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# Seizing Assets of Russia to Finance the Reconstruction of Ukraine: Conformity with International Law

MASTER THESIS

presented

by

**Jan Egli**

under the supervision of

**Professor Andreas R. Ziegler**

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*Case Concerning the Factory at Chorzów*, Judgement No. 13, 13 September 1928, Series A, No. 17.

# Table of Abbreviations

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|---|---|
| ARSIWA | Draft Articles on Responsibility of States for Internationally Wrongful Acts |
| Art. | Article |
| BIT | Bilateral Investment Treaty |
| CBR | Central Bank of Russia |
| CHF | Swiss franc |
| Cl. | Clause |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) |
| ECSI | European Convention on State Immunity |
| ECtHR | European Court of Human Rights |
| Ed. | Edition |
| Edit. | Editor |
| Edits. | Editors |
| *Etc.* | *Et cetera* |
| EU | European Union |
| Fn. | Footnote |
| GC | Grand Chamber |
| *I.e.* | *Id est* |
| *Ibid*. | *Ibidem* |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| ICSID | International Centre for Settlement of Investment Disputes |
| *Id*. | *Idem* |
| IHL | International Humanitarian Law |
| JAAC | *Jurisprudence des autorités administratives de la Confédération* |
| Let. | Letter |
| MPEPIL | Max Planck Encyclopedia of Public International Law |
| NATO | North Atlantic Treaty Organization |
| No. | Number |

| | |
|---|---|
| p. | Page |
| par. | Paragraph |
| PCIJ | Permanent Court of Justice |
| REPO | Russian Elites, Proxies, and Oligarchs Task Force |
| Sec. | Section |
| SRIEL | Swiss Review of International and European Law |
| SSRN | Social Science Research Network |
| U.S.C. | United States Code |
| UK | United Kingdom of Great Britain and Northern Ireland |
| UN | United Nations |
| UNCIO | United Nations Conference on International Organization |
| UNCSI | United Nations Convention on Jurisdictional Immunities of States and Their Property |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNSC | United Nations Security Council |
| UNTS | United Nations Treaty Series |
| US | United States |
| USA | United States of America |
| USD | United States dollar |
| USSR | Union of Soviet Socialist Republics |
| v. | *versus* |
| VCDR | Vienna Convention on Diplomatic Relations |
| VCLT | Vienna Convention on the Law of Treaties |
| Vol. | Volume |

# I. Introduction

On 24 February 2022, Russia invaded Ukraine.[1] In addition to the human losses, the invasion led to the destruction of numerous buildings and infrastructure. In particular, housing, transport and energy infrastructure have been heavily damaged.[2] The World Bank estimates the costs for reconstruction and recovery at USD 411 billion so far.[3] The idea has been put forward that Russia must pay for these costs and, if it does not pay voluntarily, that the allies of Ukraine should seize assets of Russia to finance the reconstruction of Ukraine.[4] The rule of law requires that any action taken against Russia is in accordance both with international as well as national law.[5] This master thesis analyses whether it is in conformity with international law if allies of Ukraine seize assets of Russia on their territory to cover the damages Russia has inflicted upon Ukraine and its people.

The first section deals with the "preliminary question" of whether Russia is liable under international law for the damages it has caused. The second section provides a closer look at the proposals of seizing assets of Russia. The third section addresses various international obligations which might stand in the way of seizing assets of Russia: the law of state immunity, the prohibition of intervention, the rules of inviolability, international investment law and the rules protecting due process.[6] The fourth section considers whether circumstances exist which justify non-compliance with international obligations. The last section summarizes and briefly discusses the results of this master thesis.

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1 UNHRC, par. 12–13, p. 3.
2 WORLD BANK, p. 20.
3 *Id*., p. 21.
4 STEIN Jeff/HUDSON John/COLETTA Amanda, *U.S. intensifies push to use Moscow's $300 billion war chest for Kyiv*, The Washington Post, available at: https://www.washingtonpost.com/business/2023/10/11/us-intensifies-push-use-moscows-300-billion-war-chest-kyiv/ (retrieved 15 November 2023).
5 MOISEIENKO, *Sanctions*, p. 35–36.
6 This list is inspired by WEBB who identified various international obligations which might prevent the seizure of assets of Russia. See WEBB, point 4, par. 1–3.

## II. Responsibility of Russia under International Law

The demand to seize assets of Russia to finance the reconstruction of Ukraine implies that Russia is obliged to pay for the damages it has inflicted on Ukraine and its people. The question is whether this assertion is true under international law.

### A. The Law of State Responsibility

It is a long-established principle of customary international law that the violation of international obligations by a state gives rise to its responsibility.[7] Responsibility includes the obligation to make reparation. The PCIJ already held in 1928 that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[8] In 2002, the UNGA adopted a resolution which took note of the draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[9] The draft articles were established by ILC with the objective of defining the general rules of international law on state responsibility.[10] The ARSIWA are generally considered to express customary international law.[11] According to Art. 1 ARSIWA, the international responsibility of a state is triggered if there is an internationally wrongful act of that state. According to Art. 2 ARSIWA, an internationally wrongful act consists of two components. First, there must be an action or omission attributable to a state. Second, this action or omission must constitute a breach of an international obligation of that state. However, in certain cases there exists a justification for the state's non-compliance with its international obligations.[12] The ARSIWA defines six circumstances precluding wrongfulness: consent, self-defence, countermeasures, *force majeure*, distress and necessity.[13] If there is an internationally wrongful act by a state, Art. 30 and Art. 31 par. 1 ARSIWA stipulate that that state is under the obligation of cessation and non-repetition and the obligation to make "full reparation". The term "full reparation" indicates that the reparation should eliminate the consequences of the internationally wrongful act as far as possible.[14] Art. 34 ARSIWA provides that reparation for injury can take the form of restitution, compensation or satisfaction (either alternatively or cumulatively).

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7 ZIEGLER, *Völkerrecht*, par. 297, p. 127.
8 PCIJ, *Chorzów Factory*, p. 29.
9 UNGA, *Resolution 56/83*. The draft articles are annexed to the resolution.
10 ILC, *State Responsibility*, par. 1, p. 31.
11 CRAWFORD, p. 43.
12 ILC, *State Responsibility*, par. 2, p. 71.
13 Art. 20 to 25 ARSIWA.
14 *Id.*, par. 2–3., p. 91. The ILC refers to PCIJ, *Chorzów Factory*, p. 47.

## B. International Rules Governing Armed Conflicts

Russia and Ukraine are belligerents in an international armed conflict.[15] Two sets of rules regulate armed conflicts. First, the rules governing the question of when it is lawful that a state uses force against another state (*jus ad bellum*).[16] Second, the rules governing an armed conflict after it has begun (*jus in bello* or international humanitarian law, IHL).[17] The prohibition of the use of force is the cornerstone of the *jus ad bellum*.[18] It is enshrined in Art. 2 par. 4 UN Charter which stipulates that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state".[19] While the prohibition of the use of force is not absolute, exceptions are only allowed in very limited circumstances. In this sense, the term "*jus contra bellum"* would be more apt than "*jus ad bellum"* to refer to the law on the use of force.[20] The UN Charter recognises two exceptions from the prohibition to use force: self-defence (Art. 51 UN Charter) and an authorisation by the UNSC (Art. 42 UN Charter).[21] Additional exceptions are heavily disputed.[22] IHL, the second set of rules applying to armed conflicts, consists of a large number of rules based on various sources. International armed conflicts are notably governed by the four Geneva Conventions of 1949, the Additional Protocol I of 1977 and various weapons treaties.[23]

## C. Application to the Present Case

The question is whether Russia is responsible for the invasion and the resulting damages suffered by Ukraine and its people. International responsibility exists if, first, the relevant conduct can be attributed to Russia, second, Russia has breached an international obligation by its conduct and, third, that there are no circumstances precluding the wrongfulness Russia's breach.

Nobody disputes that the attacks on Ukraine are attributable to Russia[24]. Furthermore, the majority of states expressed the view that Russia's conduct has violated the *jus ad bellum*. In March 2022, the UNGA deplored "in the strongest terms the aggression by the Russian Federation

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15 UNHRC, par. 10, p. 3.
16 MELZER, p. 27.
17 *Ibid*.
18 DÖRR, par. 1.
19 United Nations Charter, 26 June 1945, XV UNCIO 355, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.
20 ZIEGLER, *Völkerrecht*, par. 704, p. 308.
21 MELZER, p. 27.
22 See DÖRR, par. 45–52, for a discussion of additional exceptions.
23 *Id*., p. 21.
24 Not even Russia denies this, although it uses the euphemism "special military operation". See UNSC, *Address by the President of the Russian Federation*, p. 6.

against Ukraine in violation of Article 2 (4) of the Charter".[25] The resolution was adopted by a vote of 141 in favour, 5 against and 35 abstentions.[26] Moreover, Russia has violated IHL on numerous occasions, at times so gravely that the acts qualify as war crimes.[27] Russia has put forward various explanations why its conduct against Ukraine is justified under international law. It has notably referred to the right of self-defence under Art. 51 UN Charter.[28] According to Russia, NATO intends to advance ever further eastwards and therefore menaces the security of Russia. However, this does not qualify as an armed attack. Thus, Russia cannot rely on the right to self-defence and no circumstances apply which preclude the wrongfulness of Russia's breaches of its international obligations.[29] In conclusion, Russia has committed several internationally wrongful acts. First, the invasion itself as an unlawful use of force. Second, the violations of IHL on various occasion. As there are no circumstances precluding wrongfulness, Russia is responsible under international law. This includes the obligation of Russia to make reparation for damages resulting from its internationally wrongful acts. This finding is in line with the resolution of the UNGA from February 2023. The UNGA recognized that Russia "must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts".[30]

International law obliges Russia to pay. The question remains how much. State responsibility entails the principle of "full reparation" which means that effects of the internationally wrongful acts need to be eliminated as far as possible.[31] However, it is disputed whether this principle applies in the case of violations of the *jus ad bellum.*[32] The extent of Russia's obligation to pay reparations require further scrutiny. As far as this master thesis is concerned, it suffices to conclude that Russia is obliged to pay at least for a substantial share of the damages it has inflicted upon Ukraine and its people. This obligation does not depend on any further action. It arises *ipso jure* as a consequence of the wrongfully international acts committed by Russia.[33]

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25 UNGA, *Resolution ES-11/1*, par. 2.
26 UN*, Press Release, p. 1.*
27 UNHRC, par. 109.
28 UNSC, *Address by the President of the Russian Federation*, p. 5–7.
29 RICHTER, p. 12–13.
30 UNGA, *Resolution ES-11/5*, par. 2.
31 *Supra* II.A, p. 2.
32 *Pro*: GÜNNEWIG, p. 469; *Contra*: SULLO/WYATT, par. 45, with further references.
33 CRAWFORD, p. 553; GÜNNEWIG, p. 445.

