⁶⁰

In the influential case of *Schooner exchange v. McFaddon* from 1812, which has been referred to as United States jurisprudence on foreign sovereign immunity, the court held that:

“foreign sovereigns have no right to immunity in [US] courts [...] however, as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over the other sovereigns in certain classes of cases [...]”⁶¹

⁵⁸ Shaw (n 26), 601 and 603; Fox and Webb (n 50), 1.

⁵⁹ C.f. United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), article 5; Fox and Webb (n 50), 23.

⁶⁰ Fox and Webb (n 50), 23; Shaw (n 26), 645; Wuerth (n 33), 267; United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), articles 18 and 19.

⁶¹ *Schooner Exchange v. McFaddon* [1812] the Supreme Court of the United States 11 U.S. 7 Cranch 116; the U.S. Supreme Court explains that the take on immunity as a matter of comity expressed in *Schooner Exchange v. McFaddon* constitutes jurisprudence on the matter of sovereign immunity: *Republic of Austria v. Altman* [2004] the Supreme Court of the United States 327 F.3d 1246.

Although State immunity may have been a matter of reciprocal privilege in the past, the ILC has since affirmed that it has since evolved into “a general rule of customary international law solidly rooted in the current practice of States”.⁶² This determination was subsequently confirmed by the ICJ in *Jurisdictional Immunities*, wherein that court held that the ILC’s conclusion was substantiated by, *inter alia*, national legislation, judicial decisions, consistent claims to immunity and the commentary of States during the drafting process of the UNCSI.⁶³ At present,

“‘[a]ll States, with a very few exceptions, accept sovereign immunity as something which is legally binding under international law’, rather than as a matter of mere comity.”⁶⁴

Consequently, international law on State immunity has its legal basis in customary international law and is derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order as provided by article 2(1) of the UN Charter.⁶⁵ This principle gives rise to the obligation of non-intervention and prevents the courts of the forum State from exercising its jurisdiction on acts attributed to a foreign State, without the consent of the foreign State in question.⁶⁶ It was not until the 21st century that an international treaty on the issue of sovereign immunity was introduced through the UN General Assembly’s adoption of the UNCSI.⁶⁷ The UNCSI defines State immunity as follows “[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State [...]”⁶⁸ In this context, it should be emphasized that while international law lays out the requirements of when, what and how immunity is acquired by States and their property, it is ultimately national legislation and domestic courts that apply the law and thus influences the precise extent and manner of application.⁶⁹

While, the UNCSI is not yet in force, as it presently has 24 out of the required 30 State parties,⁷⁰ several articles within the Convention are understood as a

⁶² ‘Yearbook of the International Law Commission’ (n 41), 147 para 26.

⁶³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 56.

⁶⁴ Hathaway, Mills and Posten (n 8), 999.

⁶⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para. 57; United Nations Charter of the United Nations (n 9), article 2(1).

⁶⁶ Shaw (n 26), 605; Webb (n 20), 335; 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.

⁶⁷ United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51).

⁶⁸ *ibid*, article 5.

⁶⁹ Fox and Webb (n 50), 1; Shan and Wang (n 66), 63.

⁷⁰ ‘United Nations Treaty Collection’ (n 52).

reflection of customary international law.⁷¹ On the one hand, the Convention's relatively few State parties may not provide much evidence of State practice and *opinio juris*. On the other hand, the provisions of the UNCSI have been enacted in domestic legislation in a number of countries including France, Japan, Spain and Sweden and additionally the Convention is commonly referenced in court proceedings concerning immunity.⁷²

For example, in the case of *Oleynikov v. Russia* the European Court of Human Rights [hereafter ECtHR] found that the Convention applies as customary international law "[...] even if the State in question has not ratified [the] convention, provided it has not opposed it either [...]".⁷³ The ECtHR has in several cases referred to specific articles in the Convention as a reflection of customary international law applicable to States, as long as the State has not objected to the adoption of the Convention as a whole⁷⁴ or objected to the relevant article in question during the negotiation and adoption of the UNCSI.⁷⁵ The ICJ took a more cautious approach to the UNCSI in *Jurisdictional Immunities* and held that the work of the ILC, the negotiations during the drafting process, the signatures and ratifications of the Convention, and the application of the Convention could constitute evidence of State practice and *opinio juris*.⁷⁶ At present, it is generally accepted, that customary international law continues to govern the law on State immunity, and the UNCSI is relevant only insofar it reflects customary international law.⁷⁷

2.2 State Immunity from Enforcement

In recent years, immunity from enforcement has attracted public attention, a development Webb attributes to international efforts to confiscate sovereign Russian assets, including CBR assets and reserves, to secure reparations and provide financial support for military efforts in Ukraine.⁷⁸

Initially, it is of significance to note that there is no absolute rule within international law that prohibits enforcement against foreign State property,

⁷¹ C.f. (Wuerth) Brunk (n 3), 3; Webb (n 33), 15; Thouvenin and Grandaubert (n 46), 250.

⁷² Webb (n 20), 340; c.f. Fox and Webb (n 50) 2.

⁷³ *Case of Oleynikov v Russia* [2013] European Court of Human Rights Application no. 36703/04, paras. 66 and 68.

⁷⁴ *Case of Naku v Lithuania and Sweden* [2016] European Court of Human Rights Application no. 26126/07, paras. 60 and 89.

⁷⁵ *Case of Wallishauser v Austria* [2012] European Court of Human Rights Application no. 156/04, para. 69; Webb (n 20), 341–342.

⁷⁶ Webb (n 20), 342; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para. 55.

⁷⁷ Fox and Webb (n 45), 2.

⁷⁸ Webb (n 20), 355; European Council, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Support Ukraine's Self-Defence and Reconstruction' (21 May 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/extraordinary-revenues-generated-by-immobilised-russian-assets-council-greenlights-the-use-of-windfall-net-profits-to-support-ukraine-s-self-defence-and-reconstruction/>> accessed 13 April 2025.

nonetheless there are several crucial restrictions on such execution measures.⁷⁹ In general, States appear hesitant to limit the scope of State immunity from enforcement, which has prompted it to be called “the last bastion of State immunity”.⁸⁰ This is likely due to how enforcement measures against State property are generally conceived as more intrusive than a judgment rendered by a domestic court.⁸¹

Therefore, it is important to distinguish between immunity from jurisdiction and from enforcement. The distinction between immunity from adjudication and executive measures is articulated by the ICJ in *Jurisdictional Immunities*, wherein the court reaffirmed that:

“[...] immunity from enforcement enjoyed by [S]tates in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same [S]tates before foreign courts.”⁸²

The distinction between immunity from jurisdiction and enforcement provides, as explained by the ICJ, that even when a lawful judgment has been rendered against a foreign State, for instance if Russia was to waive its immunity from jurisdiction, it does not follow *ipso facto* that the State against which the judgment has been given, can be subjected to measures of constraint to enforce the judgment, for instance through seizing CBR’s foreign reserves. Therefore, customary international law regulating the two types of immunity must be applied separately.⁸³

This approach to immunity from jurisdiction and enforcement is mirrored, and further settled, in the UNCSI, for instance article 20 of the Convention states that “[w]here consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint”.⁸⁴ Although the Convention largely touches upon jurisdictional immunity, part IV of the Convention specifically regulates State immunity from measures of constraint in connection with proceedings before a court of another State. As highlighted in subchapter 2.1, while the UNCSI is only partly considered to reflect customary international law, *inter alia* Thouvenin and Grandaubert holds that this is especially true in relation to immunity from enforcement.⁸⁵ Article 18

⁷⁹ James Crawford, *Brownlie’s Principles of Public International Law* (Ninth edition, Oxford University Press 2019), 487.

⁸⁰ August Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’ (2006) 17 *European Journal of International Law* 803, 804.

⁸¹ Fox and others (n 26), 23.

⁸² *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 113.

⁸³ *ibid*, para. 113.

⁸⁴ United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), article 20.

⁸⁵ Thouvenin and Grandaubert (n 46), 250.

of the UNCSI provides that no pre-judgment measures of constraint, such as attachment or arrest, may be taken against property of a State unless the State has expressly consented or allocated property for the ‘satisfaction of the claim which is the object of that proceeding’.⁸⁶ More importantly, article 19 regulates post-judgment measures of constraint, and introduces an additional exception to immunity of enforcement in its sub-paragraph (c), for when “it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum” and the property in question “has a connection with the entity against which the proceeding was directed”.⁸⁷

Notably, in *Jurisdictional Immunities*, the ICJ identified three exceptions to State immunity from post-judgment enforcement measures under customary international law, which were essentially identical to those outlined in article 19 UNCSI.⁸⁸ Thus, while the court refrained from determining if all aspects of article 19 of the UNCSI reflected customary international law, it essentially reaffirmed that the scope of State immunity from post-judgment measures codified in article 19, reflected customary law.⁸⁹ Consequently, Russia’s State property appears to be protected against post-judgment enforcement measures, unless the property is used for other than government non-commercial purposes. This raises the questions of (i) whether CBR assets are considered as State property and (ii) if so, whether central bank assets are granted the same immunity from enforcement measures as other State property under the laws of State immunity.

2.3 State Immunity from Execution for Central Banks

2.3.1 Central Bank Assets as State Property

To assess whether the foreign reserves of the CBR are protected by immunity from enforcement, it must first be determined whether the CBR can be classified as a “State”, as immunity from enforcement applies specifically to States and their property.

According to Kamminga, central banks – despite how some may enjoy considerable autonomy from their governments – are viewed as a State organs

⁸⁶ United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), article 18(a) and (b).

⁸⁷ *ibid*, article 19.

⁸⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 118; Chester Brown and Roger O’Keefe, ‘Article 21’ in Roger O’Keefe and Christian J Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013), 346.

⁸⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), paras. 117-118.

and thus acquire State sovereignty according to international law and consequently immunity from execution.⁹⁰ However, as central banks became more independent from the State during the twentieth century, it has proven more difficult to define them as foreign States or other entities entitled to State immunity. Hence, this shift led to changes in the classification of central banks in relation to State immunity.⁹¹

Accordingly, Thouvenin and Grandaubert takes a more cautious approach and claim that one must look at the relationship between the State and the central bank to determine if the bank is entitled to State immunity. They hold that it follows from the UNCSI that the property of a central bank is protected so long as the bank is seen as the State in accordance with article 2(1)(b) of the UNCSI, since only States enjoy immunity for their property under customary law and article 5 of the UNCSI.⁹²

Article 2 of the Convention defines a State as *inter alia* “the State and its various organs of government” or as “agencies or instrumentalities of the State or other entities, to the extent that they are *entitled to perform* and are *actually performing acts* in the exercise of sovereign authority of the State”.⁹³ Consequently, if a central bank is an independent body it won’t be categorized as an organ of the State, however it may still be categorized as an agency or instrumentality of the State, but this requires that the central bank is not only entitled to but also “actually *act* in exercise of sovereign authority”.⁹⁴ Nonetheless, the precise definition of “exercis[ing] sovereign authority” is not easily translated into reality, especially since the language is broad, as acknowledged by Thouvenin and Grandaubert.⁹⁵ O’Keefe and Brown notes that insofar the central bank is entitled to act as the State’s monetary authority, it can be presumed that the bank is at least authorized to “perform acts in the exercise of the State’s sovereign authority”.⁹⁶

Wuerth takes a similar approach to Thouvenin and Grandaubert and argues that also customary international law, much like the UNCSI, requires central banks to qualify either directly as State organs or as agencies and instrumentalities of States, to generate State immunity from execution for their property. Like Thouvenin and Grandaubert, she emphasizes the complexity of making such a classification and attributes this difficulty to how central banks

⁹⁰ Kamminga (n 1), 5.

⁹¹ Wuerth (n 33), 268.

⁹² Thouvenin and Grandaubert (n 46), 252–253.

⁹³ United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), article 2(1)(b)(iii) (emphasis added).

⁹⁴ Thouvenin and Grandaubert (n 46), 252–253.

⁹⁵ *ibid*, 253; c.f. Wuerth (n 33), 276 and 278.

⁹⁶ Brown and O’Keefe (n 88), 343.

have become increasingly independent from States during the last four decades.⁹⁷ Nonetheless, she holds that States in general, based on judgments by domestic courts and national legislation, tend to grant central banks State immunity from enforcement.⁹⁸

According to article 75 of the Constitution of the Russian Federation the primary task of the CBR is to protect and ensure the stability of the ruble and it shall fulfil this task independently from other bodies of State authority. The central bank is also entrusted with exclusively carrying out Russia's "[m]oney issue[s]".⁹⁹ For instance the CBR has exclusive right to "issue currency and organize its circulation".¹⁰⁰ Consequently, the Russian constitution confirms that the CBR is indeed an independent body, yet it is clearly entrusted with governmental powers. In addition, the CBR states on its official website that its mission is to strengthen and develop Russia's banking system and that it is entitled to "regulate, exercise control of and supervise the financial markets", for instance through supervising and regulating pension funds and insurance companies.¹⁰¹ In the light of this, it appears the bank is not only entitled to perform acts in the exercise of sovereign authority of the State, but also in fact acts in the exercise of this authority. As such CBR should be considered as a "State", hence its property is entitled to some form of immunity from enforcement.

2.3.2 The Protection of Central Bank Assets under the Law of State Immunity

While the CBR is, based on the conclusions drawn in the previous subchapter, considered as a "State" in the context of State immunity and thus entitled to State immunity, it needs to be examined if all the immobilized CBR assets *ipso facto* enjoy immunity from executive measures in connection with judicial proceedings and if not, what conditions must the CBR fulfill to enjoy such immunity.

Article 21 of the UNCSI lists a few categories of State property that should not be considered as property used or intended to be used for other than government non-commercial properties, hence this article provides an exception

⁹⁷ Wuerth (n 33), 278; Alex Cukierman, 'Central Bank Independence and Monetary Policymaking Institutions — Past, Present and Future' (2008) 24 *European Journal of Political Economy* 722, 722 and 724; United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), c.f. article 2(1)(b)(i) and (iii).