# III. Seizing Assets of Russia to Enforce its Responsibility

## A. Proposals of Seizing Assets of Russia

The question arises of how Russia's obligation to pay reparations can be enforced. The discussions have mainly focused on seizing frozen assets of the Central Bank of Russia (CBR).[34] The CBR is organized as a separate legal entity from the government of Russia but exercises sovereign authority in its task to issue currency and to protect the Russian rouble.[35] It holds assets abroad in the form of foreign currency or securities denominated in foreign currencies at other central banks or foreign commercial banks.[36] These foreign assets serve the CBR to stabilize the rouble and to perform transactions in foreign currency.[37] As a reaction to Russia's invasion of Ukraine, various countries have immobilized assets of the CBR. The members of the Russian Elites, Proxies, and Oligarchs (REPO) Task Force have immobilized more than USD 300 billion worth of assets.[38] The REPO Task Force consists of the G7 countries (Canada, France, Germany, Italy, Japan, the United Kingdom, the USA), the EU and Australia.[39] Shortly after the invasion, the High Representative of the EU for Foreign Affairs and Security Policy has publicly embraced the proposal of seizing assets of the CBR.[40] However, in the meantime, the EU is discussing about the more modest proposal of only seizing the interests generated from the immobilized assets of the CBR.[41] By contrast, in the UK and the USA, bills were introduced in their respective parliaments aiming at seizing assets of Russia (including the immobilized assets of the CBR).[42] The UK bill concerns "the seizure of Russian state assets for the purpose of offering support to Ukraine and the Ukrainian people".[43] It grants the government the power to vest assets of Russia in a person acting as a trustee.[44] Subsequently, the trustee can use the assets for various payments, including for "funding the ongoing needs for repair of Ukrainian

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34 BISMUTH, p. 12.
35 BANK OF RUSSIA, par. 1–4.
36 GOLDMAN, par. 3.
37 *Ibid.*
38 EUROPEAN COMMISSION, *REPO*, p. 1.
39 EUROPEAN COMMISSION, *Task Force*, p. 1. Not all states which have frozen assets are part of the REPO Task Force. For example, Switzerland has frozen CHF 7.5 billion worth of Russian assets but is not part of the Task Force. See STATE SECRETARIAT FOR ECONOMIC AFFAIRS, *REPO,* par. 4–5.
40 FLEMING Sam, *EU should seize Russian reserves to rebuild Ukraine, top diplomat says*, 9 May 2022, available at: https://www.ft.com/content/82b0444f-889a-4f3d-8dbc-1d04162807f3 (retrieved 15 November 2023).
41 FLEMING Sam/ARNOLD Martin/STAFFORD Philip, *Why the EU is split over raiding Russian assets*, Financial Times, available at: https://www.ft.com/content/b09dd675-6f76-48ed-aad5-c3a056f743f3 (retrieved 15 November 2023).
42 HOUSE OF COMMONS, *Debate*; SENATE FOREIGN RELATIONS COMMITTEE, par. 1.
43 HOUSE OF COMMONS, *Seizure of Russian State Assets and Support for Ukraine Bill*, cl. 1(1).
44 *Id.*, cl. 3 and 4.

civilian buildings, facilities and infrastructure".[45] The US bill grants the President the power to "confiscate any Russian sovereign assets subject to the jurisdiction of the United States".[46] The rights and titles of the confiscated assets shall be vested in the Ukraine Support Fund which must be established for this purpose.[47] The funds shall be available to the Secretary of State "for the purpose of compensating Ukraine for damages resulting from the unlawful invasion by the Russian Federation".[48] The term "Russian sovereign assets" expressly includes funds and other property of the CBR.[49]

It remains to be seen whether the bills will pass. In any case, several observations can be made regarding the nature of the proposed seizure of assets of Russia. First, there is no uniform terminology for the seizure of assets. While the UK bill uses the term "seizure", the US bill uses the term "confiscation".[50] Second, the bills conceive seizing assets as a change in ownership. The state deprives Russia of certain property rights and transfers these rights to a fund or a government agent. Third, the seizure is permanent and not merely temporary. Fourth, no compensation is offered for the seizure. Fifth, the seizure targets assets located on the territory of the state which orders the seizure. Sixth, the seizure is based on a decision by the executive.

## B. Alternative Options

Seizing assets of Russia to enforce its responsibility is by no means an obvious choice. First of all, a diplomatic settlement would be an alternative. After armed conflicts, peace treaties are often concluded between the parties to the conflict.[51] Certain peace treaties also contain provisions addressing the extent and modalities of reparations.[52] The Treaty of Versailles concluded in June 1919 after the First World War is among the notable examples of such treaties.[53] A second option would be a judicial settlement on the international level. For example, in 2022, the ICJ held that Uganda must pay a total of USD 325 million to the Democratic Republic of the Congo as compensation.[54] The compensation was due for damages resulting from violations of *jus ad bellum*, IHL and human rights law.[55] Yet another option for a judicial settlement would

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45 *Id.*, cl. 6(2)(b)(ii).
46 SENATE OF THE UNITED STATES, Rebuilding Economic Prosperity and Opportunity for Ukrainians Act, sec. 104(b)(1).
47 *Id.*, sec. 104(b)(4) and sec. 104(c).
48 *Id.*, sec. 104(b)(4) and sec. 104(d).
49 *Id.*, sec. 109(4)(A)(i).
50 In this master thesis, these terms are used interchangeably.
51 KLEFFNER, par. 1.
52 SULLO/WYATT, par. 2.
53 *Id.*, par. 10.
54 ICJ, *Armed Activities on the Territory of the Congo*, par. 409.
55 *Id.*, par. 6.

be the establishment of an international claims commission.[56] For example, in 2000, Eritrea and Ethiopia established the Eritrea-Ethiopia Claims Commission to settle claims resulting from a two-year long armed conflict between the two countries.[57] A third option would be an intervention by the UNSC. In the past, the UNSC has also used its power to settle questions of reparations.[58] Most notably, it established the UN Compensation Commission as a reaction to the invasion of Kuwait by Iraq in 1990.[59] The Commission examined claims by governments, enterprises and individuals brought against Iraq for damages suffered during the invasion.[60]

In the present case, the problem is that these solutions require Russia's cooperation. However, it is not foreseeable that Russia will be willing to recognise its obligation for reparations and to settle the issue of reparations diplomatically with Ukraine.[61] A judicial settlement is also not in sight as this would require Russia's consent. Without it, the ICJ does not have jurisdiction for claims of reparations resulting from the invasion.[62] Neither is it possible to establish an international claims commission on a bilateral basis without Russia's consent. Measures by the UNSC are also no viable option given that as a permanent member of this organ, Russia can veto any resolutions it deems unfavourable.[63] The demand of seizing assets of Russia is a way of circumventing the need for Russia's cooperation.

## C. Precedents

It happens from time to time that individuals or companies bring lawsuits against a state before the national courts of another state.[64] This sometimes leads to the situation where a state seizes assets of another state to enforce a judgement.[65] This happens mostly when a state engages in commercial activities.[66] However, there exist also cases where national courts have rendered judgements against another state outside of the commercial context. The Ferrini case is among the examples. Mr. Ferrini is an Italian national who sued Germany before Italian courts for

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56 GIORGETTI/KLIUCHKOVSKY/PEARSALL, par. 1–3.
57 KLEIN, par. 1.
58 MOFFETT, p. 100.
59 SULLO/WYATT, par. 31.
60 UNSC, *UN Compensation Commission*, par. 13, p. 4.
61 WISSENSCHAFTLICHE DIENSTE DES BUNDESTAGS, p. 14.
62 Ukraine initiated proceedings against Russia before the ICJ. However, they concern the violation of the Genocide Convention and not violations of *jus ad bellum* and IHL by Russia. See ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, par. 19. The ICJ does not have jurisdiction to decide upon Russia's duty to make reparations for violating the rules of armed conflicts. See CEASEFIRE, p. 12–13.
63 PETERS, p. 96.
64 MÜLLER-CHEN, p. 198.
65 THOUVENIN/GRANDAUBERT, p. 245–246.
66 *Ibid*.

injuries suffered during the occupation of Italy by German forces during World War II.[67] Italian courts subsequently held that Germany must pay reparations to Mr. Ferrini.[68] Another famous example is the Peterson case where US nationals sued Iran before US courts for injuries resulting from acts of terrorism (notably for the bombing of a US military installation in Lebanon in 1983).[69] Subsequently, US courts obliged Iran to pay reparations and enforcement proceedings were initiated, *inter alia*, against assets of the Bank Markazi, the central bank of Iran.[70] All these cases involved national courts exercising jurisdiction on another state or the application of measures of constraints to enforce judgements by national courts. Furthermore, the national courts did not act on their own initiative. Private persons initiated the cases. By contrast, it seems less common that the executive branch of a state decides on its own initiative to seize assets of another state. Precedents exist from the two world wars, when warring states seized assets of their enemies.[71] A more recent example occurred in 2003, when the US President ordered the seizure of Iraqi assets located in the USA.[72] Under IHL, a state can seize certain assets of the belligerent state during an armed conflict.[73] However, in the present case, the allies of Ukraine are not involved themselves in an armed conflict with Russia. Providing aid (including military aid) to Ukraine in its war against Russia is not sufficient to qualify the supporters of Ukraine as belligerents *vis-à-vis* Russia.[74]

In conclusion, there are various precedents where a state seizes assets of another state in the context of court proceedings. There are also precedents where a state seizes assets of another state in extrajudicial proceedings in wartime. By contrast, it seems to be a new phenomenon that a state seizes assets of another state in extrajudicial proceedings in peacetime, *i.e.* without being involved in an armed conflict with the targeted state.[75]

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67 The Ferrini case was among the cases which lead Germany to initiate proceedings before the ICJ against Italy. Germany claimed that Italy had violated its immunity.as a state. See ICJ, *Jurisdictional Immunities of the State*, par. 27.

68 *Ibid*.

69 ICJ, *Certain Iranian Assets*, par. 22. The decision by the US courts and the subsequent measures of enforcements led Iran to initiate proceedings before the ICJ against the USA. Iran claimed that the USA violated its immunity. However, the Court did not decide this claim due to lack of jurisdiction. See ICJ, *Certain Iranian Assets*, par. 80.

70 *Id*., par. 27.

71 MOISEIENKO, *Sanctions,* p. 39.

72 THE WHITE HOUSE, p. 344. This measure was based on the International Emergency Economic Powers Act which allows confiscating certain assets if the USA «is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals». See 50 U.S.C. §1702(a)(1)(C).

73 MOISEIENKO, *Friend's Enemy*, p. 720. See also DEDERER, par. 1, and JENNINGS/WATTS, p. 365.

74 WENTKER, p. 653.

75 STEPHAN, International Legal Issues With Possible New Legislation*,* par. 2. See also MOISEIENKO, *Sanctions,* p. 55–56.

## IV. International Obligations Prohibiting the Seizure of State Assets

In the Lotus case, the PCIJ discussed the conditions under which a state acts in conformity with international law.[76] According to one approach, a state acts lawfully if there is an international rule expressly allowing the behaviour in question. According to another approach, a state acts lawfully if there is no international rule prohibiting the behaviour in question.[77] The PCIJ decided in favour of the latter approach based on the argument that "[r]estrictions upon the independence of states cannot […] be presumed".[78] Following this reasoning, it is sufficient to show that no international obligation prevents the allies of Ukraine from seizing assets of Russia. However, several concepts in international law might prevent such action in the present case: the law of state immunity, the prohibition of intervention, the rules on inviolability, the law of international investment protection and the rules protecting due process.[79] Each of these concepts will be analysed in turn.

### A. State Immunity

State immunity comprises two distinct concepts: the immunity from jurisdiction and the immunity from enforcement (or execution).[80] Immunity from jurisdiction shields a state from the jurisdiction of the domestic courts of another state.[81] Immunity from execution prevents a state to apply coercive measure against another state to enforce a decision by a domestic court.[82] State immunity has developed as a rule of customary international law over a long period of time.[83] Furthermore, to some extent, it has been codified in treaties, notably in the European Convention on State Immunity (ECSI)[84] adopted by the Council of Europe in 1972 and the United Nations Convention on the Jurisdictional Immunities of States (UNCSI)[85] adopted by the UNGA in 2004. The UNCSI is not yet in force, given that not enough states have become party of the Convention so far.[86] However, the UNCSI is considered to reflect, at least partially,

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76 DAWIDOWICZ, p. 28. See also CARONI, p. 137.
77 PCIJ, *S.S. "Lotus"*, p. 18.
78 *Ibid.*
79 WEBB, point 4, par. 3.
80 ICJ, *Jurisdictional Immunities of the State*, par. 113; STOLL, par. 50.
81 FOX/WEBB, p. 75; JENNINGS/WATTS, p. 342; STOLL, par. 1; ZIEGLER, S*tate Immunity*, p. 178.
82 FOX/WEBB, p. 484; STOLL, par. 50; ZIEGLER, State Immunity, p. 178.
83 ICJ, *Jurisdictional Immunities of the State*, par. 56; JENNINGS/WATTS, p. 342.
84 European Convention on State Immunity, 16 May 1972, 1495 UNTS 182.
85 UNGA, *Resolution 59/38.* The Convention is annexed to this resolution.
86 According to Art. 30 UNCSI, 30 states must become parties. So far, only 23 states have deposited their ratification, acceptance or approval of the Convention. See UN Treaty Collection, Privileges and Immunities, Diplomatic and Consular Relations, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en (retrieved 16 November 2023).

customary international law.[87] Besides international law, some states have enacted statutes to implement state immunity in their national law.[88]

1. The Scope of State Immunity

It is undisputed that the immunity from jurisdiction protects a state against the jurisdiction of domestic courts of other states. It is also not disputed that the immunity from execution protects a state against enforcement measures taken by other states in relation to domestic court proceedings. However, it is disputed whether immunity applies beyond this "narrow" notion of state immunity[89]. According to the broad notion of state immunity, states enjoy general protection against the exercise of jurisdiction by other states and against all measures of constraint.[90] Thus, immunity applies regardless of which authority of a state is acting and regardless of whether the measures of constraints are applied in relation to court proceedings or extrajudicial proceedings.

According to the proposals for seizing assets of Russia, it is the executive and not a court which orders the seizure of these assets. This also means that the enforcement of the decision does not relate to court proceedings. It is based on extrajudicial proceedings. If one restricts state immunity to court proceedings, it seems that Russia is not protected. By contrast, if one follows the broad notion of state immunity, Russia is protected. Given the importance of the scope of state immunity in the present case, it is necessary to analyse the controversy in detail.

a) The Scope of State Immunity according to the ICJ

In its landmark case on state immunity, the ICJ defined the immunity from jurisdiction as "the right of a state not to be the subject of judicial proceedings in the courts of another state".[91] Furthermore, the ICJ referred to the immunity from enforcement only in the context of court proceedings.[92] Thus, the ICJ followed the narrow notion of state immunity. However, the facts of the case only related to court proceedings: on the one hand, the case concerned judgements rendered by national courts of Italy and Greece against Germany, and, on the other hand, enforcement measures against assets of Germany for executing these judgements.[93] Consequently,

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87 STOLL, par. 83.
88 Ziegler, *Völkerrecht*, par. 652, p. 280.
89 CARONI, p. 224.
90 *Id.*, p. 226; CASTELLARIN, p. 180; THOUVENIN/GRANDAUBERT, p. 247.
91 ICJ, *Jurisdictional Immunities of the State*, par. 113.
92 *Id.,* par. 114.
93 *Id.*, par. 15. See *supra* III.C, p. 7, regarding the Ferrini case.

the ICJ did not have to discuss whether state immunity applies in extrajudicial proceedings. Therefore, as of now, the position of the ICJ regarding the scope of state immunity is unclear.[94]

b) The Scope of State Immunity according to the UNCSI and the ECSI

Regarding the immunity from jurisdiction, Art. 5 UNCSI stipulates that "[a] state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state". Regarding the immunity from execution, Art. 18 and 19 UNCSI provide that neither pre-judgement nor post-judgement measures of constraint "may be taken in connection with a proceeding before a court of another state". Thus, the UNCSI follows the narrow definition. Yet, it is important to note that the treaty defines the term "court" as "any organ of a state, however named, entitled to exercise judicial functions"[95]. This means that even if an executive or administrative organ decides, it might still qualify as a court and therefore, state immunity applies.[96] In its commentary, the ILC provides the following definition: "judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a state".[97] Thus, the notion of "court proceedings" according to the UNCSI is broader than one might expect. However, this does not change the fact that the UNCSI enshrines the narrow notion of state immunity. The ECSI, for its part, defines immunity from jurisdiction in relation to the "court of another Contracting state".[98] Regarding the immunity from execution, Art. 23 ECSI determines that "[n]o measures of execution or preventive measures against the property of a Contracting state may be taken in the territory of another Contracting state […]". While the wording does not contain any limitation to court proceedings, the explanatory report expresses that it applies only to the execution of judgements.[99] In conclusion, both the UNSCI and the ECSI follow the narrow definition of state immunity.[100]

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94 *Contra*: RUYS, p. 679. According to RUYS, the definitions provided by the ICJ express that it adheres to the narrow notion of state immunity (even though the ICJ did not expressly address the controversy).
95 Art. 2 par. 1 let. a UNCSI.
96 ILC, *Jurisdictional Immunities*, par. 3, p. 14.
97 *Ibid*.
98 Art. 1 to 15 ECSI ("Chapter I – Immunity from jurisdiction").
99 COUNCIL OF EUROPE, par. 95, p. 19.
100 CARONI, p. 223; RUYS, p. 677.

c) Other Sources of Treaty Law

State immunity derives from the principle of the sovereign equality of states.[101] This principle is enshrined in Art. 2 par. 1 UN Charter. It stipulates that "[t]he Organization is based on the principle of the sovereign equality of all its Members". The principle of sovereign equality constitutes a cornerstone of the international legal order.[102] Whereas states differ in the power and the territory they possess, the principle of sovereign equality determines that states are equal from a legal point of view.[103] As DE VATTEL put it, "[a] dwarf is as much a man as a giant: a small republic is no less a sovereign state than the most powerful kingdom".[104] If states are equal, it follows that a state cannot decide upon another state (*par in parem non habet imperium*).[105] By shielding a state from the jurisdiction and measures of enforcement by another state, state immunity protects the principle of the sovereign equality of states. This facilitates international cooperation as it helps reducing frictions among states.[106]

It has been suggested that Art. 2 par. 1 UN Charter requires states to respect the broad notion of state immunity.[107] The equality of states implies that states should enjoy a general protection against the exercise of jurisdiction and against measures of constraints by other states – including the cases where the executive branch exercises jurisdiction and measures of constraints are applied in extrajudicial proceedings. Limiting state immunity to court proceedings seems inconsistent with the notion of sovereign equality.[108] However, critics have raised several objections to this reasoning. First, it is doubtful to equate the very abstract principle of sovereign equality of states with the concept of state immunity.[109] Second, critics have claimed that state practice does not support the view that states interpret Art. 2 par. 1 UN Charter as a provision which protects the broad notion of state immunity.[110]

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[101] ICJ, *Jurisdictional Immunities of the State*, par. 57.
[102] ZIEGLER, *Völkerrecht*, par. 611, p. 260–261.
[103] JENNINGS/WATTS, p. 339; KOKOTT/MÄLKSOO, par. 2 and 10.
[104] DE VATTEL, par. 18, p. 59.
[105] FOX/WEBB, p. 26–27.
[106] *Id*. p. 1; ZIEGLER, *Völkerrecht*, par. 650, p. 279.
[107] THOUVENIN, p. 213; THOUVENIN/GRANDAUBERT, p. 247.
[108] CARONI, p. 226; THOUVENIN, p. 213; THOUVENIN/GRANDAUBERT, p. 247.
[109] WUERTH BRUNK, p. 18; RUYS, p. 685.
[110] WUERTH BRUNK, p. 19; RUYS, p. 685.

d) State Immunity in Customary International Law

Customary international law requires that a settled practice together with *opinio juris* exists among the community of states.[111] Settled practice exists if states generally act in the same way.[112] In principle, for a custom to exist, the practice must have been adhered to over a longer period of time.[113] Regarding *opinio juris*, it is necessary to show that states act based on the conviction that there exists a legal obligation requiring them to act in this way.[114]

(i) State practice

The question is whether there exists settled practice among states to grant immunity to other states in extrajudicial proceedings. This would mean that the community of states generally abstains from exercising jurisdiction on other states and from measures of constraints in extrajudicial proceedings.

There are precedents of states seizing assets of other states in extrajudicial proceedings in times of war. Yet, in peacetime, states generally abstain from seizing assets of other states in extrajudicial proceedings.[115] By contrast, the situation looks different when it comes to the practice of sanctions. States have increasingly used the tool of financial sanctions against other states.[116] Sanctions are the domain of the executive and legislative branch of states.[117] Furthermore, sanctions have a coercive character.[118] Thus, sanctions entail measures of constraints in extrajudicial proceedings. Not all states impose sanctions against other states, but many states use this tool.[119] The practice of sanctions shows that at least a significant part of the community of states engages in exercising jurisdiction and the application of measures of constraints against other states in extrajudicial proceedings.[120] Therefore, there is no settled practice among the community of states to grant immunity outside of court proceedings.

In conclusion, many states do abstain from exercising jurisdiction and applying measures of constraints to other states in extrajudicial proceedings. However, a significant number of states does not abstain from doing so. Therefore, a settled practice among states of abstaining from such practice does not exist.

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111 ICJ, *Jurisdictional Immunities of the State*, par. 55.
112 ICJ, *Nicaragua*, par. 186; ZIEGLER, *Völkerrecht*, par. 122, p. 54.
113 ZIEGLER, *Völkerrecht*, par. 120, p. 53–54.
114 *Id.*, par. 123, p. 55.
115 *Supra* III.C, p. 7.
116 RUYS, p. 671.
117 CASTELLARIN, p. 179–180.; RUYS, p. 680.
118 CARONI, p. 24; PELLET/MIRON, par. 5.
119 RUYS, p. 685.
120 WUERTH BRUNK, p. 15.

(ii) Opinio juris

The states which engage in the practice of sanctions imply that they assume sanctions to be in conformity with international law. This also implies that they assume that exercising jurisdiction and measures of constraints on other states in extrajudicial proceedings does not violate the law of state immunity[121]. Furthermore, if there was settled state practice to grant immunity in extrajudicial proceedings, states against whom sanctions are imposed would be expected to protest against sanctions on the basis of state immunity. However, it is very rare that targeted states claim sanctions violate state immunity.[122] Lastly, states which have enacted statutes to implement state immunity in their national law only prescribe it in relation to court proceedings.[123] RUYS cites the legislation of Argentina, Australia, Canada, Singapore, the UK and the USA as examples.[124] This provides additional support for the view that state immunity is limited to the jurisdiction by courts and measures of constraints relating to court proceedings.

e) Conclusion regarding the Scope of State Immunity

The two main treaties of state immunity only refer to the exercise of jurisdiction by courts and measures of constraint in relation to court proceedings. Furthermore, there is no settled practice and *opinio juris* according to which states are required to grant immunity from jurisdiction in a general way and to refrain from measures of constraint in extrajudicial proceedings.

It is not convincing that Art. 2 par. 1 UN Charter requires states to follow the broad notion of state immunity. First, the wording of this provision is very abstract and does not refer to the notion of immunity. Second, state practice does not suggest that states assume that this article requires them to grant other states immunity outside of court proceedings. State immunity derives from the principle of the sovereign equality of states. However, in the absence of a more concrete wording and supporting state practice, it seems stretched too far to assume that Art. 2 par. 1 UN Charter codifies the broad notion of state immunity.

In conclusion, neither treaty law nor customary international law protects states against the exercise of jurisdiction in general and against all measures of constraints by another state. The protection is limited to the exercise of jurisdiction by courts and measures of constraints relating to court proceedings.

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[121] An alternative reading is that the sanctioning states assume that while their action breaches state immunity, it is justified as a lawful countermeasure. See THOUVENIN/GRANDAUBERT, p. 252.
[122] WUERTH BRUNK, p. 15–16.; MOISEIENKO, *Confiscation*, p. 32.
[123] RUYS, p. 677–678.
[124] *Ibid*. with further references.

## 2. Exceptions from State Immunity

So far, we have established that international law requires states to grant immunity to other states when it comes to the jurisdiction of courts and measures of constraint in relation to court proceedings. Earlier, states followed the idea that no exceptions apply to the principle of state immunity.[125] However, there exists a trend towards a restrictive doctrine which allows for certain exceptions.[126] Today, the great majority of states applies this restrictive doctrine.[127] The UNCSI itself follows the restrictive model by stating state immunity as a rule and subsequently defining various exceptions from this rule.[128]

### a) Exceptions from the Immunity from Jurisdiction

In the 20th century, states increasingly expanded the field of their activities and this created pressure to limit state immunity.[129] Notably in cases where a state undertook commercial transactions, state immunity was put into question.[130] A distinction has developed between acts in the exercise of sovereign authority (*acta jure imperii*) and private or commercial acts (*acta jure gestionis*).[131] This corresponds to the idea that if a state does not use its sovereign authority but acts like a private entity, it should not be protected by immunity.[132]

More recently, courts and scholars have considered whether exceptions from state immunity also exist in certain cases where a state performs sovereign functions.[133] For example, the UNCSI includes the "territorial tort exception".[134] According to Art. 12 UNCSI, an exception applies to acts which took place on the territory of the state before whose national courts an action is brought to claim reparation for damages resulting from these acts. The territorial tort exception applies regardless of whether the acts in question were sovereign or private.[135] However, the ICJ found that Art. 12 UNCSI does not reflect present customary international law when it comes to torts resulting from armed conflicts.[136]

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[125] ZIEGLER, *Völkerrecht*, par. 653, p. 280.
[126] SHAN/WANG, p. 63.
[127] FOX/WEBB, p. 324.
[128] *Id.*, p. 4.
[129] *Id.*, p. 33.
[130] ZIEGLER, *State Immunity*, p. 180.
[131] FOX/WEBB, p. 34.
[132] ZIEGLER, *State Immunity,* p. 180.
[133] *Id.*, p. 191.
[134] SHAN/WANG, p. 73.
[135] ILC, *Jurisdictional Immunities*, par. 8, p. 45; STOLL, par. 37.
[136] ICJ, *Jurisdictional Immunities of the State*, par. 78.