⁹⁸ C.f. Wuerth (n 33), 278; Australia, Foreign States Immunities Act 1985, article 35(1); United Kingdom, State Immunity Act 1978 [1978 Chapter 33], sec. 14(4); Singapore, State Immunity Act 1979 [the Statutes of the Republic of Singapore], sec. 16.

⁹⁹ Constitution of the Russian Federation 1993 article 75(1) and (2).

¹⁰⁰ 'Legal Status and Functions' (*Bank of Russia*) <https://www.cbr.ru/eng/about_BR/bankstatus/> accessed 16 March 2025.

¹⁰¹ 'About Bank of Russia' (*Bank of Russia*, 26 November 2024) <https://www.cbr.ru/eng/about_br/> accessed 27 March 2025; 'Legal Status and Functions' (n 100).

to the exception in article 19(c). The property categories listed in article 21 of the Convention are thus granted nearly absolute immunity from executive measures in connection with judicial proceedings, as it can be subjected to such measures only when the foreign State consents to it.¹⁰² Subparagraph 21(1)(c) lists property of central banks as property that should not be considered to be used or intended to be used for commercial purposes.¹⁰³ In its commentary to the draft articles, the ILC explains this extra protection by arguing that certain categories of property, including the property of central banks, needs special protection “in the view of the trend in certain jurisdictions to attach or freeze assets of foreign States, especially [...] assets of the central bank”.¹⁰⁴ Consequently, the wording in UNCSI suggests that central bank property, including the property of CBR, enjoy a far stretched, if not absolute, immunity from enforcement as the central bank seemingly cannot be subjected to pre- or post-measures of constraint in any circumstances (unless the foreign State has consented to it), regardless of what property is used for.

Yet, in *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Brown and O’Keefe observe that while several of the other categories of property that are afforded extra protection by article 21(1) of the UNCSI, have obtained the same protection under customary international law, State practice concerning central bank property is less coherent.¹⁰⁵ Not even the States that have adopted legislation on State immunity are coherent in their practice, as some States consider all property of foreign central banks to be immune from enforcement measures, while other States treat central bank assets like any other State property.

The lack of consensus amongst States on how central bank assets are to be protected from measures of constraint was noticeable in the drafting process of the UNCSI.¹⁰⁶ For instance Germany, Australia, Qatar and the five Nordic States all opposed the proposition that all central bank property should be labeled as “not in use or intended for use for commercial purposes” and thus be granted near-absolute immunity, and instead suggested that only property serving “monetary purposes” should be considered as uncommercial. Nevertheless, when a new, more restrictive, formulation that aligned with sentiment was proposed, other members opposed it, and the formulation was eventually dropped due to a lack of support.¹⁰⁷

¹⁰² United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), articles 19 and 21.

¹⁰³ *ibid*, article 21(1)(c).

¹⁰⁴ ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries’ (n 53), 58–59 para 2.

¹⁰⁵ Brown and O’Keefe (n 88), 346.

¹⁰⁶ C.f. *ibid* 337 and 347.

¹⁰⁷ *ibid*, 337; ‘Yearbook of the International Law Commission’ (1991) Vol. II(2) Report of the Commission to the General Assembly on the work of its forty-third session 1, 59.

According to Wuerth, an increasing number of States provide central bank property with near-absolute immunity from executive measures.¹⁰⁸ For instance, the exception found in article 21(1)(c) of the UNCSI can be found also in certain national legislation, including the United Kingdom’s State Immunity Act,¹⁰⁹ Pakistan’s State Immunity of Ordinance,¹¹⁰ and Singapore’s State Immunity Act,¹¹¹ and as such these States provide immunity for central bank assets regardless of whether the central bank property is used for commercial purposes.¹¹² Likewise, Argentina, China, Japan and South Africa also provide central banks with a near-absolute immunity from measures of constraint.¹¹³ The common exception to immunity from execution within the legislation of these States, is consent. Notwithstanding, Argentina, China and Russia also limit immunity by the application the principle of reciprocity.¹¹⁴

So far, it seems central bank property is afforded a more generous immunity from enforcement measures, compared to other State property. Nevertheless, as pointed out by O’Keefe and Brown, not all States grants central bank assets with near-absolute protection from enforcement measures.¹¹⁵ Wuerth suggests State immunity from post-judgment executive measures should be viewed as a spectrum, on which the most protective States (discussed above) offers a near-absolute immunity from execution and the least protective States treat central bank assets as any other type of State property and thus tend to deny immunity from post-judgment enforcement, for property used for commercial activities.¹¹⁶

States in the middle of the spectrum typically either grant central banks a high, though not absolute, level of protection, or they extend a high level of protection for all State property.¹¹⁷ For instance, the European Convention on State Immunity [hereafter ECSI] provides a high level of protection for all State-owned property, but provides no special protection for central bank property.¹¹⁸ Article 23 of the Convention states that:

“[n]o measures of execution [...] against the property of a Contracting State may be taken in the territory of another Contracting State except

¹⁰⁸ Wuerth (n 33), 269.

¹⁰⁹ United Kingdom State Immunity Act (n 98), sec. 14(4).

¹¹⁰ Pakistan, The State Immunity Ordinance 1981, sec. 15(4).

¹¹¹ Singapore State Immunity Act (n 98), article 16(4).

¹¹² C.f. Wuerth (n 33), 269–271.

¹¹³ Wuerth (n 33) 269; c.f. Webb (n 20) 357.

¹¹⁴ Wuerth (n 33), 270.

¹¹⁵ C.f. Brown and O’Keefe (n 88), 346.

¹¹⁶ Wuerth (n 33), 266.

¹¹⁷ Wuerth (n 33), 271.

¹¹⁸ C.f. Council of Europe, European Convention on State Immunity 1972 [ETS No. 074]; Wuerth (n 33), 271.

where and to the extent that the State has expressly consented thereto [...].”¹¹⁹

Subsequently, while the ECSI does not grant central banks any special protection, it instead provides all State property with a near-absolute immunity, only subjected to exception through consent.

The United States Foreign Sovereign Immunities Act 1976 [hereafter FSIA], on the other hand, provides a special post-judgment immunity from executive measures for central bank property, similar to the UNCSI.¹²⁰ The FSIA states that the property of a “foreign central bank or monetary authority *held for its own account*” is immune from execution measures in relation to a judicial process, unless the immunity is explicitly waived.¹²¹ The obvious question is thus what the condition “held for its own account” entails. In *NML Capital, Ltd v. Banco Central de la República Argentina*, which is considered to be the authoritative case on interpreting this phrase,¹²² the court stated that when “funds are held in an account in the name of a central bank [...] the funds are presumed to be immune from attachment”.¹²³ The court added that this presumption could be overturned if it can be demonstrated that the central bank assets are not used for central banking functions, “irrespective of their commercial nature”.¹²⁴ The court did not adopt a comprehensive definition on what constitutes central banking functions, but instead recognized that activities of central banks will change over time.¹²⁵ Hence, as long as the central bank assets are held in an account in the name of the central bank and used for the broadly defined central banking functions, the assets are afforded near-absolute immunity from post-judgment enforcement measures, as the FSIA does not distinguish between assets used for commercial or non-commercial activities.¹²⁶

Germany, on the other hand, grants immunity from enforcement when foreign central bank assets serve a sovereign *purpose*, similar to the treatment of other

¹¹⁹ Council of Europe, European Convention on State Immunity (n 118), article 23.

¹²⁰ Wuerth (n 33) 271.

¹²¹ Foreign Sovereign Immunities Act 1976, paras. 1611(a) and 1611(b)(1) (emphasis added).

¹²² Wuerth (n 33), 272.

¹²³ *NML Capital, Ltd et al v Banco Central de la República Argentina* [2011] Court of Appeals (Second Circuit) 652 F.3d 172, 39–40.

¹²⁴ *ibid*, 40; Wuerth (n 33), 272.

¹²⁵ Reagan Reynolds, ‘NML Capital, Ltd. v. Banco Central de La República Argentina: The Second Circuit Reinforces Immunity Protection over Foreign Central Banks’ (2012) 20 Tulane Journal of International and Comparative Law <<https://journals.tulane.edu/jicl/article/view/3245>> accessed 15 May 2025.

¹²⁶ The United States does, however, permit post-judgment executive measures against foreign central bank assets as an exception to State immunity from enforcement in cases wherein the owner-State is designated as a sponsor of terrorism, see subchapter 3.1.1; Wuerth (n 33), 272.

types of State property. However, because the emphasis is placed on the purpose rather than the nature of the activity, the immunity provided to central banks is likely to encompass otherwise commercial activities; such as lending money to private banks or providing financial assistance to distressed companies.¹²⁷

The French Monetary and Financial Code states that central bank assets of any kind, in particular foreign reserve assets, cannot be seized. Notwithstanding, the Code makes an exception for assets that “form part of resources allocated to a primary activity governed by private law”. However, it is the creditor who holds the burden of proof, and thus needs to prove that the central bank assets are assigned to a primary activity governed by private law, which in reality is quite complicated.¹²⁸ Especially, since as Webb states “[i]t is widely accepted that central bank property enjoys extensive immunity because it is assumed to be used for government non-commercial purposes”¹²⁹

Alas, the least protective States, including Australia, Canada and Israel, grant central bank assets the same immunity from enforcement as any other State property. In these States central bank assets are not immune when used for commercial activities.¹³⁰ For instance, Canada’s State Immunity Act states that:

“property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial *activity* is immune from attachment and execution.”¹³¹

Unlike the German legislation on State immunity, which requires a sovereign purpose test, Canada’s legislation rather focuses on the activity itself. As observed above, while some activities are inherently commercial, they may still serve a sovereign purpose. Accordingly, since the Canadian Act is focused on the nature of the act rather than its purpose, it appears that Canada affords foreign central bank assets less protective immunity from enforcement.

However, irrespective of how much protection a state offers central bank assets from post-judgment enforcement measures, no States question if central bank assets used for monetary purposes should be afforded immunity.¹³² Moreover, since foreign currency reserves “unquestionably serve a monetary purposes”, these are afforded absolute immunity.¹³³ The EU regulations that governs the sanctioned CBR assets within the EU, consistently reference

¹²⁷ *ibid*, 273.

¹²⁸ *ibid*, 274-275.

¹²⁹ Webb (n 20), 357.

¹³⁰ Wuerth (n 33), 276.

¹³¹ Canada, State Immunity Act 1985 [R.S.C., 1985, c. S-18], article 12(4) (emphasis added).

¹³² Brown and O’Keefe (n 88), 337.

¹³³ Wuerth (n 33), 281.

CBR property as “reserves and assets”.¹³⁴ Additionally also the EU Ad Hoc Working Party on Frozen Assets referred to the immobilized CBR property as both assets and reserves, and seemed to use the terms interchangeably.¹³⁵

2.3.3 Conclusion

Consequently, it appears customary international law provides central bank assets with a more generous immunity from post-judgment executive measures compared to other State property, although not quite as absolute as the protection under article 21(1)(c) of the UNCSI.

Notably, article 21(1)(c) of the UNCSI and customary law does not render *all* central bank property immune from enforcement measures. The bank must first be classified as an organ of the State or a State agency, instrumentality or other entity with a legal personality separate from the foreign State. In case the central bank is an independent organ, which is the case for the CBR, it is considered a “State” for the purposes of the UNCSI article 2(1)(b)(iii) only to the extent that is entitled to perform and actually performs acts in the exercise of sovereign authority of the State. Notably, customary international law and the UNCSI appears to be fairly aligned in this assessment. Moreover, as asserted in subchapter 2.4.1, although independent from the State, the CBR is entitled to performs acts, and in fact does so, in the sovereign authority. Accordingly, the CBR is to be classified as a “State” in the context of State immunity, providing its assets with immunity from enforcement measures, including confiscation, in connection with judicial proceedings under customary international law and the UNCSI.

According to article 21(1)(c) of the UNCSI, all of the immobilized CBR assets would be provided near-absolute immunity from executive measures in connection to judicial proceedings, since the property of central banks under no circumstances are considered to be used or intended to be used for commercial purposes. As such, the CBR assets would be subject to execution only insofar that Russia has consented to it or allocated CBR assets to satisfy a court judgment.¹³⁶ Nonetheless, the Convention is not yet in force, and State immunity is still regulated by customary international law. Thus, the question regarding how extensive the immunity the CBR assets are afforded under customary international law remains.

¹³⁴ C.f. Council Regulation (EU) 2024/576 of 12 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine 2024 [ST/5438/2024/INIT]; Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) no 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine (n 22).

¹³⁵ C.f. General Secretariat of the Council of the European Union, ‘AWHP Frozen Assets - Non Paper by the Commission Services on Generation of Resources to Support Ukraine - Item 3’ (2023) WK 3926/2023 INIT, 3.

¹³⁶ C.f. subchapter 2.2.

Regardless of whether a State falls on the more or less protective side on the continuum, they still offer some form of immunity from attachment and execution for central banks. At the very least, foreign central bank assets not used for commercial activities are immune from executive measures, as this is what the least protective States provide. However, much indicates that customary international law extends greater immunity than this to central banks.