Another exception is discussed regarding the case where a state violates fundamental norms of international law.[137] This is also referred to as the "*jus cogens* exception".[138] The notion of *jus cogens* is defined in the Vienna Convention on the Law of Treaties (VCTL).[139] According to Art. 53 VCTL, there exists a category of norms in international law "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". There are different approaches to justify why norms of jus cogens ought to prevail over state immunity, including the "normative hierarchy theory".[140] According to the normative hierarchy theory, the international rules belonging to *jus cogens* prevail over other rules of international law (including state immunity) because no derogation from *jus cogens* norms are allowed.[141] However, the UNCSI does not contain a *jus cogens* exception.[142] Furthermore, both the ICJ and the ECtHR rejected the normative hierarchy theory.[143] According to the ICJ, *jus cogens* concerns substantive law while state immunity concerns procedural law.[144] Due to the different nature of *jus cogens* norms as opposed to state immunity, no conflict can arise between these two sets of norms.[145] The ICJ conceives state immunity as a procedural bar: national courts of a state cannot even examine if *jus cogens* norms were violated because they do not have jurisdiction over it.[146]

b) Exceptions from the Immunity from Execution

It occurs that immunity from jurisdiction does not apply and that a domestic court of a state renders a decision against another state. Yet, immunity from execution might still oppose the enforcement of this decision. In this sense, the immunity from execution is "the last bastion of state immunity".[147] However, there also exist exceptions for the immunity from execution.[148] Most notably, according to Art. 19 let. c UNCSI, a judgement can be enforced against assets of another state if three requirements are met. First, the assets must be located in the forum state.

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[137] ZIEGLER, S*tate Immunity*, p. 185–186.
[138] D'ARGENT/LESAFFRE, p. 614.
[139] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. See FROWEIN, *Ius Cogens*, par. 1.
[140] D'ARGENT/LESAFFRE, p. 615.
[141] *Id.*, p. 617.
[142] FOX/WEBB, p. 320. In its preparatory work, the ILC consciously made the choice not to include such an exception as it considered the issue "not ripe enough" for codification. See UNGA, *Report of the Chairman of the Working Group,* par. 47.
[143] FOX/WEBB, p. 40. Regarding the ECtHR, see *Al-Adsani v. The United Kingdom,* par. 48 and par. 61.
[144] ICJ, *Jurisdictional Immunities of the State*, par. 93.
[145] *Ibid*.
[146] *Id*., par. 58. See also D'ARGENT/LESAFFRE, p. 632; FOX/WEBB, p. 53. This distinction was not supported by all Judges of the ICJ. Judge CANÇADO TRINDADE heavily criticised this distinction as "artificial". See ICJ, *Jurisdictional Immunities of the State*, Dissenting opinion by Judge Cançado Trindade, par. 295.
[147] ILC, *Jurisdictional Immunities*, par. 2, p. 56.
[148] Art. 18 and 19 UNCSI.

Second, these assets are in use or intended for use "for other than government non-commercial purposes". Third, these assets must belong to an entity against which the decision in question is connected.[149] The complicated phrasing "for other than government non-commercial purposes" essentially means that the assets must be used or intended to be used for commercial purposes.[150] Art. 21 UNCSI contains a list of five categories of property, whose non-commercial purpose is presumed. This list includes diplomatic property and central bank property.[151]

3. Application to the Present Case

The question is whether the seizure of assets of Russia by the executive of allies of Ukraine violates the rules of state immunity as provided for in current international law.

a) The Principle of State Immunity

Immunity from jurisdiction grants Russia only immunity from the courts of other states. Therefore, if a state seizes assets of Russia based on a decision by the executive, it seems that the principle of state immunity does not apply. However, the question is whether the executive ordering the seizure of Russian assets qualifies as court.[152] If the executive decides to deprive Russia of certain assets, this implies that Russia has an obligation under international law to pay reparations. The argument can be made that the executive settles a dispute concerning the payment of reparations and determines questions of law and of fact. Therefore, the executive, albeit not a court in the formal sense, constitutes a *de facto* court.[153] The problem is that it is difficult to distinguish between judicial functions and executive functions.[154] It is not convincing to consider the decision on the seizure of assets as an inherently judicial function. Therefore, if the executive orders the seizure of assets of Russia, this cannot be reinterpreted as a judicial action. It remains an executive action. Therefore, the exercise of jurisdiction by the executive does not fall under the immunity from jurisdiction.

Turning to the immunity from execution, it must be recalled that it only applies in relation to court proceedings. As the present case concerns extrajudicial proceedings, immunity from execution does not apply. In conclusion, neither the immunity from jurisdiction nor the immunity from execution apply in the present case.

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149 Art. 19 let. c UNCSI

150 STOLL, par. 60. When the ILC worked on the draft articles which lead to the Convention, in the first reading the phrasing "for commercial [non-governmental] purposes" was used. See ILC, *Jurisdictional Immunities*, par. 11, p. 58.

151 Art. 21 par. 1 let. a and c UNCSI.

152 Under the UNCSI, the notion of court is broader than one might expect. See *supra* I.A.1.b), p. 11.

153 WUERTH BRUNK, p. 23

154 *Ibid*.

b) Exceptions from the Principle of State Immunity

If neither the immunity from jurisdiction nor the immunity from execution are applicable, the question of an exception becomes irrelevant. However, for the sake of completeness, the issue of exceptions is briefly addressed as well.

The seizure of Russian assets relates to Russia's invasion of Ukraine. This invasion constitutes a sovereign act by Russia (*jure imperii*). Russia does not act as a private actor. Furthermore, the fact that a sovereign act violates *jus cogens* does not change the sovereign nature of this act. *State* immunity needs to be applied irrespective of the legality of the act in question.[155] Thus, the exception relating to *acta jure gestionis* does not apply in the present case. Neither does the territorial tort exception apply. First, the conditions set out by the UNCSI for the territorial tort exception are not fulfilled with regard to the allies of Ukraine. The acts have been committed by Russia on Ukrainian territory and not on the territory of the allies of Ukraine. Second, the territorial tort exception does not even apply to Ukraine. Even though the exception as phrased in Art. 12 UNCSI applies to Ukraine, the ICJ held that the territorial tort exception is not established as a rule of customary international law when it comes to damages in the context of armed conflicts. Russia has violated *jus cogens* by violating the prohibition of the use of force as well as principles of international humanitarian law.[156] However, State immunity acts as a procedural bar. It applies regardless of the nature of the substantive norms in question. There is no exception in the case of a violation of *jus cogens*.

With regard to the immunity from execution, according to Art. 21 par. 1 let. c UNCSI, the assets of the CBR are presumed to be used for non-commercial purposes. Furthermore, the assets by the CBR serve a governmental function as it uses the foreign reserves to protect the stability of the Russian rouble.[157]

In conclusion, if Russia could invoke its state immunity in the present case, there would be no exception from the principle of state immunity. However, the principle of state immunity does not apply in the first place. Therefore, if the allies of Ukraine seize assets of Russia based on a decision by the executive, this does not breach the law of state immunity[158].

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[155] ILC, *Jurisdictional Immunities*, par. 60. See also ZIEGLER, *State Immunity*, p. 188.
[156] See FROWEIN, *Ius Cogens*, par. 8.
[157] *Supra* III.A, 5.
[158] This surprising result will be discussed in the conclusion of the master thesis. See *infra* VI VI, p. 47.

## B. Prohibition of Intervention

The prohibition of intervention bans "forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state".[159] The question arises whether the seizure of assets of Russia by allies of Ukraine constitutes an intervention in the affairs of Russia and is thus prohibited.

### 1. Origins and Legal Basis of the Prohibition of Intervention

Like the principle of state immunity, the prohibition of intervention is rooted in the principle of sovereign equality of states.[160] If states are equal, it follows that a state is not allowed to interfere in the affairs of another state. The prohibition of intervention can be understood as a principle which, at least in rudimentary fashion, coordinates the coexistence of sovereign states.[161] In this sense, the sovereignty of a state ends where the sovereignty of another state begins. The prohibition of intervention has evolved as a rule of customary international law.[162] The principle is also mentioned in Art. 2 par. 7 UN Charter[163].

### 2. The Notion of Intervention

In its judgement in the Nicaragua case, the ICJ provided the following definition: "[…] the principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty to decide freely. […] Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones".[164] Based on this definition, an intervention entails two requirements. First, a state must interfere in the affairs of another state where this state has the right to decide freely. Second, the interference must be coercive.

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[159] JENNINGS/WATTS, p. 430.
[160] ICJ, *Nicaragua*, par. 202.
[161] ZIEGLER, *Völkerrecht*, par. 617, p. 263.
[162] ICJ, *Nicaragua*, par. 202.
[163] However, Art. 2 par. 7 UN Charter concerns the relations between the UN organs *vis-à-vis* the UN member states. The prohibition of intervention in inter-state relations is not explicitly enshrined in the UN Charter. See CARONI, p. 143; KUNIG, par. 9.
[164] ICJ, *Nicaragua*, par. 205.

a) Interference in the Domaine Réservé of a State

The affairs of a state where it has the exclusive rights to make decisions is also called the "*domaine réservé"* or the "domestic jurisdiction" of a state.[165] An interference in the *domaine réservé* can take various forms. It can be direct or indirect and it can be based on positive acts as well as (in exceptional cases) on abstaining from certain acts.[166] Ultimately, the scope of the *domaine réservé* can only be defined negatively.[167] It comprises all matters which are not regulated by international law and are thus in the sole responsibility of a state.[168] As soon as a state takes up an international obligation to act in a certain way, it can no longer decide freely on how to act.[169] States differ in their international obligations, notably because states vary in the number and the extent of treaties they conclude. Therefore, the *domaine réservé* is not the same for every state.[170] There exists a trend according to which many matters which were previously in the sole responsibility of states are no longer in the *domaine réservé* of a state due to the expansion of international law.[171] This shrinks the *domaine réservé* and, linked with it, the scope of the prohibition of intervention.[172] The ICJ held that the *domaine réservé* includes "the choice of a political, economic, social and cultural system, and the formulation of foreign policy".[173] However, it is questionable whether these choices can be considered as being part of the *domaine réservé* of a state. TZANAKOPOULOS provides two examples to illustrate these doubts: First, due to the prohibition of the use of force in the UN Charter, a state cannot base its foreign policy on the use of force. Second, due to the prohibition of racial discrimination, a state cannot freely choose its social and cultural system but is faced with certain limitations by international law.[174] This shows that even when it comes to fundamental decisions about the social and cultural system and foreign policy, states are no longer completely free in their choices. Their room for manoeuvre is considerably smaller than it used to be.

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[165] CARONI, p. 144; KUNIG, par. 3.
[166] ZIEGLER, *Völkerrecht*, par. 618, p. 263.
[167] TZANAKOPOULOS, p. 620.
[168] CARONI, p. 144; KUNIG, par. 3.
[169] TZANAKOPOULOS, p. 620.
[170] VON RÜTTE, p. 65.
[171] KUNIG, par. 48.
[172] KOKOTT/MÄLKSOO, par. 51.
[173] ICJ, *Nicaragua*, par. 205.
[174] TZANAKOPOULOS, p. 631.

b) Using Measures of Coercion

Interference by a state in the *domaine réservé* of another state is not sufficient to constitute an intervention. The interference needs to be accompanied by coercion.[175] It is important to distinguish between merely exerting pressure and exercising coercion on another state.[176] Coercion clearly exists in the case of an interference using force. This holds true both in the case of using force directly as well as in the case of indirectly using force by supporting armed activities in another state operating against the government of this state.[177] Traditionally, the element of coercion required that military force is applied against another state.[178] However, the notion of coercion was expanded to include economic, political or diplomatic measures if they achieve the required coercive effect.[179] This understanding acknowledges that instead of relying on brute force, there exist more subtle ways to coerce another state.[180] The Friendly Relations Declaration adopted by the UNGA takes up this approach by stating that "[n]o state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".[181] However, it can be hard to distinguish between, on the one hand, a state pursuing economic interests which affect the *domaine réservé* of another state and, on the other hand, a state using its economic power to impose decisions on a state concerning a matter where this state is entitled to freely make its own decision.[182]

3. Application to the Present Case

The seizure of assets of Russia constitutes a prohibited intervention if this measure coercively interferes in the *domaine réservé* of Russia. In other words, an intervention exists if the seizure of assets imposes a decision on Russia regarding a matter where Russia is entitled to decide freely under international law.

If states permanently deprive Russia of certain assets located on their territory for the payment of reparations, they impose these payments on Russia. This is coercive. However, Russia is obliged to pay reparations to Ukraine. Russia cannot decide freely whether it pays reparations or not. It is obliged to pay reparations by virtue of international law. Therefore, seizing assets

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[175] JENNINGS/WATTS, p. 432.
[176] TZANAKOPOULOS, p. 620.
[177] ICJ, *Nicaragua*, par. 205.
[178] KUNIG, par. 6.
[179] JENNINGS/WATTS, p. 434.
[180] KUNIG, par. 6.
[181] UNGA, *Friendly Relations Declaration,* p. 123.
[182] CARONI, p. 146; KUNIG, par. 25.

of Russia does not constitute an interference in Russia's *domaine réservé*. Consequently, this action is not an intervention, even though measures of coercion are used. According to the prevailing view, there exists no separate right of a state to be free from economic coercion.[183] Thus, the use of coercion is not sufficient, given that there is no interference in the *domaine réservé*. However, this only holds true as long as there is a corresponding international obligation by Russia. Forcing Russia to pay for something for which it is not obliged to pay would clearly constitute a coercive interference in the *domaine réservé* and thus a prohibited intervention. Therefore, it is crucial that the authority of a state which adopts the decision to deprive Russia of certain assets carefully evaluates the extent of Russia's obligation to pay reparations. Furthermore, a state must consider to which extent Russia has already fulfilled its obligations, notably because authorities of other states might already have adopted measures to deprive Russia of certain assets. This shows that the allies of Ukraine must work together. If they go beyond the enforcement of Russia's international obligations, the seizure of assets of Russia becomes a prohibited intervention.

In conclusion, seizing assets of Russia to enforce its obligation to pay reparations does not constitute an intervention, provided that the allies of Ukraine respect the extent of Russia's obligations.

[183] HOFER, p. 182–183; TZANAKOPOULOS, p. 633.

## C. Inviolability

### 1. Inviolability in Treaty Law

Inviolability is a concept mentioned in several treaties.[184] Among those treaties is the Convention on the Privileges and Immunities of the United Nations from 1946.[185] It prescribes that the premises of the UN (Art. II s. 3), the archives of the UN and in general all documents belonging to or held by the UN (Art. II s. 4) as well as all papers and documents of the representatives of members to the UN (Art. IV s. 11 let. b) are inviolable. Another treaty mentioning inviolability is the Vienna Convention on Diplomatic Relations (VCDR) from 1961.[186] It stipulates that the premises of a mission (Art. 22 par. 1), the archives and documents of a mission (Art. 24), the official correspondence of a mission (Art. 27 par. 2), the diplomatic courier (Art. 27 par. 5), diplomatic agents (Art. 29), the private residence of a diplomatic agent (Art. 30 par. 1) as well as the papers, correspondence, and, in principle, all the property of a diplomatic agent (Art. 30 par. 2) are inviolable.

The ICJ has referred to inviolability in several of its judgements but always mentioned the concept together with the concept of immunity and without distinguishing between these two concepts.[187] However, there exists the view that immunity and inviolability are two separate concepts which need to be distinguished.[188] This view seems plausible given that treaties seem to differentiate between the two concepts.[189] For example, the VCDR refers in its Art. 29 to the inviolability of diplomatic agents and in Art. 31 to the immunity of diplomatic agents. Furthermore, state immunity only comprises a negative duty by acting as a procedural bar to court proceedings and by protecting from measures of constraint in relation to court proceedings.[190] By contrast, inviolability comprises both a negative and a positive obligation. First, the negative obligation comprises the duty to abstain from exercising any form of jurisdiction and any measures of constraints on the object or person in question[191]. Second, the positive obligation requires to protect the object or person in question.[192]

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[184] RUYS, p. 691.
[185] Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.
[186] Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95.
[187] RUYS, p. 689.
[188] DENZA, p. 126.
[189] RUYS, p. 688.
[190] *Supra* I.A.1.e), p. 14.
[191] DENZA, p. 110
[192] *Ibid*.

## 2. Inviolability as a Rule of Customary International Law

The treaties referring to inviolability only concern specific categories of assets or persons. The question is whether there is a rule of customary international law providing for inviolability of state assets in general. This question was debated in proceedings before the ICJ between Timor-Leste and Australia.[193]

### a) The Proceedings between Timor-Leste and Australia

In December 2013, agents of Australia's intelligence service seized documents in the Australian-based office of a legal advisor to Timor-Leste.[194] The seized material included documents and data relating to pending arbitration proceedings between Australia and Timor-Leste.[195] Subsequently, Timor-Leste initiated proceedings before the ICJ against Australia. It claimed that Australia had violated, *inter alia*, the inviolability of the seized documents and data to which Timor-Leste considered itself entitled.[196] Timor-Leste argued that there is a "fundamental principle that inviolability applies to state documents generally, wherever they may be and even though they are not state archives in the narrow sense, or archives of a diplomatic mission or consular post".[197] Timor-Leste held the view that the treaties which enshrine inviolability for particular categories of state assets "reflect a customary rule of international law granting inviolability to state documents and archives".[198] In its counter-memorial, Australia acknowledged that there exists inviolability for specific categories of assets based on various Conventions.[199] However, according to Australia, "they [the Conventions] do not evidence a general principle of inviolability of all state property in all circumstances, wherever such property may be located".[200] Australia went on to express that there is simply no state practice to support the assertion by Timor-Leste that customary international law contains a general protection of state documents.[201] Ultimately, the ICJ never settled the controversy. The proceedings were discontinued on mutual agreement after Australia had returned the seized material to Timor-Leste[202].

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193 RUYS, p. 700.
194 ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data*, par. 36.
195 *Id.*, par. 1.
196 *Id.*, par. 24.
197 GOVERNMENT OF TIMOR-LESTE, par. 5.65, p. 50.
198 *Id.*, par. 5.58, p. 48.
199 OFFICE OF INTERNATIONAL LAW, par. 5.70, p. 110.
200 *Ibid.*
201 *Id.*, par. 5.73, p. 111.
202 PEREIRA COUTINHO, par. 14.

b) Assessment

Timor-Leste did not claim that a rule of general inviolability of state assets exists in treaty law. It claimed that such a rule exists in customary international law. Customary international law requires settled practice together with *opinio juris* among the community of states.[203] The existence of treaties specifically protecting certain state assets such as diplomatic property suggests that states generally do not adhere to the view that there exists general inviolability of state assets. If such a general rule existed, it would not be necessary that states negotiate treaties providing protection for specific categories of state assets.[204] Furthermore, the practice of some states to target assets of other states in the framework of sanctions suggests that the sanctioning states do not assume that there is a rule of general inviolability preventing such action.[205] Additionally, targeted states tend not to raise the objection that this practise violates a general rule of inviolability or state immunity.[206] Lastly, according to RUYS, the Conventions referring to inviolability do not contain hints that they aim at partially codifying an overarching principle of inviolability of state assets.[207] The development of the VCDR illustrates this point. The rules codified in this Convention were among the earliest rules of customary international law to develop.[208] Therefore, it is not convincing that the inviolability rules in diplomatic law are derived from an overarching principle of inviolability. It is rather the case that these rules evolved together with other rules of diplomatic law over a long period of time in an autonomous process. In conclusion, international law does not provide for a general inviolability of state assets.[209] Only certain categories of state assets are inviolable.

3. Application to the Present Case

The VCDR protects assets of Russian diplomatic missions in other countries. Most notably, according to Art. 22 par. 1 VCDR, the premises used by Russian embassies for their operations are inviolable. By contrast, there is no general inviolability of assets of Russia. In particular, the assets of the CBR do not enjoy inviolability under current international law.

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[203] *Supra* I.A.1.d), p. 12.
[204] RUYS, p. 700; TZENG, p. 1811.
[205] *Supra* I.A.1.a)(i), p. 13.
[206] *Ibid*.
[207] RUYS, p. 700.
[208] DENZA, p. 1–2.
[209] JENNINGS/WATTS, p. 363.

## D. International Investment Law

International investment law aims at protecting foreign investments, *i.e.*, investments in a state (the capital-importing state) made by investors from another state (the capital-exporting state)[210].

### 1. Investment Protection in Treaty Law

There are only relatively few multilateral treaties protecting foreign investments.[211] Bilateral investment treaties (BITs) are the main source of international investment law.[212] BITs regulate how investments by a foreign investor are treated (post-establishment provisions) and, in some cases, under which condition a foreign investor is allowed to make an investment in the first place (pre-establishment provisions).[213] The post-establishment provisions notably include the protection of the foreign investor against expropriation by the host state.[214] States conclude BITs because, on the one hand, they are interested in attracting investments from abroad and, on the other hand, they wish that investments of their nationals are protected in other countries.[215] The scope of BITs depends on how they define the terms "investor" and "investment".[216] As each BIT is the result of negotiations between two states, BITs comprise different definitions of those terms[217]. Therefore, the scope of BITs requires a case-by-case analysis.

#### a) BITs Concluded by Russia

Russia has concluded 85 BITs of which 64 are in force – those in force include BITs with almost all member states of the EU as well as Canada, Japan, South Korea, Switzerland and the UK.[218] By contrast, the BIT signed between Russia and the USA in 1992 never entered into force.[219]

It is not possible in this master thesis to analyse all the BITs in force between Russia and the allies of Ukraine. As an example, this section analyses the BIT between Russia and the UK from 1989.[220] This BIT was concluded by the USSR. After its disintegration in 1991, the newly emerged Russian Federation overtook all international treaty obligation of the USSR as the sole

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[210] QURESHI/ZIEGLER, par. 14-001, p. 533–534.
[211] *Id.*, par. 14-001, p. 534–535
[212] DOLZER/KRIEBAUM/SCHREUER, p. 16.
[213] QURESHI/ZIEGLER, par. 14-001, p. 535.
[214] DOLZER/KRIEBAUM/SCHREUER, p. 146–147.
[215] *Id*., p. 10.
[216] QURESHI/ZIEGLER, par. 14-012, p. 546.
[217] UNCTAD, *Scope and Definition*, p. 7.
[218] UNCTAD, *Investment Policy Hub*, Bilateral Investment Treaties (BITs).
[219] *Ibid*.
[220] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, 6 April 1989, 1670 UNTS 28.

successor.[221] In particular, the question arises whether the BIT with the UK protects the foreign reserves of the CBR.

b) The Scope Ratione Personae of the Treaty with the United Kingdom

According to Art. 1 let. d of the BIT between Russia and the UK, "the term 'investor' shall comprise with regard to either Contracting Party: i) natural persons having the citizenship or nationality of that Contracting Party in accordance with its laws; ii) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the territory of that Contracting Party; provided that that natural person, corporation, company, firm, enterprise, organisation and association is competent, in accordance with the laws of that Contracting Party, to make investments in the territory of the other Contracting Party".

c) Assessment

The BIT with the UK differentiates between natural persons and legal persons. Regarding legal persons, the BIT lists seven structures which are protected. Furthermore, it is required that these structures are lawfully incorporated or constituted in one of the contracting states. The BIT does not indicate whether a state itself or state entities can qualify as investors. In this regard, this treaty is no exception. The great majority of BITs does not make any reference to states or state entities as investors.[222] It is rare that BITs explicitly include or exclude states or state entities as investors.[223] For example, Art. 1 let. b of the BIT between the UK and the United Arab Emirates defines the term "investor" as "any national or company of one of the Contracting Parties or the Government of one of the Contracting Parties, or the Government of any of the Emirates of the United Arab Emirates".[224] In the absence of an explicit rule, a BIT must be interpreted to establish its scope. As for other treaties, Art. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) serve as the guidelines for interpretation.[225] According to Art. 31 par. 1 VCLT, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