As noted in subchapter 2.1, the ICJ observed in *Jurisdictional Immunities* that the work of the ILC, the negotiations during the drafting process, the signatures and ratifications of the Convention could constitute evidence of State practice and *opinio juris*.¹³⁷ This supports the proposition that central bank property could be afforded near-absolute immunity from executive measures also under customary international law, *inter alia* since the negotiations during the drafting process of the UNCSI showed a lack of support for the alternative formulation for article 21(2)(c) which would only grant immunity from enforcement measures for central bank assets that served “monetary purposes”.¹³⁸ At the very least, this implies that States consider central bank assets to have an extensive immunity from execution. This is further reflected in the number of signatures and ratifications of the final version of article 21(1)(c) of the UNCSI.¹³⁹

Moreover, it is evident that several States, including *inter alia* China, Japan, Pakistan, Singapore and the United Kingdom, have adopted variations of article 21(1)(c) in their domestic legislation and thus provide central banks with near-absolute immunity from measures of constraint. Moreover, while formulated differently, both the ECSI and the United States’ FSIA, which both offer moderate protection from post-judgment executive measures according to Wuerth, appears to in practice provide near-absolute immunity. The ECSI holds consent as the only exception to immunity from execution of State-owned property, including central bank property, and the FSIA taken in conjunction with case law offers all central bank property used for central banking functions (which is refrains from defining) immune, regardless of whether the property is used for commercial activities. Furthermore, Germany extends immunity to central bank assets, insofar they serve a sovereign purpose, but as observed due to the emphasis on purpose, the immunity likely encompasses activities that are inherently commercial.

The least protective States, including Australia, Canada and Israel, do not provide central bank assets with any special protection, but treat it as any other State-owned property and as such central bank assets are not protected when used for commercial activities, regardless of whether they serve a sovereign purpose. Although the commercial activity approach employed by the least protective States represents the lowest common denominator, it deviates

¹³⁷ C.f. subchapter 2.1.

¹³⁸ C.f. subchapter 2.4.2.

¹³⁹ C.f. subchapter 2.1.

notably from the extensive and often near-absolute immunity provided by the most protective and moderately protective States. It also appears that few States, and arguably no major financial centers, subscribe to this quite restrictive approach. For instance, no States questioned during the drafting of the UNCSI whether at the very least central bank property used for “monetary purposes” should be afforded absolute immunity from enforcement during the drafting process of the UNCSI.¹⁴⁰ Yet, the commercial activity approach practiced by *inter alia* Canada without reference to purpose could strip assets used for monetary purposes of its immunity, if they pursue the purpose through commercial activities.

Accordingly, it appears that customary international law grants immunity at least to central bank property that serve sovereign interests or is used for central banking functions, regardless of the nature of the acts. Based on the Russian Constitution and information provided by CBR itself, it is evident that the CBR assets fulfils these conditions, as the purpose of the bank is to ensure stability for Russia’s national currency. In addition, as provided in subchapter 2.3.2, foreign currency reserves are presumed to serve monetary purposes and thus enjoy absolute immunity. While neither the EU nor Russia has clearly stated that *all* the frozen assets constitute foreign reserves, these assets are nonetheless referenced as “assets and reserves” within EU regulations. This too suggests that the frozen CBR assets are granted absolute immunity from enforcement measures, including confiscation, in connection with judicial proceedings before domestic courts.

¹⁴⁰ Subchapter 2.4.2.

3 Exceptions to State Immunity for State Property

As asserted in chapter 2, State Property is protected by State immunity from pre- and post-judgment enforcement measures, at least insofar the property is used for activities pursuing governmental non-commercial purposes. Moreover, the property of central banks enjoys a particular generous sovereign immunity from measures of enforcement, under customary international law.¹⁴¹ Yet, a number of States and legal scholars have adopted and endorsed specific exceptions to sovereign immunity, by which a foreign State is denied State immunity for its property based on actions undertaken by the foreign State itself.¹⁴² Chapter 3 examines two such exceptions which, if applicable according to customary international law, could permit a confiscation of the immobilized CBR assets. First, subchapter 3.1 examines if central bank assets could be deprived of its entitlement to State immunity from enforcement measures if the owner-State is designated as a terrorism supporter. Second, subchapter 3.2 examines if customary international contains an exception to State immunity for State property in cases wherein the owner-State has violated *jus cogens* norms.

3.1 Exception to State Immunity due to Financing of Terrorism

3.1.1 The United States and its Application of a Terrorism Exception to State Immunity

The United States has enacted a so called “terrorism exception” to State immunity, through which the post-judgment immunity from executive measures is lifted for *inter alia* central banks, in “cases involving the enforcement of terrorism-related judgments”.¹⁴³ The seizure of the assets of the central bank of Iran, Bank Markazi, because of the 1983 terrorist attack in Beirut serve as a practical example of how the United States has applied the “terrorism exception” in practice. The terrorist attack in Beirut affected more than 1,000 individuals, most of whom were French and American personnel serving on a peacekeeping mission during the Lebanese civil war.¹⁴⁴

In the year following the terrorist attack, the United States categorized Iran as a “State sponsor of terrorism”, and in 1996 the United States amended the FSIA so that States designates as “State sponsors of terrorism” were stripped

¹⁴¹ Wuerth (n 33), 266; Webb (n 20), 356; Angelina Maleska, ‘From Rubles to Hryvnia: The Freezing and Seizing of Russian Assets to Rebuild Ukraine’ (2024) 99 Tulane Law Review 191, 211.

¹⁴² Maleska (n 141), 211.

¹⁴³ Wuerth (n 33), 282; Maleska (n 141), 211.

¹⁴⁴ Maleska (n 141), 211.

of their immunity from jurisdiction and enforcement in certain cases involving allegations of for instance extrajudicial killing, hostage taking and torture. The amendment of the FSIA opened up the possibility to file lawsuits against Iran before the United States' domestic courts, for damages arising from the acts just mentioned.¹⁴⁵ Then in 2002, the United States enacted the Terrorism Risk Insurance Act, which permitted that blocked assets of a State sponsor of terrorism were subjected to "execution or attachment in aid of execution" in order to satisfy a judgment pronounced in accordance with the terrorism exception under FSIA. Lastly, in 2008 the then President of the United States, Barack Obama, issued Executive Order 13599, which blocked all assets of the Government of Iran within the United States territory, including those of its central bank.¹⁴⁶ Consequently, in 2016, the Supreme Court of the United States reaffirmed a lower court order to confiscate roughly USD 1.75 billion in immobilized Iranian sovereign assets to compensate relatives of the victims from the attack in 1983.¹⁴⁷

The enactment of legislations and actions taken by the United States raises an interesting question of whether foreign State property could be deprived of its protection from post-judgment executive measures, if the State owning the property is considered as a sponsor of terrorism. Subchapter 3.1.3 examines whether the United States' domestically implemented exception to State immunity from enforcement is compatible with customary law on State immunity.

3.1.2 The European Union and a Potential Legal Basis for a Terrorism Exception to State Immunity

In a press release from 23 November 2022 the European Parliament identified Russia as a "state sponsor of terrorism". The Parliament also called on the EU and its member States adopt a legal framework that would allow for the EU to officially designate States as sponsors of terrorism, so that Russia could potentially be added to such a list.¹⁴⁸ Does this declaration indicate that also the EU has adopted a terrorism exception to State immunity from enforcement measures?

Despite the classification of Russia as a State sponsor of terrorism, the European Parliament notes that the EU does not have any regulations that allows

¹⁴⁵ *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* [2023] ICJ Rep 2023 51 (International Court of Justice), paras. 24-25.

¹⁴⁶ the United States, 'Executive Order – Blocking Property of the Government of Iran and Iranian Financial Institutions' (*The White House Office of the Press Secretary*, 6 February 2012) <[https://obamawhitehouse.archives.gov/the-press-office/2012/02/06/executive-order-blocking-property-government-iran-and-iranian-financial->](https://obamawhitehouse.archives.gov/the-press-office/2012/02/06/executive-order-blocking-property-government-iran-and-iranian-financial-) accessed 17 April 2025; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 145), paras. 26 and 28.

¹⁴⁷ Maleska (n 141), 211.

¹⁴⁸ European Parliament (n 33).

the union to officially designate States as sponsors of terrorism. Consequently, unlike United States, it appears there are no current EU regulations which would allow member States to confiscation sovereign assets from States designated as terrorism sponsors.

Notwithstanding, in 2005 the Council of Europe adopted the Council of Europe Convention on Laundering Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism commonly known as the Warsaw Convention 2005.¹⁴⁹ At present the Convention has 39 parties, including Belgium, the State that holds the vast majority of the immobilized Russian sovereign assets within the EU through its central security depository [hereafter CSD], Euroclear.¹⁵⁰ It has been suggested that the Convention may serve as a legal basis for the confiscation of CBR assets, provided that Russia has financed terrorism within the meaning of the Warsaw Convention.¹⁵¹

The Warsaw Convention requires its State parties to take legislative or other measures to enable it to *inter alia* freeze, seize and confiscate property used for the financing of terrorism.¹⁵² However, neither the Convention nor the Convention's explanatory note makes any mention of whether third State property falls within the scope of the Convention and thus if the Convention could justify confiscation of for instance sovereign Russian assets.¹⁵³ Furthermore, article 28(1)(a) of the Convention states that cooperation may be refused if "the action sought would be contrary to the fundamental principles of the legal system of the requested Party", according to Webb, State immunity may be considered as a fundamental principle, and thus hinder application of the Convention to third State property.¹⁵⁴ Moreover, since Russia is one of the State parties to the Convention, it may be tempting to claim that this indi-

¹⁴⁹ Council of Europe, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 [CETS No. 198].

¹⁵⁰ *ibid*; 'MEPs to Push for Seizing Russian Assets and Phasing out Russian Energy' (6 March 2025) <<https://www.europarl.europa.eu/news/en/agenda/briefing/2025-03-10/3/meps-to-push-for-seizing-russian-assets-and-phasing-out-russian-energy>> accessed 28 April 2025; Council of Europe, 'Chart of Signatures and Ratifications of Treaty 198' (*Treaty Office*, 2 May 2025) <<https://www.coe.int/en/web/conventions/full-list>> accessed 2 May 2025.

¹⁵¹ C.f. Webb (n 33), 42–44.

¹⁵² Council of Europe, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (n 150); Webb (n 33), 43.

¹⁵³ C.f. 'Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism' (Council of Europe 2005) No. 198; Council of Europe Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (n 149), article 1 and 2.

¹⁵⁴ Council of Europe Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (n 149), article 28(1)(a); Webb (n 33), 43.

cates that Russia has waived its State immunity. However, the general understanding is that a waiver of immunity must be unequivocal and express, not implied as is the case here.¹⁵⁵

To conclude, it is unlikely that the Warsaw Convention would equate a European attempt to exercise a terrorism exception from State immunity, that would allow for the EU to (at least under EU legislation) to confiscate foreign central bank assets. This is attributed to the ambiguity of the Convention's applicability on State-owned property and the limitations imposed on the applicability of Convention in relation to domestic fundamental principles. Moreover, as previously noted, the EU lacks a formal system to designate States as sponsors of terrorism, which complicates the assessment of whether the CBR assets could be considered to be used for the financing of terrorism.¹⁵⁶ Thus, it is evident that the EU, at present, has not adopted a terrorism exception to State immunity from execution for foreign State property.

3.1.3 The Existence or Non-Existence of a Terrorism Exception to Immunity under Customary International Law

Notwithstanding the lack of legal basis within the EU to confiscate foreign State property, it remains of interest to assert whether customary international law allows States to limit State immunity for foreign State-owned property, including central bank assets, in cases where the foreign State is designated as a sponsor of terrorism. If allowed, this may provide the EU with a way forward in their quest to confiscate CBR assets without implicating the customary law of State immunity.

Initially it should be observed that the United States' confiscation of the Iranian central bank assets through post-judgment execution prompted Iran to file a complaint to the UN Secretary-General in 2016, wherein Iran held that the United States had breached international law by permitting "private litigations to bring civil action before United States domestic courts against sovereign States, including the Islamic Republic of Iran".¹⁵⁷ The complaint, and its position on the immunity from enforcement enjoyed by State property in general and central bank property in particular, was subsequently supported by the Coordinating Bureau of the Non-Aligned and its 120 members

¹⁵⁵ Although for example the law of the United States allows for implied consent to waive immunity from jurisdiction and from execution, this does not align with the general understanding of waivers of immunity under customary international law, see Webb (n 20), 343–344.

¹⁵⁶ Webb (n 33), 43–44.

¹⁵⁷ A/70/853-S/2016/400 from Gholamalia Khoshroo, 'Letter Dated 28 April 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General' (28 April 2016) <<https://digitallibrary.un.org/record/828768?ln=en&v=pdf>>.

States.¹⁵⁸ Later the same year Iran filed a claim against the United States before the ICJ.¹⁵⁹ Despite how Iran claimed that the actions taken by the United States violated not only a bilateral treaty between the two parties, but also customary law on immunity from enforcement of judicial proceedings, the ICJ contained itself to only evaluate the events in relation to the bilateral treaty and thus refrained from commenting on the United States actions in relation to customary law of State immunity.¹⁶⁰ Accordingly, the ICJ never examined if the domestically imposed exception to immunity from post-judgment executive measures in cases when the foreign State has been designated as a State sponsor of terrorism, violates customary law on State immunity. Nevertheless, in *Jurisdictional Immunities*, the ICJ noted that no other States that had enacted legislation on State immunity had established similar exceptions (this was before Canada enacted a similar exception, see below), indicating that there existed no State practice and thus no customary law that allowed this type of exception from State immunity.¹⁶¹

Notably, also Canada has enacted a terrorism exception to immunity from enforcement within its national legislation, similar to the one practiced by the United States, through adopting the Justice for Victims Act in 2012,¹⁶² which subsequently amended Canada's State Immunity Act 1985.¹⁶³ The legislation provides that a foreign State may be designated as a supporter of terrorism, and as such the State's immunity from jurisdiction and post-judgment executive measures is revoked.¹⁶⁴ As a response to the amendment of the Canadian State Immunity Act, Iran filed a claim before the ICJ in 2023 claiming that the adoption of the Justice for Victims Act 2012 violates Iran's immunity from measures of constraint under the customary law of State immunity.¹⁶⁵ Consequently, Iran has persistently asserted that it does not consider customary international law to contain any so-called terrorist exceptions that would

¹⁵⁸ Kristina Daugirdas and Julian D Mortenson, 'Contemporary Practice of the United States Relating to International Law' (2016) 110 American Journal of International Law 554, 561; Thouvenin and Grandaubert (n 46), 252.