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[221] RIPINSKY, p. 595.
[222] SHIMA, p. 5.
[223] DOLZER/KRIEBAUM/SCHREUER, p. 59.
[224] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Emirates for the Promotion and Protection of Investments, 8 December 1992, 1863 UNTS 124.
[225] ANNACKER, p. 533. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

purpose". Thus, three different methods of interpretation can be distinguished: textual interpretation (the ordinary meaning), systematic interpretation (the context) and teleological interpretation (the object and purpose).[226]

Regarding the CBR, it is doubtful to qualify it as a "corporation", "company", "firm", "enterprise" or "association". However, the CBR might be considered as an "organisation" in the ordinary sense of the term. Furthermore, the treaty does not make any distinction whether the entity is of private or public nature. Thus, the CBR can be considered as covered based on a textual interpretation of the BIT. The systematic interpretation requires to consider the context of a treaty, including the entire text as well as the preamble and annexes.[227] The preamble of the BIT with the UK states that the contracting parties are "[r]ecognizing that the promotion and reciprocal protection under international agreement of such investments will be conducive to the stimulation of business initiative and will contribute to the development of economic relations between the two states". The wording is very broad. It does not provide any hints that the treaty should be limited to private investors. Regarding the object and purpose of the treaty at hand, it is instructive to consider its historical context. The treaty was concluded by the USSR in 1989. The USSR was based on a communist model. According to Soviet law, only the state could have ownership of significant property.[228] If the BIT concluded by the USSR in 1989 had not covered the state and state entities, the treaty would have offered no protection to Soviet investments, given that at this time only state entities made such investments abroad.[229]

In conclusion, given the broad wording of the treaty and the historical context, it seems plausible that Russia and its entities (including the CBR) qualify as an investor under the BIT. But one question remains. Can a state or state entity also qualify as an investor if it does not act like a private actor in a commercial context but exercises sovereign functions? The foreign ministry of Switzerland examined this issue in a memorandum. Asked whether investments by a state are protected under BITs, the foreign ministry concluded that this depends on whether the nature of the acts is commercial (*jure gestionis*) or governmental (*jure imperii*).[230] It based its reasoning on the practice of arbitral tribunals regarding the ICSID Convention.[231] According to Art. 24 par. 1 ICSID Convention, the ICSID has jurisdiction in cases of disputes "between a

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[226] ZIEGLER, *Völkerrecht*, par. 249, p. 106.
[227] DOLZER/KRIEBAUM/SCHREUER, p. 39.
[228] ANNACKER, p. 539.
[229] *Ibid*.
[230] FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, *Avis de droit,* p. 188.
[231] *Id.*, p. 184.

Contracting state […] and a national of another Contracting state".[232] It is generally accepted that state-owned entities can qualify as nationals in the sense of the ICSID Convention.[233] The deciding factor is whether the entity in question "is acting as an agent for the government or is discharging an essentially governmental function".[234] This test ("Broches test") reflects the rules of attribution under customary international law.[235] If one follows these considerations, the CBR does not qualify as an investor under the BIT with the UK. The CBR is entrusted with the task of issuing currency and protecting the Russian rouble. The assets invested by the CBR abroad are used as reserves for protecting the stability of the rouble.[236] Thus, the CBR exercises a governmental function. It is therefore not protected under the treaty with the UK.

In conclusion, there is no BIT in force in the first place with the USA. As far as the UK is concerned, there is a BIT in force but the CBR does not fall under its scope *ratione personae*. Thus, the CBR is neither protected against expropriation in the UK nor in the USA. However, as each BIT needs to be interpreted individually, this conclusion cannot be generalized for all the other allies of Ukraine.

### 2. Investment Protection in Customary International Law

International customary law includes the so-called international minimum standard. This is a set of rules governing the treatment of aliens.[237] The minimum standard has developed in relation to the status of aliens in general and concerns various areas.[238] It includes rules protecting the property of aliens. In particular, it prescribes that expropriation is only allowed if certain requirements are fulfilled.[239] The question is who qualifies as an alien and is thus protected by the minimum standard. Aliens are individuals who reside within a state but are not a citizen or subject of that state.[240] Furthermore, foreign legal persons can also qualify as aliens.[241] Yet, it must be emphasized that the minimum standard has developed as a protection for private persons.[242] Consequently, similar concerns exist as in the case of the scope *ratione personae* of BITs. The minimum standard might protect states and state entities when their acts are of a

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[232] Convention on the settlement of investment disputes between states and nationals of other states, 18 March 1965, 575 UNTS 160.
[233] ICSID, *Československa obchodní banka, a.s. v. Slovak Republic*, par. 16.
[234] BROCHES, p. 355.
[235] ICSID, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, par. 34.
[236] *Supra* III.A, p. 5.
[237] DICKERSON, par. 1.
[238] DOLZER/KRIEBAUM/SCHREUER, p. 5.
[239] JENNINGS/WATTS, p. 918–919.
[240] DICKERSON, par. 2.
[241] HOBE, par. 1, p. 7.
[242] *Id.*, par. 4–6., p. 8–9.

commercial nature. By contrast, it is not plausible that they enjoy protection under the minimum standard if exercising sovereign authority.

In conclusion, international investment law does not protect Russia and its state entities when they exercise sovereign authority.

## E. Due process

The question is whether international law requires the allies of Ukraine to respect certain procedural safeguards if they decide to seize assets of Russia. In particular, it is necessary to examine whether states must grant Russia access to judicial review.

### 1. International Human Rights Law

Several treaties in the field of human rights enshrine procedural safeguards, including the International Covenant on Civil and Political Rights[243] and the European Convention on Human Rights (ECHR)[244]. First, the scope of application of these treaties must be examined. As the name implies, human rights law aims at protecting humans. Human rights law evolved out of the natural law tradition which emphasized that human rights are a natural right of humans.[245] This suggests that human rights only protect human beings. While it is true that most human rights instruments exclusively protect natural persons, the ECHR also protects the rights of legal persons and entities under certain circumstances.[246] Thus, human rights law cannot simply be equated with the protection of humans but can also protect legal persons.[247] However, legal persons are only protected under the ECHR if they are not closely related to the state.[248] If an entity exercises sovereign authority, such a close relationship clearly exists.[249] Therefore, it must be concluded that the procedural safeguards in international human rights law do not protect states or state entities exercising sovereign authority *vis-à-vis* other states.

### 2. Other Sources of International Law

One might argue that state immunity and the prohibition of intervention offer a form of procedural safeguards when a state conducts proceeding against another state. Furthermore, certain BITs prescribe procedural safeguards[250], providing that the BIT is applicable in the first place. However, it seems international law does not contain general procedural safeguards as such for inter-state relations.

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[243] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 172.
[244] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1959, 213 UNTS 222.
[245] KÄLIN/KÜNZLI, p. 114
[246] *Ibid*.
[247] *Ibid*.
[248] GRABENWARTER, par. 5, p. 3.
[249] NETTESHEIM, par. 25, p. 73–74.
[250] DOLZER/KRIEBAUM/SCHREUER, p. 183.

## F. Conclusion

If allies of Ukraine seize assets of Russia based on a decision of the executive to enforce Russia's obligations to pay reparations, this does neither breach the rules on state immunity nor the prohibition of intervention. However, if they seize diplomatic property, this constitutes a breach of the rules of inviolability as provided for in the VCDR. By contrast, other assets of Russia (including the assets of the CBR) are not protected by rules of inviolability. Furthermore, in the case of the UK and the USA, the seizure of assets of the CBR does not breach international investment law. The BIT with the USA is not in force in the first place. The BIT with the UK is not applicable as the CBR does not qualify as an investor. Whether this also applies to BITs between Russia and other allies of Ukraine cannot be answered in the abstract. Given that international investment law is mainly based on BITs, each BIT needs to be interpreted individually. However, it might be that the concerns raised during the discussion of the BIT with UK also applies to BITs between Russia and other allies of Ukraine. Lastly, international law does not contain general rules of due process in inter-state proceedings.

In conclusion, the present examination has shown that the executive of allies of Ukraine can seize assets of Russia without breaching international law.

# V. Justification for Non-Compliance with International Obligations

When a state responds to an internationally wrongful act of a state, it is not absolved from complying with international law. If the response of a state breaches international obligations, this entails its responsibility if there are no circumstances precluding wrongfulness.[251] These circumstances are also described as "justification" or "excuse" for non-compliance with international obligations.[252]

The examination in the previous section has shown that the allies of Ukraine can seize assets of Russia in a way which does not breach international obligations. Consequently, the seizure is a mere retorsion, *i.e.* an act which might be considered as an "unfriendly" response to Russia's conduct, but which does not interfere with the rights of Russia under international law.[253] However, for the sake of completeness, the issue of precluding wrongfulness will be addressed all the same. According to WEBB, two circumstances could potentially apply in the present case for precluding wrongfulness: the concept of third-party countermeasures and the concept of collective self-defence.[254]

## A. Countermeasures

Countermeasures are measures by a state against an internationally wrongful act by another state.[255] They aim at inducing this other state to cease breaching international law and to make reparations for its breaches.[256] Countermeasures are a recognized form of "peaceful self-help" for states by serving as a tool of law enforcement *vis-à-vis* other states.[257] Countermeasures always entail measures which do not comply with international law and are thus "intrinsically" unlawful.[258] This is what sets them apart from retorsions.[259] However, if the requirements for lawful countermeasures are fulfilled, the wrongfulness of this non-compliance is precluded.[260] This leads to a certain paradox: countermeasures serve the enforcement of international law but

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[251] See *supra* II.A, p. 2, for a discussion concerning international responsibility and the framework of the ARSIWA.
[252] ILC, *State Responsibility*, par. 2, p. 71.
[253] GIEGERICH, par. 1.
[254] WEBB, point 4, par. 3.
[255] CRAWFORD, p. 685.
[256] DAWIDOWICZ, p. 19.
[257] CRAWFORD, p. 684; DAWIDOWICZ, p. 18.
[258] PADDEU, par. 12.
[259] ILC, *State Responsibility*, par. 3, p. 128.
[260] *Id.*, par. 2, p. 75; PADDEU, par. 11.

at the same time, they are a danger to international law.[261] To limit the potential for abuse, countermeasures must fulfil several substantive and procedural requirements to be lawful.[262]

1. The Requirements for Lawful Countermeasures

The conditions for lawful countermeasures are set out in Articles 49 to 54 ARSIWA.[263] These provisions are considered to be an expression of customary international law.[264]

a) Response to an International Wrongful Act of Another State

Art. 49 par. 1 ARSIWA sets out three conditions for a response. First, a state must have committed an internationally wrongful act. Second, the countermeasures must be taken by another state as a reaction to this internationally wrongful act.[265] Third, the countermeasure must be directed against the state which has acted wrongfully in order to induce it to comply with its obligations.[266] It is not necessary that the breach has been established in a judicial procedure or by a political body on the international level.[267] States must evaluate at their own risk whether there was an internationally wrongful act by the targeted state. The state taking countermeasures may become responsible if it turns out that its assessment regarding the targeted state was false.[268]

b) Temporary Requirements

Countermeasures are of a temporary nature.[269] On the one hand, countermeasures are reactive and not preventive.[270] On the other hand, countermeasures must immediately cease if the targeted state no longer violates international law.[271] Furthermore, according to Art. 49 par. 3 ARSIWA, "[c]ountermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question". The wording "as far as possible" points out that the requirement of reversibility is not absolute.[272] As the ILC stated, "[i]t may

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[261] PADDEU, par. 45. See also DAWIDOWICZ, p. 265.
[262] CRAWFORD, p. 686.
[263] ILC, *State Responsibility*, par. 4, p. 75.
[264] CARONI, p. 246; PADDEU:, par. 10.
[265] The question of which states are entitled to take countermeasures will be discussed later. *Infra* I.A.1.f), p. 38.
[266] ICJ, *Gabčíkovo-Nagymaros Project*, par. 83.
[267] DAWIDOWICZ, p. 287.
[268] ILC, *State Responsibility*, par. 3, p. 130.
[269] Art. 49 par. 2 ARSIWA and Art. 53 ARSIWA; CRAWFORD, p. 702; ILC, *State Responsibility*, par. 7, p. 130–131.
[270] CARONI, p. 249.
[271] *Ibid*.; ILC, *State Responsibility*, par. 1, p. 137.
[272] CRAWFORD, p. 688.

not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased".[273]

c) Procedural Requirements

According to Art. 52 par. 2 ARSIWA, an injured state needs to request the targeted state to cease its wrongful act or to pay reparations.[274] Furthermore, if a state proceeds to countermeasures, it must notify the targeted state. Given the severity of countermeasures, a state cannot take countermeasures "out of the blue" without any prior warning.[275]

d) Absolute Limits of Countermeasures

Art. 50 ARSIWA defines certain international obligations which must be respected by countermeasures under all circumstances and are thus "sacrosanct".[276] First, countermeasures must be peaceful. The use of force is not permitted.[277] Second, countermeasures must respect the "obligations for the protection of fundamental human rights".[278] This refers only to "a core of basic human rights" as not all of human rights law is sacrosanct.[279] Third, countermeasures must respect the basic rules of international humanitarian.[280] Fourth, countermeasures cannot impair international obligations belonging to *jus cogens*.[281] Fifth, if there exists a binding mechanism for dispute settlement between the involved states, countermeasures are not permitted.[282] Sixth, the "core obligations" resulting from diplomatic and consular law must be respected.[283] These obligations consist of "those obligations which are designed to guarantee the physical safety and inviolability […] of diplomatic agents, premises, archives and documents in all circumstances".[284]

e) Proportionality

According to Art. 51 ARSIWA, "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". This provision aims at requiring a certain equivalence between the countermeasure

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[273] ILC, *State Responsibility*, par. 9, p. 131.
[274] ICJ, *Gabčíkovo-Nagymaros Project*, par. 84.
[275] DAWIDOWICZ, p. 364.
[276] ILC, *State Responsibility*, par. 1, p. 131.
[277] Art. 50 par. 1 let. a ARSIWA.
[278] Art. 50 par. 1 let. b ARSIWA; ILC, *State Responsibility*, par. 6, p. 132.
[279] CRAWFORD, p. 692.
[280] Art. 50 par. 1 let. c ARSIWA; CRAWFORD, p. 694.
[281] Art. 50 par. 1 let. d ARSIWA.
[282] Art. 50 par. 2 let. a ARSIWA; CRAWFORD, p. 702; ILC, *State Responsibility*, par. 1, p. 135.
[283] Art. 50 par. 2 let. b ARSIWA; CRAWFORD, p. 697.
[284] ILC, *State Responsibility*, par. 14, p. 133.

and the injury suffered as a result of the wrongful acts of the targeted state.[285] The assessment of proportionality requires to consider the suffered injury both in quantitative as well as in qualitative regards.[286] Furthermore, the countermeasure must be necessary to enforce international law. Otherwise, it can hardly be considered as proportionate.[287]

f) The Right to Take Countermeasures

It is controversial whether only injured states are entitled to take countermeasures or if non-injured states also have this right.[288] Countermeasures taken by injured states are called "bilateral countermeasures", countermeasures taken by non-injured states "third-party countermeasures".[289]

(i) Bilateral Countermeasures

According to Art. 49 par. 1 ARSIWA, the "injured state" may take countermeasures as a response to the breach of an international obligation. According to Art. 42 ARSIWA, a state qualifies as injured in three scenarios. First, if a state is "individually" affected by the breach. Second, if a state is "specially" affected by the breach. Third, if a state is affected "per se" by the breach.[290]

The first scenario concerns the situation where a state is "individually" affected by an internationally wrongful act of another state.[291] This case requires that a state has a particular obligation *vis-à-vis* another state and that this state subsequently violates this particular obligation.[292] This first case notably arises in relation to bilateral treaties.[293]

Unlike the first scenario, the second and third scenarios do not concern the breach of an individual obligation of a state. They concern the breach of an obligation which is owed to a "group of states" or "the international community as a whole".[294] These obligations are also called "collective obligations".[295] The sub-category of collective obligations which are owed to the international community as a whole are also referred to as "obligations *erga omnes*".[296] The second scenario applies if a collective obligation is breached and a state is "specially" affected

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[285] DAWIDOWICZ, p. 347.
[286] ILC, *State Responsibility*, par. 6, p. 135.
[287] CRAWFORD, p. 699.
[288] PADDEU, par. 39.
[289] DAWIDOWICZ, p. 20.
[290] ILC, *State Responsibility*, par. 5, p. 117–118.
[291] Art. 42 let. a ARSIWA.
[292] ILC, *State Responsibility*, par. 6, p. 118.
[293] *Ibid*.
[294] Art. 42 let. b ARSIWA.
[295] ILC, *State Responsibility*, par. 11, p. 118
[296] *Id.*, par. 8, p. 127. See also FROWEIN, *Obligations erga omnes,* par. 1.

as a result of this breach.[297] A state is only specially affected by the breach of a collective obligation if it is concerned "in a way which distinguishes it from the generality of other states to which the obligation is owed".[298] For example, Art. 194 of the UN Convention on the Law of the Seas requires the contracting states to preserve the marine environment.[299] As every contracting state owes this obligation to a group of states, it is a collective obligation. Thus, if a state breaches this obligation, all the states of this group are affected. However, if, for example, the beaches of several states are polluted by toxic residues, only these states are "specially" affected.[300] Thus, only a subset of the group of state qualifies as injured states. The other states of the group are not specially affected.

The third scenario occurs if the breached collective obligation is "of such character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation".[301] The collective obligation must be such that its objective can only be achieved through the interdependent performance by all the states.[302] If a state breaches an interdependent obligation, all other states are affected *per se* and are entitled to respond to this breach.[303] The ILC cites disarmament treaties and nuclear-free zone treaties as examples.[304] It is important to distinguish interdependent obligations from obligations in the general interest.[305] For example, human rights obligations are in the general interest of states, but they are not interdependent obligations. If one state violates a multilateral human rights treaty, this does not jeopardize the whole structure of the regime.[306]

(ii) Third-Party Countermeasures

There are different terms used for describing countermeasures taken by non-injured states. These terms include "third-party countermeasures", "collective countermeasures", "solidarity measures" and "multilateral countermeasures".[307] In the drafting process of the ARSIWA, the issue of third-party countermeasures was among the most controversial aspects of countermeasures.[308] Ultimately, the right for non-injured states to take countermeasures was not included in

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297 Art. 42 let. b (i) ARSIWA.
298 ILC, *State Responsibility*, par. 12, p. 119.
299 United Nations Convention on the Law of the Sea, 16 November 1994, 1833 UNTS 3.
300 ILC, State Responsibility, par. 12, p. 119.
301 Art. 42 let. b (ii) ARSIWA.
302 SIMMA/TAMS, par. 38, p. 1365.
303 ILC, *State Responsibility,* par. 13, p. 119.
304 *Id*.
305 CRAWFORD, p. 547.
306 *Id*., p. 547, fn. 29.
307 DAWIDOWICZ, p. 34.
308 CRAWFORD, p. 703; PADDEU, par. 39.

the ARSIWA.[309] The ILC found that state practice regarding third-party countermeasures is "limited and rather embryonic".[310] However, the ILC did not intend to prohibit third-party countermeasures. As a compromise, the ILC included a savings clause in Art. 54 ARSIWA. It provides that the ARSIWA do not prejudice the right of non-injured states to take countermeasures.[311] As a result, the position on the matter was reserved and left for further development in international law.[312]

Some scholars have challenged the view of the ILC that there is only sparse state practice for third-party countermeasures.[313] In an extensive survey on third-party countermeasures published in 2017, DAWIDOWICZ arrived, *inter alia*, at the following conclusions. First, "practice cannot today be qualified as neither limited nor embryonic". Second, "although dominated by Western states, practice is considerably more widespread and diverse than the ILC had assumed". Third, "*opinio juris* may be somewhat obscure but it nevertheless exists". Fourth, "[i]n sum, there is considerable support for the conclusion that third-party countermeasures are permissible under international law ".[314] However, there exists an important caveat. DAWIDOWICZ limits his conclusion to third-party countermeasures aiming at the cessation of an internationally wrongful act by a state. By contrast, it does not apply to third-party countermeasures aiming at enforcing reparations. "Unlike claims for cessation, there is no clearly recognized entitlement to obtain reparation by way of third-party countermeasures. Practice is too limited to reach any firm conclusion. [..] In sum, it appears that the instrumental function of third-party countermeasures may be more limited than under the traditional regime applicable to bilateral countermeasure."[315]

2. Application to the Present Case

Seizing assets of Russia is a response to an international wrongful act by Russia. Russia has violated the prohibition of the use of force by invading Ukraine. There exist no grounds for precluding the wrongfulness of this act. Thus, Russia is obliged to pay for the damages resulting from this act. [316] The seizure of Russian assets is directed against Russia and aims at inducing

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[309] *Id.,* par. 6, p. 139.
[310] ILC, *State Responsibility*, par. 3, p. 137.
[311] *Ibid.*
[312] CRAWFORD, p. 706.
[313] PADDEU, par. 40.
[314] DAWIDOWICZ, p. 283. MOISEIENKO describes this work as "the most extensive study on the subject presently available". See MOISEIENKO, p. 39, *Confiscation*.
[315] DAWIDOWICZ, p. 302. See also the view of GAJA during a discussion of the ILC. ILC, *2650th Meeting*, par. 58, p. 308: "Countermeasures should thus be regarded as admissible only to the extent that their purpose was cessation."
[316] See s*upra* II.C, p. 3.

it to fulfil its obligations to pay reparations. Furthermore, the seizure respects the absolute limits of countermeasure as long as no diplomatic or consular property is among the seized assets. Ukraine and the community of states have requested Russia to cease its violation of international law and to pay for the damages it has inflicted upon Ukraine and its people.[317] If a state which seizes Russian assets notifies Russia, the procedural requirements are respected.

The requirements of reversibility, proportionality and the entitlement to take countermeasure pose more problems. They are addressed in more detail.

a) Reversibility

Seizing assets means to permanently deprive Russia from certain of its property rights. In contrast to merely freezing assets of Russia, this measure is permanent, *i.e.* irreversible[318]. One might counter this argument by saying that if Russia fulfils its obligation to pay reparations, the seized assets could be given back to Russia or, if the assets are no longer available, compensation could be paid to Russia[319]. Therefore, the seizure is reversible. However, given that seizing Russian assets consists of permanently depriving Russia of certain property rights, it is not convincing to affirm reversibility by simply pointing out the theoretical possibility of restitution. On the other hand, it is important to note that the criterion of reversibility is not absolute as the measure only needs to be reversible "as far as possible". One can argue that it is simply not possible to enforce Russia's obligation to pay reparations in a way which is reversible. The crucial question is how strict the requirement of reversibility needs to be interpreted. The requirement of reversibility aims at limiting the severity of countermeasures. The targeted state should not suffer more than necessary to ensure compliance with its international obligations. If this reasoning is applied to the enforcement of reparations, it seems that seizing assets of Russia does not cause more "suffering" to Russia than if Russia voluntarily fulfilled its obligations. In both cases, Russia "loses" some of its assets to finance the payment of reparations. Following this reasoning, the requirement of reversibility does not serve as a mitigating factor when it comes to the enforcement of the obligation to pay reparations.[320] This supports the view that the criterion of reversibility cannot be interpreted strictly, at least regarding the enforcement of obligations of reparation. In conclusion, the temporary requirement of countermeasures

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[317] UNGA, *Resolution ES-11/5*, par. 2.
[318] KAMMINGA, p. 10.
[319] MOISEIENKO, *Confiscation*, p. 44.
[320] MOISEIENKO, *Friend's Enemy*, p. 727.

is fulfilled in the present case as long as states only seize assets of Russia to enforce obligations of reparation not already paid by Russia or enforced by other states.[321]

b) Proportionality

If the allies of Ukraine only seize as many assets as is necessary to cover the damages for which Russia must make reparation, the requirement of proportionality seems to be satisfied. In contrast, the necessity of the seizure is less clear. For example, the allies of Ukraine could merely freeze assets of Russia and use them as a "bargaining chip" to exert pressure on Russia to recognize its obligations to pay reparations.[322] Thus, an alternative option exists which would be less "aggressive". In the face of this alternative option, the option of seizing the assets could be regarded as disproportionate. However, this alternative option is much less effective. Seizing assets is the straightforward way for ensuring that Russia complies with its obligations to pay reparations. Freezing assets only exerts pressure. In this sense, one can argue that this alternative is not a "real" alternative as its impact is much less effective. Therefore, the seizing of assets is necessary. In conclusion, the seizure satisfies the requirement of proportionality.

c) The Right to Take Countermeasures

The prohibition of the use of force is an obligation *erga omnes*.[323] The obligation to abstain from using force is owed to all states. In this sense, Russia's unlawful invasion of Ukraine affects all states. However, according to Art. 42 let. b ARSIWA, if a collective obligation is breached, a state must be either specially affected or affected *per se* to qualify as an injured state. Ukraine is clearly specially affected by Russia's unlawful use of force. By contrast, this is not the case for the allies of Ukraine. Some allies provide significant support to Ukraine as a reaction to the use of force by Russia.[324] Still, this does not change the fact that Ukraine is the only country which is subjected to Russia's use of force. The allies of Ukraine are not the target of the use of force and thus not specially affected by Russia's breach of international law. Furthermore, the prohibition of the use of force is not an interdependent obligation. If a state violates the prohibition of the use of force, other states are not simply absolved from respecting the prohibition itself. If a state breaches the regime, this does not jeopardize the structure of the

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[321] *Contra*: KAMMINGA, p. 14; WUERTH BRUNK:, p. 33–34.
[322] KAMMINGA, p. 14.
[323] DÖRR, par. 30.
[324] For example, since the outbreak of the war in 2022, the USA has so far given around USD 44 billion worth in military assistance to Ukraine by providing, inter alia, air defence systems, artillery systems (guided rockets, bomb launchers etc.), tanks, armed vehicles and various aircrafts. See US DEPARTMENT OF STATE, p. 1–2.

whole regime. In conclusion, the allies of Ukraine do not qualify as injured states. Therefore, they cannot take bilateral countermeasures.