¹⁵⁹ Daugirdas and Mortenson (n 158), 561.

¹⁶⁰ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 145), paras. 18(d), 19(a)(ii) and 48; Maleska (n 141), 211–212.

¹⁶¹ C.f. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 88; Webb (n 33), 44.

¹⁶² Canada, Justice for Victims of Terrorism Act 2012 [S.C. 2012, c. 1, s. 2].

¹⁶³ Canada, State Immunity Act 1985 [R.S.C., 1985, c. S-18], article 12(4); Jaqueline Hutchins, 'Islamic Republic of Iran v. Canada: An Evaluation of the Terrorism Exception to State Immunity' (*Columbia Undergraduate Law Review*, 6 January 2024) <<https://www.cu-lawreview.org/current-events-2/islamic-republic-of-iran-v-canada-an-evaluation-of-the-terrorism-exception-to-state-immunity>> accessed 17 April 2025.

¹⁶⁴ Canada State Immunity Act (n 163), articles 6.1(1), 6.1(2), 12(1)(b) and 12(1)(d).

¹⁶⁵ International Court of Justice, 'Alleged Violations of State Immunities (Islamic Republic of Iran v. Canada)' (2023) Application Instituting Proceedings filed in the Registry of the Court on 27 June 2023, paras. 2 and 24(i).

allow a State to subject a foreign State and its property to executive measures.¹⁶⁶

Notwithstanding how both Canada and the United States have codified terrorism-related exceptions to State immunity, it appears they are the only two States that have done so, it therefore seems excessive to claim that this represents established customary law, as there seems to be a lack of consistent and State practice and *opinio juris*.¹⁶⁷ For example, Iran has protested both the enforcement measures practiced by the United States and the legislation adopted by Canada, in the formal complaint to the UN Secretary General, the lawsuit against the United States before the ICJ and, most recently, in the lawsuit against Canada before the ICJ. In every one of the procedures, Iran insisted that Iranian State-owned property, including central bank assets, is entitled to immunity from jurisdiction and immunity from measures of execution to enforce these judgments under customary international law.¹⁶⁸

3.1.4 Conclusion

Notwithstanding, the lack of an established terrorism exception within the EU, customary international law contains no exception to State immunity from enforcement for State sponsors of terrorism. As previously emphasized, the United States and Canada are the only two States to have enforced terrorism exceptions to State immunity, and as indicated by the ICJ and several legal scholars, such an isolated approach does not reflect customary law. Moreover, Iran's persistent efforts in asserting its right to immunity from enforcement, by objecting to Canada's and the United States' adoption of a terrorism exception to State immunity, indicates a lack of *opinio juris*.

Notably, the situation between Iran and the United States as well as Canada's State Immunity Act 1985, merely concern *post-judgment executive measures*, and makes no mention of non-judicial executive measures.

3.2 Exception to State Immunity due to Violations of *Jus Cogens* Norms

3.2.1 Sovereign Immunity v. *Jus Cogens* Norms: A Legal Dilemma

Angelina Maleska argues in her article *From Rubles to Hryvnia: The Freezing and Seizing of Russian Assets to Rebuild Ukraine* that a potential confiscation

¹⁶⁶ *ibid*, para. 22.

¹⁶⁷ C.f. Thouvenin and Grandaubert (n 46), 246; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 88.

¹⁶⁸ A/70/853-S/2016/400 from Khoshroo (n 157), 2; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 145), paras. 18(d) and 19(a)(ii); International Court of Justice (n 165), paras. 2 and 24(i); (Wuerth) Brunk (n 3), 16.

of Russian State assets would be an entirely different question than the one between the United States and Iran in *Certain Iranian Assets*. She holds that:

“[u]nlike the terrorist attack in Lebanon, Russia continues to blatantly violate the prohibition against the use of force when it occupies Ukraine and refuses to respect Ukraine’s territorial integrity.”¹⁶⁹

This line of argumentation relates to the widely discussed tension between *jus cogens* norms and immunity provided to States, including their property and officials, under the law of State immunity.¹⁷⁰ *Jus cogens* rules, or peremptory norms, are substantive rules under customary international law that are recognized to have a higher status, as there may be no derogation from these norms.¹⁷¹ This is evident in *inter alia* article 53 of the Vienna Convention on the Law of Treaties,¹⁷² which asserts that a treaty is void if it is in conflict with a *jus cogens* norm.¹⁷³ Moreover, article 64 of the Convention provides that if a new *jus cogens* norm emerges, any existing treaty which is in conflict with the peremptory norm becomes void and terminates.¹⁷⁴ In addition, Shaw asserts that peremptory norms applies also in the context of customary international law, entailing that derogations from such rules are neither permitted by “local or special custom”.¹⁷⁵

There appears to be a relatively broad consensus amongst States in that Russia has violated article 2(4) of the UN Charter, through its acts of aggression against Ukraine. This position was endorsed by UNGA in resolution ES-11/1, adopted in March 2022.¹⁷⁶ Notably, the resolution was adopted with a significant majority — 141 votes in favor, 5 against (including Russia), and 35 abstentions.¹⁷⁷ The prohibition to use force in art. 2(4) of the UN Charter is one of the “least controversial” peremptory norms. Although, also protection from slavery, genocide, crimes against humanity, racial discrimination and prohibition of torture are commonly referred to as norms with *jus cogens* status.¹⁷⁸ The question that remains is thus if Russia’s violation of the prohibition to use force under article 2(4) of the UN Charter may deprive its property, specifically its central bank assets, of its immunity from enforcement measures.

¹⁶⁹ Maleska (n 141), 212.

¹⁷⁰ Pauline Lesaffre and Pierre d’Argent, ‘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.

¹⁷¹ C.f. Shaw (n 26), 105–106; Crawford (n 79), 581.

¹⁷² United Nations, Vienna Convention on the Law of Treaties 1969 [1155].

¹⁷³ *ibid*, article 53.

¹⁷⁴ *ibid*, article 64.

¹⁷⁵ Shaw (n 26), 106.

¹⁷⁶ United Nations General Assembly Resolution adopted by the General Assembly on 2 March 2022 (n 12), para 2.

¹⁷⁷ Kamminga (n 1), 4.

¹⁷⁸ Crawford (n 79), 581–582; Shaw (n 26), 106.

The discussion on whether customary international law contains an exception to State immunity for violations of *jus cogens* norms, is not a new one. In fact, this issue was discussed in the making of the UNCSI by a Working Group on jurisdictional immunities of States and their property, established by the ILC in 1999.¹⁷⁹ The Working Group noted the emerging tension between State immunity and violations of *jus cogens*, but concluded that this issue “did not seem to be ripe enough for the Working Group to engage in a codification over it”.¹⁸⁰ In her article *State Immunity and Jus Cogens* Lorna McGregor praise the Working Groups decision. She expressed that:

“[a]s the purpose of the Convention is to promote ‘uniformity and clarity in the law of jurisdictional immunities of States and their property’, any definitive treatment of the issue would have been premature”.¹⁸¹

In 1999 the ILC thus noted that while national courts in some individual cases had denied State immunity due to *jus cogens* violations, the courts had not approved any general exception from immunity based on violations of peremptory norms.¹⁸² Accordingly, the ILC decided not to adopt any exception from State immunity in cases concerning violations of peremptory norms within the UNCSI, due to lack of consensus.¹⁸³

Moreover, although both Canada and the United States has established, legally questionable, exceptions to State immunity within their domestic legal system for State property belonging to States that are designated as “sponsors of terrorism” or “supporters of terrorism”, neither Canada nor the United States has accepted a broader *jus cogens* exception to such immunity.¹⁸⁴ Nevertheless, since the rules of customary law are ever evolving and the case law on the subject is divided, it is necessary to examine if a coherent State practice may have evolved on the issue and thus has initiated a new exception from immunity in cases of *jus cogens* violations.¹⁸⁵

3.2.2 Denial of Immunity from Jurisdiction due to *Jus Cogens* Violations

In *Prefecture of Voiotia v the Federal Republic of Germany*, the Greek Supreme Court (*Areios Pagos*) found that Germany had violated peremptory norms and that such action could not be considered as sovereign acts (*acts*

¹⁷⁹ Lorna McGregor, ‘State Immunity and Jus Cogens’ (2006) 55 The International and Comparative Law Quarterly 437, 437.

¹⁸⁰ United Nations General Assembly, ‘Convention on Jurisdictional Immunities of States and Their Property: Report of the Chairman of the Working Group’ (1999) A/C.6/54/L.12, para 47.

¹⁸¹ McGregor (n 179), 437.

¹⁸² ‘Yearbook of the International Law Commission’ (1999) Vol. II(2) 1, 172 paras. 3–7.

¹⁸³ *ibid* 172 para 13; Crawford (n 79) 490.

¹⁸⁴ Webb (n 20), 348–349 and *supra*note 69.

¹⁸⁵ C.f. Lesaffre and d’Argent (n 170), 614.

jure imperii), which are normally protected by State immunity.¹⁸⁶ In 1944, German forces had massacred more than 300 inhabitants in the Greece village Distomo. The case in question concerned compensation claims against Germany filed by relatives to victims of the massacre. A lower instance, specifically the Court of Livadia, had ordered Germany to pay compensation which led Germany to appeal to the Greek Supreme Court, claiming that Greece had no jurisdiction due to State immunity from jurisdiction. The Supreme Court nonetheless dismissed the appeal and held that Greece had jurisdiction over the case, and thus denied Germany State immunity.¹⁸⁷ Although the court acknowledged that State immunity is applicable to *acta jure imperii*, or acts which constitute an exercise of sovereign power, it argued that Germany had waived its immunity by violating *jus cogens* rules, since such acts did “not have the character of acts of sovereign power”.¹⁸⁸ Hence, instead of claiming that *jus cogens* norms as such would override the law of State immunity, it argued that by violating a *jus cogens* rule, Germany had *ipso facto* waived its State immunity.¹⁸⁹ This approach is commonly referred to as the implied waiver theory in legal doctrine.¹⁹⁰

If this exception is applicable under customary international law, it may entail that Russia’s violation of the peremptory norm which prohibits the use force in article 2(4) of the UN Charter, indicates an implied waiver of its immunity. It should however be noted that the case of *Prefecture of Voiotia v the Federal Republic of Germany* concerned immunity from jurisdiction, not enforcement, and as expressed by the ICJ in *Jurisdictional Immunities*, a waiver from jurisdiction does not *ipso facto* entail that a State may be subjected to enforcement measures, as these two types of immunity are regulated separately.¹⁹¹

Nonetheless, The Greek Supreme Court upheld the judgment of Court of Livadia and thus reaffirmed an exception to State immunity under the implied waiver theory, however despite this the theory has in practice gained minimal traction and has been consistently rejected by domestic courts in the United States and Europe.¹⁹² For instance in the 1994 case of *Princz v. Federal Republic of Germany*, in which Mr. Princz, a German holocaust survivor, filed a claim for reparations in the United States’ courts against Germany for the injuries he suffered and the slave labor he was forced to perform while he was imprisoned in concentration camps during the Second World War.¹⁹³ The

¹⁸⁶ McGregor (n 179) 440.

¹⁸⁷ *Prefecture of voiotia v Federal Republic of Germany (Distomo Massacre Case)* [2000] Greece, court of Cassation (Areios Pagos) Case No. 11/2000, 129 ILR 513, 514.

¹⁸⁸ *ibid*, 516 and 521.

¹⁸⁹ McGregor (n 179), 440.

¹⁹⁰ Lesaffre and d’Argent (n 170), 616; McGregor (n 179), 440.

¹⁹¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 113.

¹⁹² Lesaffre and d’Argent (n 170), 616; McGregor (n 179), 440 *supra* note 27.

¹⁹³ *Princz v Federal Republic of germany* [1994] US Court of Appeals 26 F.3d 1166 (D.C. Cir. 1994); Lesaffre and d’Argent (n 170), 615–617.

court examined if it had jurisdiction to adjudicate the case, since Germany as a foreign State is generally afforded State immunity from jurisdiction. In doing so, the Court of Appeals examined whether Germany, by violating the peremptory norms on prohibition from genocide and slavery, may have waived its immunity and concluded that there was no reason for the court to assume that a violation of *jus cogens* norms constitutes an implied waiver of State immunity.¹⁹⁴

Nonetheless, in *Ferrini v the Federal Republic of Germany*, which addresses a situation where the applicant was subjected to forced labor during the Second world War and therefore was seeking reparations, the Italian Supreme Court (*Corte di Cassazione*) agreed with the Greek Supreme Court's findings in *Perfection of Voiotia v the Federal Republic of Germany*, but disagreed with the implied waiver theory and held that "a waiver cannot [...] be envisaged in the abstract, but only encountered in the concrete".¹⁹⁵ The Italian Supreme Court held, that such an argument creates a strain on the law of immunity, due to how a waiver needs to be explicit. Instead, the court relied on norm hierarchy to deny Germany immunity and claimed that recognizing State immunity in cases wherein the foreign State has violated *jus cogens* norms "would hinder the protection of values whose safeguard is to be considered [...] essential to the whole international community".¹⁹⁶ Hence, while Italy rejected the implied waiver theory, it embraced – and continues to do so – the normative hierarchy theory, by which "*jus cogens* norms take precedence over any other international obligations [including] immunity rules".¹⁹⁷ However, as observed by d'Argent and Lesaffre, national courts in other jurisdictions did not follow the precedent set by Italy, but refrained from applying the theory and did thus not offer any exception from immunity based on violations of peremptory norms.¹⁹⁸

In fact, Germany referred the judgment of the Italian Supreme Court in *Ferrini* case to the ICJ, claiming that Italy had violated international law by permitting civil claims against Germany in its courts.¹⁹⁹ Thus, in 2012 the ICJ pronounced its judgment in the case of *Jurisdictional Immunities*.²⁰⁰ In *Jurisdictional Immunities*, Italy held that it was entitled to deny Germany immunity in its domestic courts, since Germany failed to uphold its international obligation to make reparations to Italian victims for violations of international humanitarian law, including *jus cogens* violations, during the Second World

¹⁹⁴ *Princz v. Federal Republic of Germany* (n 193).

¹⁹⁵ Pasquale D Senar and Francesca D Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16 *European Journal of International Law* 89, 93 and 101–102; McGregor (n 179), 440 *supra* note 27.

¹⁹⁶ Senar and Vittor (n 195), 102.

¹⁹⁷ Lesaffre and d'Argent (n 170), 617 and 619.

¹⁹⁸ *ibid*, 619.

¹⁹⁹ Sandra Epko, 'Jurisdictional Immunities of the State (Germany v Italy): The Debate over State Immunity and Jus Cogens Norms' (2017) 8 *Queen Mary Law Journal* 151, 156.

²⁰⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27).

War. Italy claimed it had a right to deny immunity, despite how this would result in a breach of Italy's own obligation under international law to grant Germany sovereign immunity in its domestic courts.²⁰¹

The ICJ assessed the relationship between *jus cogens* norms and the law of State immunity and found that “*jus cogens* rules always prevail over any [...] rule of international law, whether contained in a treaty or in customary international law”. Consequently, the court seems to indicate that since State immunity does not have the status of *jus cogens*, it must yield in the event of norm conflict.²⁰² Nevertheless, Italy's claims presumes that a conflict exists between *jus cogens* norms and the law of State immunity, the ICJ however concluded that no such conflict exist. This was attributed to how the law of State immunity has a procedural character and solely determines if a State may exercise jurisdiction in respect of a foreign State, hence sovereign immunity “do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful”.²⁰³ In fact, the court even held that “Italian courts [...] are the only decisions of national courts to have accepted [this] reasoning”.²⁰⁴

In the case of *Arrest Warrant*, the Minister for Foreign Affairs of the Democratic Republic of the Congo, commonly known as the DRC, had been accused of crimes against humanity and war crimes. These rules are as previously noted generally recognized as *jus cogens* norms. Nonetheless, the ICJ concluded that there was no existing exception under customary international law from criminal jurisdiction, in cases wherein the suspect had committed such crimes.²⁰⁵ Thus, violations of *jus cogens* norms did not deprive the DRC of its right under customary international law to demand immunity on the behalf of its Minister for Foreign Affairs.²⁰⁶ The court based its conclusion partly on State practice, and partly upon the lack of such exception to immunity in the Statutes and Charters of international criminal tribunals.²⁰⁷ Although the case in question concerned State immunity for a foreign State official, and not State property, it still indicates that the ICJ rejects the normative hierarchy theory and that violations of peremptory norms therefore does not justify deprivation of State immunity.²⁰⁸

²⁰¹ *ibid*, para. 80.

²⁰² *ibid*, para. 92.

²⁰³ *ibid*, para. 93.

²⁰⁴ *ibid*, para. 96.

²⁰⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 2002 3 (International Court of Justice), para. 58; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para. 95.

²⁰⁶ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para. 95.

²⁰⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 205), para. 58.

²⁰⁸ Lesaffre and d'Argent (n 170), 627.

3.2.3 Denial of Immunity from Enforcement due to *Jus Cogens* Violations

Notably, most court decisions and judgments on this subject concern immunity from jurisdiction, rather than from execution.²⁰⁹ However in 2002 the ECtHR examined the possible existence of a *jus cogens* exception in one of the few cases concerning immunity from execution, namely *Kalogeropoulou v. Greece and Germany*.²¹⁰ The case is linked to the previously discussed case, *Prefecture of Voiotia v the Federal Republic of Germany*, in that once the Greek Supreme Court dismissed Germany's appeal and the compensation awarded to the plaintiffs by the Court of First Instance was to be enforced, Germany refused to comply with the judgment of the lower court. In addition, when the plaintiffs instead sought to enforce the judgment against German property in Greece instead, their request was denied by Greek courts.²¹¹ Consequently, the plaintiffs lodged a complaint under article 6(1) of the European Convention on Human Rights, before the ECtHR, due to the German and Greek authorities' refusal to comply with the decision of the Court of First Instance of Livadia.²¹²

The ECtHR found that there was no established exception to State immunity under international law, even when the foreign State had committed crimes against humanity.²¹³ Moreover, the court found support for its position in its previous case law, and specifically referenced its judgment in *Al-Adsani v. The United Kingdom*.²¹⁴ The case of *Al-Adsani* concerned whether the United Kingdom was entitled to State immunity from adjudication, specifically from a civil suit for damages in relation to acts of torture. It should be noted that the ECtHR recognized the prohibition of torture as a peremptory norm.²¹⁵ Similarly to the case of *Kalogeropoulou*, the court asserted that there is no acceptance in international law to *not* afford a State immunity from jurisdiction due to acts of torture.²¹⁶ Hence, also the ECtHR rejected the normative hierarchy theory, and frankly any imposition that customary international law provides an exception to immunity from jurisdiction or enforcement in situations where the State in question has violated peremptory norms.²¹⁷

²⁰⁹ *ibid*, 615.

²¹⁰ *Kalogeropoulou and Others v Greece and Germany* [2002] ECtHR App. No. 59021/00.

²¹¹ *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)* (n 187), 524.

²¹² C.f. *ibid*, 524; *Kalogeropoulou and Others v. Greece and Germany* (n 210), 4-5 paras. 1-2.

²¹³ *Kalogeropoulou and Others v. Greece and Germany* (n 210), 9; Crimes against humanity are one of the "least controversial" recognized *jus cogens* norms, see Crawford (n 79), 581-582.

²¹⁴ *Al-Adsani v The United Kingdom* [2001] ECtHR App. No. 35763/97; *Kalogeropoulou and Others v. Greece and Germany* (n 210), 9.

²¹⁵ *Al-Adsani v. The United Kingdom* (n 214), para. 61.

²¹⁶ *ibid*, para. 66.

²¹⁷ *Lesaffre and d'Argent* (n 170), 618 and 621.

However, also the *Jurisdictional Immunities* case addressed immunity from enforcement. This is attributed to how Germany claimed that the Italian court's decision to declare a Greek judgment, ordering Germany to pay compensation to Greek claimants, enforceable in Italy had implicated its entitlement to State immunity from enforcement.²¹⁸ However, Italy quite surprisingly did not challenge Germany's claims, and accordingly made no reference to Germany's violations of *jus cogens* norms in order to justify its actions.²¹⁹ Thus, although the court spoke on the scope of immunity from enforcement in general (discussed in subchapter 2.2), it did not further investigate whether a violation of peremptory norms may implicate Germany's right to immunity from enforcement under international law.²²⁰

The ICJ did however, in response to Germany's reference to article 19 of the UNCSI concerning post-judgment measures of constraint, examine the conditions under which post-judgment enforcement measures, including confiscation, is lawful. It held, similarly to article 19, that for measures of constraint to be permitted "at least one condition has to be satisfied"; the foreign State must consent to it, or the property in question must be used for "an activity not pursuing government non-commercial purposes", or the State must have allocated the property for the satisfaction of a judicial claim.²²¹ Consequently, although the ICJ did not explicitly reject the possibility that a breach of *jus cogens* norm could serve as an exception to immunity from enforcement, it did not address this issue in depth since Italy had only raised such arguments in relation to jurisdictional immunity, not executive immunity.²²² Instead, the court articulated what appears to be an exhaustive list of conditions under which enforcement measures against a foreign State's property are lawful.²²³ Notably, this list made no reference to *jus cogens* violations as a basis for limiting another State's immunity from enforcement.

3.2.4 Conclusion

Consequently, Russia's violation of the prohibition to use force in article 2(4) does not affect CBR's entitlement to State immunity for its property, neither from jurisdiction nor from enforcement measures in connection to judicial proceedings. This is attributed to how both the implied waiver theory and the normative hierarchy theory were eventually rejected by either domestic, regional or international courts. As a result, a foreign States' violations of *jus cogens* norms does not preclude the application of sovereign immunity, nei-

²¹⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), paras. 109-110.

²¹⁹ C.f. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27); Thouvenin and Grandaubert (n 46), 246.

²²⁰ C.f. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), paras. 109-120.

²²¹ *ibid*, paras. 115-116 and 118.

²²² Thouvenin and Grandaubert (n 46), 246.

²²³ C.f. subchapter 2.2.

ther under customary international law, nor according to the UNCSI. The ECtHR clearly rejected any theory that would provide an exception to State immunity from either jurisdiction or enforcement, due to a foreign State's violations of peremptory norms. In addition, also the ICJ expressly rejected the imposition that such an exception would exist in relation to State immunity from jurisdiction. However, since Italy did not claim a *jus cogens* exception in relation to State immunity from enforcement, the court never had the opportunity to make a statement on the existence or non-existence of a *jus cogens* exception in relation to State immunity from enforcement. Nevertheless, the court did, as observed both in subchapter 2.2 and 3.2.3, list three circumstances under which post-judgment enforcement measures may be taken against foreign State property, and none of these circumstances included a foreign State's violation of peremptory norms.

Since State immunity is regulated by case law, it is possible that an exception to State immunity due to *jus cogens* violations will emerge in the future. Nevertheless, this thesis aims to investigate current law on State immunity (*de lege lata*), not a possible evolution of said law (*de lege ferenda*), such discussions therefore fall outside the scope of this research paper.

4 Confiscation of Central Bank Assets Through Non-Judicial Measures of Constraint and its Implications on State Immunity

Despite the extensive immunity from execution provided to central banks under the law of State immunity, States still impose sanctions against central banks, including the CBR, at an increasing rate. This raises questions regarding the relationship between State immunity and purely executive actions. This chapter aims to investigate whether non-judicial measures of constraint, including confiscation, against foreign State property in general and foreign central bank assets in particular may be compatible with customary international law on State immunity. First, it is examined whether non-judicial measures of constraint, meaning enforcement measures taken independently of court proceedings, are regulated by the customary international law on State immunity (subchapter 4.1.1). Second, the chapter address and responds to arguments raised by legal scholars regarding whether or not non-judicial measures of constraint fall under the scope of State immunity (subchapter 4.1.2). Third, instances of State practice and *opinio juris* in the context of non-judicial measures of constraint are examined (subchapter 4.1.3). Lastly, before the presentation of the concluding remarks (subchapter 4.3) an analysis is conducted concerning EU's recent efforts to confiscate CBR assets (subchapter 4.2).

4.1 Direct Executive Measures and their Implications on State Immunity

4.1.1 State Immunity and Non-Judicial Executive Measures under the UNCSI and Customary Law

Several legal scholars notes that direct executive action against central banks, meaning enforcement action not taken in connection with proceedings before a court, does not implicate sovereign State immunity. Such action includes executively ordered sanctions that would according to this approach fall outside the scope of State immunity which makes them, if not lawful, then at least not prohibited, under international law on immunity.²²⁴

Under the UNCSI, State immunity from enforcement is articulated with reference to measures taken “in connection with proceedings before the *court* of another State”, as indicated by the title of Part IV UNCSI and specifically

²²⁴ C.f. Kamminga (n 1), 5–6; Hathaway, Mills and Posten (n 8), 999–1004; Thouvenin and Grandaubert (n 46), 247.

articles 18 and 19, which regulate pre- and post-judgment measures of constraint.²²⁵ Thouvenin and Grandaubert, amongst others, hold firmly that the Convention only affords immunity from execution in relation to proceedings before a court, hence non-judicial measures of constraint fall outside the scope of the Convention.²²⁶ This interpretation is reaffirmed in the ILC Commentary to draft article 18 wherein ILC states that “[a]rticle 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding”.²²⁷

However, article 1(a) of the Convention defines “court” broadly as “any organ of a State, however named, entitled to exercise *judicial functions*”.²²⁸ Moreover, in its official commentary to the draft articles of the UNCSI from 1991, the ILC highlights that it purposefully refrained from including a definition of judicial functions, as such functions can vary depending on the constitutional and legal system of the State.²²⁹ This is likely attributable to how judicial functions are “determined by the internal organizational structure of each State”.²³⁰ Accordingly, based on the wording of article 1(a) of the UNCSI and its commentary, the ILC appears to put more emphasis into the actual *functions* of the State organs, rather than the need for the organs to be classified as courts or as having a judicial character as such.²³¹ This suggests that action taken by administrative State agencies could also qualify as judicial.²³²

Yet, while a court constitutes *any* organ of the State entitled to exercise judicial functions, including administrative organs, it nonetheless seems judicial functions is necessarily connected with legal proceedings. The ILC states:

“[j]udicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgments. Such judicial functions may include [...] dispute settlement [...] and enforcement measures at all stages of legal proceedings and

²²⁵ United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51) articles 18 and 19 (emphasis added).

²²⁶ Thouvenin and Grandaubert (n 46), 250.

²²⁷ ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries’ (n 53), 56.

²²⁸ United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), article 1(a) (emphasis added).

²²⁹ ‘Yearbook of the International Law Commission’ (n 107), 14.

²³⁰ *ibid*, 14.

²³¹ The ILC holds that “[t]he scope of judicial functions, however, should be understood to cover such functions whether exercised by courts or by administrative organs”, see *ibid*, 14; United Nations General Assembly United Nations Convention on Jurisdictional Immunities of States and Their Property (n 51), article 1(a).

²³² (Wuerth) Brunk (n 3), 1642.

such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with [...] or pursuant to, a legal proceeding.”²³³

Hence, while a court could constitute what *prima facie* appears to be administrative organs, as long as they perform judicial functions, it undeniably appears that for an organ to have judicial functions, it must act in the connection with a legal proceeding.

Wuerth claims that the complexity in determining what constitutes a “judicial” measure under article 1(a) of the UNCSI, may suggest that, to the extent that also customary international law is confined to judicial actions, the scope of State immunity rests on a narrow, technical and potentially unstable distinction between judicial and executive authority. Nevertheless, she maintains that this uncertainty is not a strong enough reason to extend immunity to encompass purely executive actions.²³⁴

As observed by Tom Ruys, the ILC commentary clarifies two key points. First, actions undertaken by “administrative and executive powers” may implicate State immunity, and second, State immunity is only implicated when such actions are taken in relation to a judicial proceeding.²³⁵ However, as noted previously, the Convention is not yet in force customary international law therefore continues to govern the field of State immunity. Nevertheless, it should be emphasized that the ILC sought to codify existing customary law when formulating the Draft articles to the UNCSI.²³⁶ As expressed in subchapter 2.1 of the thesis, the ICJ argued that the work of the ILC, the negotiations during the drafting process, the signatures and ratifications of the Convention, and the application of the Convention could constitute evidence of State practice and *opinio juris*.²³⁷

Ruys further emphasizes that this connection between enforcement action and judicial proceedings is not only recognized in the UNCSI and its commentary, but also reflected in national legislation, case law and scholarly work.²³⁸ For instance the United Kingdom’s State Immunity Act 1978 provides that a State is “immune from the jurisdiction of the courts of the United Kingdom”.²³⁹ The United States’ FSIA holds that “a foreign [S]tate shall be immune from

²³³ ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries’ (n 53), 14 para 3.

²³⁴ (Wuerth) Brunk (n 3), 1643.

²³⁵ Ruys (n 11), 677.

²³⁶ *ibid*, 685.

²³⁷ Webb (n 20), 342; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para 55.

²³⁸ C.f. Ruys (n 11), 677–678; Brunk (n 22), 186.

²³⁹ United Kingdom State Immunity Act (n 98), sec 1.1.

the jurisdiction of the courts of the United States”.²⁴⁰ Likewise, national legislations on State immunity for *inter alia* Argentina, Australia, Canada, China, Japan and Singapore, all afford immunity from State immunity specifically in relation to judicial proceedings.²⁴¹ Philipp Janig even goes as far as to claim that there are merely two examples of national legislation that “*might* be read as addressing non-judicial measures of constraint”.²⁴²

While many scholars agree with the sentiment that State immunity applies only in relation to proceedings before a court, some remain hesitant to agree with this line of argumentation.²⁴³ The following subchapters address some of the most common objections to the idea that non-judicial executive measures against State property, including confiscation of central bank property, falls outside the scope of State immunity from enforcement.

4.1.2 Scholarly Debate on the Scope of State Immunity in relation to non-judicial executive measures

In the (since terminated)²⁴⁴ ICJ case *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* between Timor-Leste and Australia, Australia strongly advocated that the customary law on State immunity apply only in connection with a proceeding before a court.²⁴⁵ The case was brought by Timor-Leste and concerned Australia’s seizure of documents, data and other property from the business premises of a legal advisor in Australia who represented Timor-Leste in then pending case between Timor-Leste and Australia, the so-called Timor Sea Treaty Arbitration.²⁴⁶ Timor-Leste held that seizure of the documents, despite them being seized independently of any judicial proceedings, violated Timor-Leste’s entitlement so State immunity for its property under customary international law.²⁴⁷ For instance Timor-Leste expressed:

²⁴⁰ United States, Foreign State Immunity Act, §1604.

²⁴¹ C.f. Ruys (n 11), 678; Brunk (n 22), 186; Philipp Janig, ‘State Immunity from Non-Judicial Measures of Constraint’ (2025) 74 International and Comparative Law Quarterly 1, 9–10.

²⁴² Janig (n 241), 10 (emphasis added).

²⁴³ Ruys (n 11), 678; Thouvenin and Grandaubert (n 46), 250; Hathaway, Mills and Posten (n 8), 1001–1005.

²⁴⁴ Once Australia returned the documents to Timor-Leste, the case was terminated, see *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [2015] ICJ Rep 2015 Termin 572 (International Court of Justice), 6.

²⁴⁵ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (2014) 1 Count-Meml Aust (International Court of Justice) paras 5.92–5.120.

²⁴⁶ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [2014] ICJ Rep 2014 147 (International Court of Justice), para. 1; Ruys (n 11), 679.

²⁴⁷ C.f. Anton Moiseienko, ‘Seizing Foreign Central Bank Assets: A Lawful Response to Aggression?’ [2023] SSRN <<https://ssrn.com/abstract=4420459>> or <http://dx.doi.org/10.2139/ssrn.4420459>>.

“While the UN Convention itself does not apply to criminal matters, the principles it reflects are most certainly applicable to administrative measures of constraint such as those taken under the search warrant in the present case. Were this not the case State property would be in the absurdly paradoxical position of being inviolable and immune from judicial measures, but at the mercy of administrative or executive actions.”²⁴⁸

Australia on the other hand, rejected this argumentation and found that the applicability of customary international law on State immunity is presupposes the existence of a civil proceeding before national courts.²⁴⁹ Much like Ruys (see subchapter 4.1.1),²⁵⁰ Australia argued that for State immunity to be applicable “there must be a ‘proceeding’” and “that proceeding must be before a ‘court’ of the forum State”.²⁵¹ Notably, Australia’s argumentation essentially reflects the conclusions made by Ruys, and aligns well with the ILC Commentary to the Draft articles.

According to Australia, as put by Moiseienko:

“shielding a foreign [S]tate’s documents from any interference, whether judicial or executive, would amount to a privileged status reserved for diplomatic agents and the property of diplomatic missions: namely, inviolability.”²⁵²

Inviolability, unlike State immunity imposes a *positive* obligation onto the State to take all necessary measures to protect the subject in question, for the purpose of this thesis State property.²⁵³ While both Moiseienko and Ruys suggests that the concepts of inviolability and State immunity are easily conflated, and that even the ICJ is guilty of such conflation, they nonetheless conclude that the two concepts are distinct from one another.²⁵⁴ Since this thesis intends to examine specifically the scope of State immunity, no further discussions will be conducted on the concept of inviolability.

Thouvenin and Grandaubert claim that while States in the past has been reluctant to adopt executive or legislative action against foreign State property, for instance through freezing orders, it appears more common nowadays.²⁵⁵

²⁴⁸ *Questions relating to the Seizure and Detention of Certain Documents and data (Timor-Leste v Australia)* [2014] Meml Democr Repub Timor-Leste 1 (International Court of Justice), para. 5.18.

²⁴⁹ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (n 245), para. 5.105.

²⁵⁰ Subchapter 4.1.1; for discussion on the matter, see Ruys (n 11), 677.

²⁵¹ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (n 245), para. 5.105.

²⁵² Moiseienko (n 247), 26.

²⁵³ Ruys (n 11), 690.

²⁵⁴ Moiseienko (n 247), 26–28; Ruys (n 11), 688–690.

²⁵⁵ Thouvenin and Grandaubert (n 46), 251.

Wuerth agrees that there is no lack of examples of imposed asset freezes against foreign State property, often in the form of autonomous sanctions which are commonly viewed as administrative and thus non-judicial.²⁵⁶ Nonetheless, such sanctions have in the past primarily concerned freezing of assets, including central bank assets.²⁵⁷ Interestingly, such measures of constraint are rarely objected by the affected States, yet within international law such non-judicial measures remain a contested subject.²⁵⁸ This is attributed to the controversial status of sanctions imposed independent of the UN, such as the freezes and confiscations orchestrated by the EU and G7, has under international law. While such sanctions are not explicitly unlawful under international law, they are routinely challenged and accused of breaching international legal norms.²⁵⁹ In the light of this, sanctions may be a legal grey area, although not necessarily prohibited under international law unless they violate other areas of international law, such as State immunity.²⁶⁰ As expressed by Wuerth:

“[c]urrent proposals to turn Russian central bank assets over to Ukraine would likely violate foreign sovereign immunity unless structured to avoid any judicial action.”²⁶¹

As such, Wuerth implies, aligned with the ILC Commentary and Ruys, that confiscation, taken independently from judicial procedures, does not implicate State immunity.

Nevertheless, other legal scholars disagree. Hathaway *et al.* observes that:

“[i]f sovereign equality is the animating principle of sovereign immunity, as the ICJ stated in *Jurisdictional Immunities*, acts by the executive branch pose the same fundamental problem as do those same acts committed at a judge’s behest.”²⁶²

This principle of sovereign equality appears to be the most common argument as to why State immunity should encompass also non-judicial executive measures. Also Thouvenin and Grandaubert references the principle of sovereign equality when reasoning around why States in the past has refrained from imposing asset freezes on State property.²⁶³ Wuerth rejects this rationale, and claims that simply the fact that State immunity is derived from the principle of sovereign equality does not necessarily imply that the law of immunity should be extended to encompass any conduct that is potentially

²⁵⁶ (Wuerth) Brunk (n 3), 1634–1636.

²⁵⁷ C.f. Thouvenin and Grandaubert (n 46), 251.

²⁵⁸ (Wuerth) Brunk (n 3), 1634–1636.

²⁵⁹ *ibid* 1636.

²⁶⁰ *ibid*, 1637.

²⁶¹ *ibid*, 1646.

²⁶² Hathaway, Mills and Posten (n 8), 1001–1002.

²⁶³ Thouvenin and Grandaubert (n 46), 251.

inconsistent with this otherwise broad and general principle.²⁶⁴ Ruys makes a similar argument, and holds that:

“the mere fact that the rules of State immunity are inspired by the principle of sovereign equality does not necessarily imply that the two should be equated and that any breach of the principle of sovereign equality necessarily constitutes a simultaneous breach of immunity law.”²⁶⁵

In addition, it would seem that justifying an expansion of State immunity by reference to the principle of sovereign equality, so that the forum State’s jurisdiction of its territory is further limited, would create more tension in the relationship between the principles of sovereign equality and territorial integrity. As established by the ICJ in *Jurisdictional Immunities*, “[e]xceptions to the immunity of the State represents a departure from the principle of sovereign equality” and “[i]mmunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it”.²⁶⁶ Hence, according to Ruys, it follows that the scope of customary international law on State immunity cannot be determined by relying on only one of the two competing principles.²⁶⁷ In the ICJ Judgment on the Preliminary Objections in the case of *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, the court confirmed the distinction between the principle of sovereign equality and the customary law on State immunity. In the court’s reasoning regarding article 4(1) of the Palermo Convention the court observed that the Convention solely referred to the principle of sovereign equality, but not to the customary rules on State immunity, and therefore concluded that article 4 of the Palermo Convention did not incorporate the rules on State immunity.²⁶⁸

Furthermore, Hathaway *et al.* claim that “seizures and other related measures are necessarily judicial [...] however institutionally veiled”.²⁶⁹ This argument implies first that a confiscation requires a judicial procedure, and second that States could circumvent the customary international law on State immunity from enforcement by confiscating foreign State property by *prima facie* non-judicial organs. The latter argument appears counterintuitive, as per the ILC Commentary, a court constitutes any organ of a State which exercises judicial functions and judicial functions may vary amongst States, as such functions are determined by the internal structure of the State. Accordingly, a State cannot confiscate State property through a *prima facie* administrative organ, if

²⁶⁴ (Wuerth) Brunk (n 3), 1637–1638.

²⁶⁵ Ruys (n 11), 685.

²⁶⁶ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para. 57.

²⁶⁷ Ruys (n 11), 686.

²⁶⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Preliminary Objections)* [2018] ICJ Rep 2018 292 (International Court of Justice), paras. 93 and 96.

²⁶⁹ Hathaway, Mills and Posten (n 8), 1002.

the organ it in reality performs judicial functions. At least not without implicating State immunity.²⁷⁰

As per the first argument, also Wuerth observes that “some actions on foreign government property, including central bank property, do involve judicially imposed measures of constrain”.²⁷¹ Wuerth points specifically to change of ownership over property as an example of a measure of constraint that may be regarded as judicial, “whether undertaken in the first instance by an administrative agency or by a court”.²⁷² Nevertheless, this appears to be more of a practical challenge for individual States, rather than an legal obstacle in within the law of State immunity from enforcement that would prevent non-judicial confiscation as such. This is attributed to the same line of argumentation as the one provided in the previous paragraph, judicial functions are not defined as one thing, but are “determined by the internal organizational structure of each State”.²⁷³ Moreover, recent State practice – discussed in the following subchapter – may debunk the assumption that confiscation is necessarily judicial.

4.1.3 Recent State Practice and *Opinio Juris*

While there is a fair amount of State practice concerning the enforcement of non-judicial executive measures in the form of sanctions ordering assets freezes, instances of State practice involving confiscations unrelated to judicial proceedings have rarely occurred, at least until recent years.²⁷⁴ This subchapter intends to shed some light on recent State practice and *opinio juris*, regarding specifically confiscation of foreign State property in this context.

Thouvenin and Grandabuert, who believe State immunity from enforcement encompass non-judicial measures of constraint, held that the executively ordered freeze of Iran’s central bank assets, discussed in subchapter 3.1.1, was arguably incompatible with the law of State immunity. To support their proposition, they reference the complaints filed by Iran to the UN Secretary-General in 2016 and emphasize how Iran’s objection was supported by the Coordinating Bureau of the Non-Aligned Movement, thus implying that Iran objected a non-judicial measure of constraint.²⁷⁵ Yet, Iran’s complaint to the UN Secretary-General was prompted not by the freeze, but by how the United States, through adoption of legislation, allowed its domestic court to confiscate Iran’s central bank assets through post-judgment measures.²⁷⁶ Such actions fall under the scope of State immunity from enforcement and are indeed unlawful under customary international law.²⁷⁷ However, Iran’s objection

²⁷⁰ C.f. subchapter 4.1.1.

²⁷¹ (Wuerth) Brunk (n 3), 1637.

²⁷² *ibid*, 1642.

²⁷³ ‘Yearbook of the International Law Commission’ (n 107), 14 para 3.

²⁷⁴ C.f. (Wuerth) Brunk (n 3) 1634; Ruys (n 11) 685.

²⁷⁵ C.f. subchapter 3.1.1; Thouvenin and Grandaubert (n 46), 250–253.

²⁷⁶ Subchapter 3.1.3.

²⁷⁷ Subchapter 3.2.4.

does not provide any *opinio juris* to the proposition that confiscation without any connection to judicial proceedings would implicate State immunity.

Kamminga identifies Canada's adoption of an amendment to its Special Economic Measures Act in June 2022,²⁷⁸ as one of the most obvious indications that confiscation of central bank reserves may be permissible.²⁷⁹ The amendment allow Canadian authorities to order a seizure of foreign State property situated in Canada, in cases of *inter alia* grave breaches of international peace and security.²⁸⁰ Notably, however, the amendment does not provide that State property may be subject to confiscated, which would entail a permanent change of ownership.²⁸¹ However, Canada has since made additional legal proposals to amend the Special Economic Measures Act which, if adopted, would permit the confiscation of foreign State property, seemingly also central bank property, by an executive order.²⁸²

Furthermore, in April 2024 the president of the United States signed the REPO Act,²⁸³ into law.²⁸⁴ The REPO Act obliges financial institutions within the United States to report whether they hold Russian sovereign assets within their institutions. More importantly, section 104(b)(1) of the REPO Act grants the president the power to:

“seize, confiscate, transfer, or vest *any* Russian aggressor State sovereign assets, in whole or in part, and including any interest or interests in such assets, subject to the jurisdiction of the United States.”²⁸⁵

Additionally, the REPO Act firmly asserts that such sovereign assets include central bank assets.²⁸⁶ In case of confiscation, the president is obliged to transfer the funds into a Ukrainian Support Fund.²⁸⁷ Also the power to establish the fund is granted to the president.²⁸⁸ Yet, the Biden administration never acted on the authority provided to it by the REPO Act.²⁸⁹

²⁷⁸ Canada, Special Economic Measures Act 2022 [S.C. 1992, c. 17 as amended by S.C. 2022, 10].

²⁷⁹ Kamminga (n 1), 11.

²⁸⁰ Canada Special Economic Measures Act (n 278), sec. 4(1)(b).

²⁸¹ C.f. *ibid*, sec. 5.4(1); Janig (n 241), 2 *supra*note 7.

²⁸² Canada BILL S-278: An Act to amend the Special Economic Measures Act (disposal of foreign state assets) (n 24).

²⁸³ Rebuilding Economic Prosperity and Opportunity for Ukrainians Act (n 23).

²⁸⁴ David Wessel and Alexander Conner, ‘What Is the Status of Russia’s Frozen Sovereign Assets?’ (*Brookings*, 16 April 2025) <<https://www.brookings.edu/articles/what-is-the-status-of-russias-frozen-sovereign-assets/>> accessed 25 April 2025; Brunk (n 48).

²⁸⁵ Rebuilding Economic Prosperity and Opportunity for Ukrainians Act (n 23) sec. 104(2)(b)(1) (emphasis added).

²⁸⁶ *ibid*, sec. 2(6)(A)(i).

²⁸⁷ *ibid*, sec. 104(b)(1).

²⁸⁸ *ibid*, sec. 104(d)(1).

²⁸⁹ Wessel and Conner (n 284); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 27), para. 55.

Curiously, the Act does not justify its content by claiming that non-judicial measures of constraint fall outside the scope of State immunity, but instead relies on the doctrine of countermeasures.²⁹⁰ Section 101(a)(7) of the REPO Act states that:

“the United States is legally entitled to take countermeasures that are proportionate and aimed at inducing the Russian Federation to comply with its international obligations.”²⁹¹

However, as pointed out by Wuerth, the United States would only have to rely on countermeasures, which justifies otherwise illegal actions under international law, if the REPO Act allows unlawful conduct.²⁹² Perhaps this indicates that the United States does not consider confiscation to be compatible with State immunity from enforcement, even when executed independently from judicial proceedings. Nonetheless, as the United States does not specify why it needs to rely on countermeasures, one can only speculate.²⁹³ Thus, while the REPO Act itself may provide evidence of State practice, it seems the United States considers actions under the Act to be unlawful under customary international law on State immunity, which indicates a lack of *opinio juris*.²⁹⁴

4.2 EU Efforts to Confiscate CBR Assets

Following Russia’s invasion of Ukraine, the EU imposed additional sanctions against Russia, on top of those sanctions already in place since Russia’s annexation of Crimea in 2014.²⁹⁵ Amongst other measures, the EU prohibited all transactions related to “the management of reserves as well as assets of the [CBR]”.²⁹⁶ The EU thus immobilized the assets of the CBR held by financial institutions and central banks within the EU. At present, an estimated EUR 210 billion of the CBR assets are frozen within the EU, whereof around EUR 183 billion are held by Euroclear.²⁹⁷

²⁹⁰ C.f. Brunk (n 48).

²⁹¹ Rebuilding Economic Prosperity and Opportunity for Ukrainians Act (n 23), sec. 101(a)(7).

²⁹² Brunk (n 48).

²⁹³ *ibid.*

²⁹⁴ C.f. Shaw (n 26), 68–71.

²⁹⁵ C.f. Maleska (n 141), 201; European Council, ‘EU Sanctions against Russia Explained’ (n 3).

²⁹⁶ Council Regulation (EU) 2022/394 of 9 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine 2022 [ST/6973/2022/INIT], article 5a(4); Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine 2014 [OJ L 229].

²⁹⁷ European Council, ‘EU Sanctions against Russia Explained’ (n 3); ‘Euroclear Continues to Deliver Strong Results in 2024’ (*Euroclear*, 5 February 2025) <<https://www.euroclear.com/newsandinsights/en/press/2025/mr-05-euroclear-delivers-strong-results-in-2024.html>> accessed 18 May 2025.

As a result of the immobilization of the CBR assets and foreign reserves, CSDs, including Euroclear, are accumulating unusually large cash balances on their balance sheets.²⁹⁸ By February 2024 the immobilized CBR assets held by Euroclear had generated roughly EUR 5.2 billion in interest.²⁹⁹ As the extraordinary interest generated by the frozen CBR assets kept growing, a public debate unfolded regarding whether or not the revenues could be used to financially support Ukraine.³⁰⁰ However, the debate regarding potential confiscation of the revenues was marked by concern from member States and legal scholars regarding the legality of such action. In 2023 the European Commission President, Ursula von der Leyen, announced that the Commission planned to introduce a windfall tax on profits generated through the immobilized sovereign Russian assets.³⁰¹ This announcement was followed by action, and on 12 February 2024 the European Council adopted regulation 2024/576 which amended regulation 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine. Regulation 2024/576 required CSDs which contained more than EUR 1 million CBR assets, to set aside the extraordinary revenues generated from the immobilized central bank assets.³⁰² The regulation also prohibit CSDs from disposing such net profits.³⁰³ It should be observed that as of July 2024, only Euroclear falls within the scope of these regulations, as Euroclear is the only CSD holding more than EUR 1 million of the CBR's assets and reserves.³⁰⁴

Regulation 2024/576 intended to clarify the legal status of the extraordinary revenues generated by the CSDs from immobilized CBR assets and reserves,

²⁹⁸ C.f. Joseph Stiglitz, 'Europe's Powerful Tool against Russia? Seizing Its Frozen Assets' *The Guardian* (6 March 2025) <<https://www.theguardian.com/business/2025/mar/06/europes-powerful-tool-against-russia-seizing-its-frozen-assets>> accessed 24 April 2025; Jorge Liboreiro, 'EU Vows to Tax Russia's Immobilised Assets for Ukraine Reconstruction' (*euronews*, 27 October 2023) <<https://www.euronews.com/my-europe/2023/10/27/eu-vows-to-tax-russias-immobilised-assets-for-ukraine-reconstruction>> accessed 24 April 2025; 'Euroclear Continues to Deliver Strong Results in 2024' (n 297).

²⁹⁹ Maleska (n 141) 204; the management cost of EUR 34 million was accrued during the period of January to September 2023, see Liboreiro (n 298).

³⁰⁰ C.f. Stiglitz (n 298); Liboreiro (n 298); Wessel and Conner (n 284).

³⁰¹ Liboreiro (n 298).

³⁰² Council Regulation (EU) 2024/576 of 12 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (n 134), article 5a(8)(a) and (b).

³⁰³ Council of Europe, 'Immobilised Russian Assets: Council Decides to Set aside Extraordinary Revenues' (*Consilium*, 12 February 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/02/12/immobilised-russian-assets-council-decides-to-set-aside-extraordinary-revenues/>> accessed 31 March 2025; Maleska (n 141), 204; Council Regulation (EU) 2024/576 of 12 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (n 134), article 5a(8)(c).

³⁰⁴ Directorate-General for Neighbourhood and Enlargement Negotiations, 'Questions and Answers on First Transfer of €1.5 Billion of Proceeds from Immobilised Russian Assets Made Available to Ukraine - European Commission' (*Enlargement and Eastern Neighbourhood*, 26 July 2024) <https://enlargement.ec.europa.eu/news/questions-and-answers-first-transfer-eu15-billion-proceeds-immobilised-russian-assets-made-available-2024-07-26_en> accessed 26 April 2025.

and ultimately served as a basis for future legislation.³⁰⁵ Consequently, on 21 May 2024 the European Council announced it had adopted another amendment to regulation 833/2014, namely regulation 2024/1469. Under this amendment, the relevant CSDs are obligated to transfer 99,7 percent of the net profits derived from the accumulated interest on the frozen CBR assets on a bi-annual basis.³⁰⁶ These net profits are then used to fund military support and the reconstruction of Ukraine.³⁰⁷ Specifically, 90 percent of the assets are allocated to the European Peace Facility, and the remaining 10 percent is distributed to the Ukrainian Facility.³⁰⁸ By 31 of December 2024, Euroclear had contributed a total of EUR 4 billion.³⁰⁹ Notably, none of the regulations make any mention of any judicial proceedings or involvement.

The confiscation of the generated interest from the frozen CBR assets provides a middle road between freezing and confiscation. It offers a confiscation of some of the CBR assets, namely the interest these assets have accrued.³¹⁰ This has however prompted criticism, as legal scholars have argued that either all or none of the CBR assets enjoy State immunity from enforcement.³¹¹ For instance, Keitner and Franchini both hold that there is no real reason to distinguish between ownership of the principal of an investment and the interest generated by the principal.³¹² Yet, as Keitner notes, it seems the EU regards confiscation of windfall profits as less legally intrusive than a confiscation of the frozen principal asset.³¹³ For instance, on the one hand the EU adopted regulations according to which CSDs must transfer the net profits of the accumulated interest on the frozen CBR assets to the union, on the other hand

³⁰⁵ Council of Europe (n 303).

³⁰⁶ Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) no 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (n 22), article 5a(9).

³⁰⁷ Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) no 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (n 22); European Council, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Supports Ukraine's Self-Defence and Reconstruction' (n 78).

³⁰⁸ 'EU Reaches Historic Decision to Use Revenues Generated by Russian Assets to Support Ukraine' (*Government Offices of Sweden*, 22 May 2024) <<https://www.government.se/press-releases/2024/05/eu-reaches-historic-decision-to-use-revenues-generated-by-russian-assets-to-support-ukraine/>> accessed 1 May 2025.

³⁰⁹ European Council, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Supports Ukraine's Self-Defence and Reconstruction' (n 78).

³¹⁰ Moiseienko (n 247).

³¹¹ Moiseienko (n 247).

³¹² Daniel Franchini, 'Immobilised Assets, Extraordinary Profits: The EU Council Decision on Russia's Central Bank Reserves and Its Legal Challenges' (*EJIL: Talk!*, 1 March 2024) <<https://www.ejiltalk.org/immobilised-assets-extraordinary-profits-the-eu-council-decision-on-russias-central-bank-reserves-and-its-legal-challenges/>> accessed 31 March 2025; Chimène Keitner, 'Sovereign Immunity and Reparations in Ukraine' (*Just Security*, 21 February 2024) <<https://www.justsecurity.org/92531/sovereign-immunity-and-reparations-in-ukraine/>> accessed 7 May 2025.

³¹³ Keitner (n 312).

EU member States continue to disagree over the lawfulness of confiscating the principal of the frozen CBR assets.³¹⁴

Moiseienko suggests a possible explanation to this. He observes that central banks, including the CBR, place assets with Euroclear based on contracts with the CSD. Due to the regulations imposed by the EU against Russia, Russia's central bank assets remain immobilized at Euroclear, yet its central bank's contracts with Euroclear have either become invalid because of the sanctions or because they have expired.³¹⁵ Moiseienko's suggestion is in part supported by Euroclear's own assessment of the matter. In 2023 Euroclear explained on its website that the EU decision to freeze CBR assets held by *inter alia* Euroclear, caused an accumulation of assets. Subsequently, these assets were re-invested as per Euroclear's standard procedure. Euroclear held that it considered the interest paid on these reinvestments as its own income. Notably, Euroclear made this assessment in 2023, before the EU adopted regulations according to which CSDs were prevented from disposing the accumulated interest derived from the frozen CBR assets.³¹⁶

Thus, while it may be tempting to conclude that the interest accrued by immobilized CBR assets therefore does not belong to Russia, the legal basis to reach such a conclusion is much too uncertain and vague. For instance, Webb objects to Moiseienko's line of reasoning, and instead hold that beyond what is stated by Euroclear itself, it cannot be known to whom the interest on the CBR assets belong, since the contracts between CBR and Euroclear are not publicly available.³¹⁷ Moreover, Moiseienko asserts that international law offers no guidance on whether the interest generated by the immobilized CBR assets belongs to the CBR or Euroclear. Thus, while international law, including the law of State immunity, provides protections applicable to certain types of property, the determination of whether a specific property right arises is ultimately regulated by domestic law.³¹⁸

³¹⁴ Laura Dubois, 'Frozen Russian Assets Yielded €4.4bn in 2023, Says Euroclear' *Financial Times* (1 February 2024) <<https://www.ft.com/content/f4c21b08-5f89-4abb-b72c-6f4b110c790b>> accessed 8 May 2025; Wintour (n 5); European Council, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Supports Ukraine's Self-Defence and Reconstruction' (n 78).

³¹⁵ Moiseienko (n 247) 13.

³¹⁶ Notably, this statement was made before the adoption of EU regulation 2024/576, which prevents CSDs from disposing the revenues generated by *inter alia* CBR assets after 15 February 2024, see Council Regulation (EU) 2024/576 of 12 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (n 134), article 5a(8)(c); 'Euroclear Delivers Robust Performance in Q3 2023' (*Euroclear*, 26 October 2023) <<https://www.euroclear.com/newsandinsights/en/press/2023/2023-mr-15-euroclear-delivers-robust-performance-q3-2023.html>> accessed 2 May 2025; Matt S Levine, 'Euroclear Made Some Russian Money' *Bloomberg.com* (26 October 2023) <<https://www.bloomberg.com/opinion/articles/2023-10-26/euroclear-made-some-russian-money>> accessed 19 May 2025.

³¹⁷ Webb (n 33), 41.

³¹⁸ Moiseienko (n 247), 13–14.

4.3 Conclusion

According to the UNCSI, specifically articles 18 and 19, State immunity from enforcement only extends only to enforcement measures taken in connection with proceedings before a court. Even authors skeptical to the idea that State immunity does not encompass non-judicial measures, including *inter alia* Thouvenin and Grandaubert, tend to agree that the UNCSI applies only to proceedings before a court. Yet, according to article 1(a) of the Convention, a court constitutes any organ of the State entitled to exercise judicial functions, as such it seems that also administrative organs could be considered as courts if they perform judicial functions. However, the ILC Commentary clarifies this, and hold that judicial functions are necessarily performed in relation with a legal proceeding. As such, any administrative, legislative or executive functions independent of such proceedings fall outside the scope of State immunity from enforcement, according to the UNCSI. While the Convention is not yet in force, its content is intended to reflect customary law on State immunity and the ICJ has indicated that the negotiations, adoption and States' statements during the drafting process of the Convention constitutes evidence of State practice. Moreover, the vast majority of States that have adopted legislations on State immunity from enforcement measures, provide that State immunity is granted to specifically enforcement measures taken to satisfy court proceedings. Hence, customary international law and the UNCSI appear well-aligned with one another in this aspect, and both provide that foreign State property is protected from enforcement measures, but merely in relation to judicial proceedings.³¹⁹

Legal scholars and States who reject the idea that the scope of State immunity does not encompass non-judicial measures of constraint, tend to rely on principles and areas of international law which fall outside the field of State immunity, primarily the principle of sovereignty but also inviolability. As provided by subchapter 4.1.2, while State immunity may be derived from the principle of sovereign equality, the two are distinct from one another as asserted by the ICJ in *Equatorial Guinea v. France*. The argument that the scope of State immunity could be determined, and essentially broadened, by this principle also appears counterintuitive since the principle of sovereign equality competes with the principle of territorial sovereignty, by which States have the right to exercise jurisdiction within their territory. Moreover, also the notion of inviolability, which was arguably claimed by Timor-Leste in the terminated case *Timor-Leste v. Australia*, is distinct from the notion of State immunity. Hence, even if a non-judicial confiscation of central bank assets could possibly violate other concepts under international law, that does not *ipso facto* entail that this type of confiscation would be incompatible with the law on State immunity.

³¹⁹ Subchapter 4.1.1.

By this reasoning, any non-judicial measures of constraint, including confiscation, ought to not implicate customary law of State immunity. Yet, while sanctions in the form of executively ordered freezes against foreign State property, including central bank assets, has become increasingly common, instances of non-judicial confiscation of such assets remain relatively rare in State practice. Perhaps this is attributed to how, as argued by *inter alia* Hathaway *et al.*, some measures of constraint are necessarily judicial, in the sense that although they are undertaken by an administrative organ the action of changing title would classify as an exercise of a judicial. Nevertheless, both the ILC Commentary and domestic legislations on State immunity imply that it is only when a judicial action is exercised in connection with a legal proceeding, for instance to enforce a judgment, that State immunity from enforcement is implicated.

Nonetheless, States remain apprehensive. The REPO Act, which allows non-judicial confiscation of *inter alia* foreign central bank assets, has never been used. Nevertheless, it may constitute State practice according to the ICJ's reasoning in *Jurisdictional Immunities*. However, this is complicated by how the Act appears to justify such actions as countermeasures, which indicates that the United States may not consider executively ordered confiscation as legal under State immunity, which indicates a lack of *opinio juris*. However, Canada's proposal to amend its Special Economic Measures Act appears to permit executively ordered confiscation of *inter alia* foreign central bank property, and therefore provides evidence of *opinio juris* that such confiscation is allowed under State immunity.

EU's confiscation of the windfall profits generated by the frozen CBR assets and reserves may be the most obvious evidence of State practice and *opinio juris* that confiscation of CBR assets does not implicate State immunity. Since the EU consists of 27 member States, who unanimously adopted the regulations which permits this type of confiscation, it would arguably provide a strong indication that States finds that such confiscation does not implicate customary international law on State immunity.

Yet, as expressed in subchapter 4.2, legal scholars have debated who has ownership of the assets, is it CBR or Euroclear? It appears this issue is regulated in contracts, unavailable to the public, between the CBR and Euroclear. Notably, the EU's "confiscation" of the interest accumulated from the immobilized CBR assets may not be a confiscation at all, if there is no change of ownership. If the assets, as Moiseienko suggests, does not belong to Russia, then the EU's action would likely provide little, if any, evidence in the form of State practice or *opinio juris* to the proposition that confiscation without any judicial involvement falls outside the scope of State immunity. If the assets belong to Russia, then there is an arguably strong indication that customary law on State immunity is not implicated by non-judicial confiscation of the CBR assets.

To conclude, despite the lack of State practice and *opinio juris* on specifically the permissibility of confiscation under the law of State immunity from enforcement, customary international law appears to be quite coherent on the matter of non-judicial measures of constraint. Thus, according to the rationale of State immunity, State immunity from enforcement does not apply to non-judicial measures of constraint, including executively ordered confiscation. Accordingly, a confiscation of the frozen CBR assets would be compatible with the law of State immunity.

Nevertheless, the lack of instances in which States have confiscated foreign central bank property, independent from judicial proceedings, suggests that it has not yet been truly tested whether States will concede to this line of reasoning. The increased use of sanctions in the form of assets freezes against foreign central banks and the relatively few objections to such freezes, suggests that customary law of State immunity may not be implicated by these measures. Yet, a confiscation is definite, as it changes the ownership of assets, and therefore differs from assets freezes. Hence, while the rationale of State immunity supports the proposition that a confiscation of the CBR assets is compatible with State immunity, the lack of State practice and *opinio juris* on the matter suggests that it cannot be known for certain whether customary law of State immunity would be implicated by a confiscation. Thus, since this thesis intends to examine *lex lata*, it must be concluded that in this aspect the law is unsettled.

5 Conclusion

This thesis has examined the relationship between enforcement measures, specifically confiscation, and the law of State immunity from enforcement, with the aim of determining whether the frozen CBR assets may be subjected to confiscation without implicating State immunity. This chapter offers some concluding observations in response to the three sub-questions outlined in subchapter 1.2 of the thesis. The chapter is finalized with a short response to the overarching research question of the thesis.

Chapter 2 of the thesis concludes that central bank assets are provided with a more generous immunity from pre- and post-judgment measures of constraint under customary international law, compared to other types of State property. However, to enjoy this immunity, the central bank must be categorized as “State”, since only States are afforded immunity for their property. While the CBR fulfils its task independently from other organs of the Russian State, according to article 75 of the Russian Constitution, the central bank is still entitled to act as Russia’s monetary authority. Under customary international law of State immunity and according the UNCSI, this categorizes the CBR as a State agency or instrumentality, and thus grants the bank and its property State immunity from enforcement. As a central bank, the CBR is provided absolute immunity from enforcement under article 21(1)(c) of the UNCSI, but as the Convention is not yet in force, the CBR must rely on the immunity provided by customary law. Nevertheless, also customary international law grants the CBR assets with near-absolute immunity, if they serve monetary purposes. It is evident based on the Russian Constitution and information provided by CBR itself, as well as by the EU’s references to the frozen CBR assets as foreign currency reserves, that the CBR property serve monetary purposes, since the bank is tasked to *inter alia* ensure stability for Russia’s national currency.

Chapter 3 of the thesis examined if customary international law on State immunity contains any exceptions by which the otherwise immune CBR assets may be confiscated without implicating State immunity from enforcement. Two such possible exceptions were identified and examined. The first exception, practiced by both the United States and Canada would allow the CBR assets to be confiscated to satisfy court judgments if Russia is designated as a supporter of Terrorism. While the European Parliament indeed identified Russia as a “state sponsor of terrorism”, the EU, unlike the United States and Canada, lacks a legal framework that would allow the union to confiscate foreign State property based on the owner-State being identified as a sponsor of terrorism. However, irrespective of the lack of legal basis for such confiscation within the EU, the chapter concludes that customary law contains no such “terrorism exception” to State immunity from enforcement, due to the lack of State practice and because of conflicting *opinion juris*.

The second, and arguably more substantiated, exception concern whether a State may lose its entitlement to State immunity for its property if it has violated a peremptory norm. Since Russia's has violated the prohibition to use force in article 2(4) of the UN Charter, as acknowledged in a widely supported UNGA resolution, such an exception may, if applicable, allow States to confiscate CBR without implicating State immunity from enforcement. While a few domestic courts have applied this exception, on the basis that a State's violation of *jus cogens* norms could be interpreted as an implied waiver of immunity or on the basis that *jus cogens* norms take precedence over the laws of State immunity, there is no coherent State practice or *opinion juris* on the matter. Moreover, it is well established within customary international law on State immunity that any waiver of State immunity must be explicit. The latter argument concerning norm hierarchy was rejected by the ICJ, since the court found that there is no norm conflict between peremptory norms and State immunity, as the rules on State immunity are of a purely procedural character. Thus, *jus cogens* rules cannot take precedent over the rules of State immunity. This conclusion is further supported by judgments from the ECtHR and in the preparatory of the UNCSI, both sources claim that customary law contains no exception to State immunity from enforcement due to *jus cogens* violations. Hence, customary international law on State immunity does not contain any exceptions to State immunity from enforcement, according to which central bank property could be lawfully confiscated.

Lastly, chapter 4 of the thesis examined if the scope of State immunity from enforcement extends to non-judicial measures of constraint and subsequently prohibits a confiscation of the CBR assets, even if the confiscation is unrelated to any judicial proceedings. The UNCSI and domestic legislations on State immunity, both of which constitute State practice, asserts that State immunity from enforcement applies only in relation to some form of judicial proceedings before a court. Hence, although an administrative organ could be considered as a "court" insofar it exercises judicial functions, State property is still only protected from enforcement measures taken by the judicial organ if these measures are undertaken in connection with a legal proceeding. Based on this rationale, it appears that measures of constraint, including confiscation of central bank assets, do not fall under the scope of State immunity from enforcement if the measures are not undertaken in relation to a judicial proceeding before a court. Moreover, while several legal scholars agree with this reasoning, some reject this conclusion. Interestingly though, several of the more hesitant scholars, who claim that State immunity from enforcement should apply also to non-judicial measures of constraint, base their argumentation on notions and principles outside the field of State immunity, most commonly the principle of sovereign equality. Although it could, arguably, be possible that some of these concepts ought to be observed in relation to a confiscation of central bank assets, they do not belong in the assessment of

whether an executive confiscation implicates State immunity. Hence, a confiscation not undertaken in connection with a legal proceeding ought to be legal. Nevertheless, States' hesitation to take advantage of this loophole, even in a time of immense political pressure to take action for the benefit of Ukraine, indicates that they might conceive this type of confiscation as unlawful in accordance with customary law on State immunity. This proposition is supported by inter alia the United States' attempt to justify the REPO Act which permits executively ordered confiscation of State property, as a countermeasure. Moreover, while the EU has ordered CSDs to transfer the net profits of the interest accumulated by the frozen CBR assets to the union, there is uncertainty as to whether these assets were even the CBR's to begin with. Euroclear's statement from 2023 in which the CSD claimed that the interest belonged to Euroclear, suggests that Russia may not be the owner of the assets. If so, the EU is not really confiscating the interest of the CBR assets, and therefore not providing any viable State practice on the subject matter. The fact that the EU remain hesitant to confiscate the principal of the frozen CBR assets again indicates that State may not consider a confiscation of the CBR assets to be legal. Therefore, although State immunity from enforcement *prima facie* does not encompass non-judicial measures of constraint in general, the lack of State practice and the conflicting *opinio juris* regarding specifically the measure of confiscation results in legal uncertainty regarding whether this type of non-judicial executive measure is compatible with international law of State immunity from enforcement. Hence, it cannot be determined for certain whether the *lex lata* of State immunity permits States to confiscate the frozen CBR assets, even if such confiscation is structured to avoid any judicial proceedings.

To conclude, the CBR assets are provided near-absolute immunity from enforcement measures taken in connection with legal proceedings. Customary law contains no viable exception to this extensive immunity, thus it will not be possible to confiscate the CBR assets through any legal proceedings before a court. Further, although the scope of State immunity from enforcement does not appear to extend to non-judicial measures of constraint, the lack of coherent State practice and *opinio juris* results in a legal ambiguity. As a result, it cannot with certainty be determined if the CBR assets could be confiscated independently from legal proceedings.

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