This leads us to the issue of third-party countermeasures. According to one view, current international law does not allow third-party countermeasures in the first place. By contrast, if one agrees with the findings of DAWIDOWICZ, there is both sufficient state practice and *opinio juris* to account for a rule of customary law which allows third-party countermeasures. However, state practice is limited to third-party countermeasures which induce a state to cease its internationally wrongful acts. By contrast, customary international law does not allow non-injured states to take countermeasures for enforcing the duty to pay reparations[325].

In conclusion, the allies of Ukraine are not entitled to take countermeasures for enforcing Russia's obligation to pay reparations.

[325] *Supra* I.A.1.a)(ii) *in fine*, p. 38.

## B. Self-Defence

The right to self-defence in the case of an armed attack is part of both treaty law and customary international law.[326] According to Art. 51 of the UN Charter, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security […]". The right of self-defence is among the circumstances set out in the ARSIWA precluding wrongfulness.[327] The UN Charter states that there exists both the right of individual and collective self-defence. Individual self-defence refers to the situation where a state itself is subject of an armed attack. Collective self-defence concerns the situation where a state acts in defence of another state which is under an armed attack.[328]

### 1. The Requirements for Collective Self-defence

The wording of Art. 51 UN Charter does not imply that the requirements for collective-self-defence are different than those for individual self-defence. However, practise has recognized certain differences.[329] First, it is required that there is an armed attack on another state.[330] The notion of "armed attack" is narrower than the notion of "threat or use of force" as the use of force must be of a certain gravity.[331] It is not required that the state which invokes the right of collective self-defence is subjected to an armed attack itself. It is not even required that there is a threat to the security of this state.[332] The armed attack requirement only refers to the state which is defended.

Second, the defended state must declare that it has been the victim of an armed attack.[333] A state is not entitled to assess whether another state has been attacked. The attacked state must itself express this assessment.[334]

Third, the attacked state must request the state which refers to collective self-defence for its assistance.[335] Collective self-defence involves taking action on behalf of another state and this

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[326] ICJ, *Nicaragua*, par. 178.
[327] ILC, *State Responsibility*, par. 1, p. 71.
[328] RANDELZHOFER/NOLTE, par. 47, p. 1420.
[329] GREENWOOD, par. 5.
[330] ICJ, *Nicaragua*, par. 195 and 229.
[331] RANDELZHOFER/NOLTE, par. 6, p. 1401.
[332] GREENWOOD, par. 39.
[333] ICJ, *Nicaragua*, par. 195.
[334] *Ibid.*
[335] *Id.*, par. 199.

requires the consent of this state.[336] Collective self-defence cannot be imposed on another state against its will.

Fourth, collective self-defence must be necessary and proportional.[337] This requirement is not mentioned in Art. 51 UN Charter. It results from customary international law.[338] On the one hand, measure must be necessary to achieve the purpose of self-defence.[339] On the other hand, the measure must not be excessive to achieve this purpose.[340] Both aspects must be assessed in light of the purpose of self-defence which consists of protecting the integrity and security of the attacked state.[341] While countermeasures serve as a tool of law enforcement, the goal of self-defence is "to restore a certain military balance *vis-à-vis* an attacking state".[342]

Fifth, as mentioned in Art. 51 UN Charter, a state invoking self-defence must notify the UNSC and cease any measure of self-defence when this body has taken necessary action. The principal objective of the UN is to maintain peace and that the UNSC bears the main responsibility for achieving this objective.[343]

2. The Scope of the Right of Self-defence

Self-defence may justify the threat or use of force by a state "in order to defend itself against an attack, to repel the attackers and expel them from its territory".[344] "Force" refers to armed or military force.[345] Measures of political or economic coercion or "the use of non-military forms of physical force between states" does not qualify as "force".[346] Today, the right to self-defence serves as the main exception to the prohibition of the use of force and is thus of crucial importance.[347] While it is not controversial that the right of self-defence may justify the use or threat of force, it is controversial whether this right may also justify non-forcible measures.[348] This issue was raised in the proceedings before the ICJ regarding the construction of a wall by Israel in the occupied Palestinian territory.[349] Israel justified the construction of this wall, *inter*

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[336] RANDELZHOFER/NOLTE, par. 4, p. 1420.
[337] ICJ, *Nicaragua*, par. 194.
[338] *Id.*, par. 176.
[339] RANDELZHOFER/NOLTE, par. 58, p. 1425.
[340] *Id.*, par. 62, p. 1427.
[341] KRITSIOTIS, p. 213.
[342] DAWIDOWICZ, p. 20.
[343] ZIEGLER, *Völkerrecht*, par. 730–731., p. 315–316.
[344] JENNINGS/WATTS, p. 417.
[345] DÖRR, par. 11.
[346] *Id.*, par. 12.
[347] GREENWOOD, par. 2.
[348] KRITSIOTIS, p. 172.
[349] BUCHAN, p. 21.

*alia*, as a measure of self-defence against terrorist campaigns directed at Israeli citizens.[350] In its advisory opinion, the ICJ did not address the question of whether the non-forcible measure of building a wall can be justified by the right to self-defence. It rejected the argument of self-defence based on other reasons.[351] In her separate opinion, Judge HIGGINS stated that she "remain[s] unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood".[352]

Proponents of the narrow interpretation refer to the close connection between the right to self-defence and the use of force. The right of self-defence developed "against the background of the development of international law towards the prohibition of war, and, eventually, of the use of force".[353] As KRITSIOTIS put it, "[t]he right of self-defence was there to justify the application – that is, the threat or the use – of force in international law; it was not there as a default argument for all manner of actions that states may devise or deem necessary to ensure their greater safety and well-being".[354] Another argument in favour of the narrow interpretation is that non-forcible reactions to armed attacks belong to the realm of countermeasures, while forcible reactions to armed attacks fall under the right of self-defence.[355]

Proponents of the broad interpretation of the right of self-defence point to the wording of Art. 51 UN Charter. This provision only refers to "self-defence" and does not indicate that self-defence only englobes forcible measures as opposed to non-forcible measures.[356] If Art. 51 UN Charter justifies the use of force, it must even more so justify the use of non-forcible measures given that non-forcible measures are less severe than forcible measure.[357] Another argument for the broad interpretation refers to the structure of the UN Charter[358]. Art. 51 is included in Chapter VII which sets out the system of collective security of the UN. By contrast, the provision which prohibits the use of force (Art. 2 par. 4 UN Charter) is included in Chapter I. This chapter deals with the goals and principles of the UN. The structure of the UN Charter does not suggest that the right of self-defence only applies to the use of force. If this had been the intention of the drafters of the UN Charter, they would have mentioned the right of self-defence in the same

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350 UNGA, *ES-10, 21st Meeting*, p. 6. Statement by the Ambassador of Israel to the UN.
351 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, par. 139.
352 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Separate Opinion by Judge Higgins, par. 35.
353 RANDELZHOFER/NOLTE, par. 1, p. 1399.
354 KRITSIOTIS, p. 173.
355 BUCHAN, p. 3. See, for example, JENNINGS/WATTS, p. 417.
356 BUCHAN, p. 11.
357 *Ibid*.
358 *Id*., p. 12.

breath as the prohibition of the use of force[359]. Furthermore, Chapter VII gives the UNSC both the power to take forcible measures (Art. 41 UN Charter) as well as non-forcible measures (Art. 42 UN Charter) to respond to a threat to peace, a breach of peace or an act of aggression.[360] The right to self-defence only exists until the UNSC takes necessary actions.[361] If the UNSC can take both forcible and non-forcible measures, it is plausible that also states relying on the right of self-defence should have the right to take both type of measures. The third argument for a broad interpretation refers to state practice showing that states consider the right of self-defence to encompass non-forcible measures[362]. Besides the case with Israel, BUCHAN points out, *inter alia*, that the wording of Art. 3 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and Art. 5 of the North Atlantic Treaty suggest that the contracting states consider the right of self-defence to justify both forcible as well as non-forcible measures.[363]

3. Application to the Present Case

The force used by Russia against Ukraine clearly surpasses the threshold of gravity to qualify as an armed attack. Ukraine itself uses force against Russia based on the right to individual self-defence. However, the question is whether the seizure of assets of Russia by allies of Ukraine can be justified based on the right of self-defence. From the perspective of the allies of Ukraine, the issue is one of collective self-defence. On various occasions, Ukraine has expressed that it is the victim of an armed attack by Russia and requested the support of states around the world. For example, President Zelensky has addressed the European Parliament and various national parliaments several times and requested both military and humanitarian help to defend Ukraine against Russia's aggression.[364]

The requirement of proportionality for its part seems unproblematic, as long as states do not seize more assets than is necessary to cover the obligations of Russia to pay reparations. Whether the requirement of necessity is fulfilled is less clear. The purpose of self-defence aims at repelling an armed attack. The problem is that seizing assets of Russia aims at enforcing Russia's obligations to pay reparation and not at defending Ukraine against the attack by Russia. However, seizing assets does at least have a weakening effect on Russia. Therefore, even

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[359] BUCHAN, p. 12.
[360] PELLET/MIRON, par. 29.
[361] GREENWOOD, par. 33.
[362] BUCHAN, p. 13
[363] North Atlantic Treaty, 24 August 1949, 34 UNTS 243. Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, 3 December 1948, 21 UNTS 77. See BUCHAN., p. 13–21 with further references.
[364] EUROPEAN PARLIAMENT, p. 1.

though the primary objective of the measure is not defending Ukraine against Russia, one can argue that the measure does to a certain degree help Ukraine's efforts to repel Russia's attack and is thus necessary.

While seizing assets of Russia happens against the will of Russia, it does not entail the use of military force. It is a non-forcible measure. While the scope of self-defence is controversial, it is more convincing to assume that the right to self-defence can also justify non-forcible measures. The ordinary meaning of the term "self-defence" used in Art. 51 UN Charter accommodates both forcible and non-forcible measures. From a systematic point of view, the fact that this provision is situated in Chapter VII of the UN Charter suggests that self-defence is not limited to the use of force. Lastly, it must be emphasized that attacked states do not limit their defence to forcible measures. For example, Ukraine is active in intercepting communication of the Russian military and gathering intelligence.[365] Another example is the "information warfare" where both Ukraine and Russia try to shape the global narrative regarding the war and to promote support for their cause.[366] These are both non-forcible measures. Nevertheless, they are a crucial part of Ukraine's defence against the armed attack by Russia. The purpose of Art. 51 UN Charter aims at providing an effective way of defending a state against an armed attack. Given that defending an attacked state entails not only forcible measures but non-forcible measures, it is plausible that the objective and purpose of Art. 51 UN Charter includes both forcible and non-forcible measures. Thus, the ordinary meaning, the context as well as the purpose and objective of Art. 51 UN Charter speak in favour of the view that non-forcible measures can qualify as self-defence.

In conclusion, if the seizure of assets of Russia by the allies of Ukraine leads to a breach of an international obligation, the wrongfulness of this breach is precluded on the basis of Art. 51 UN Charter.

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[365] MILLER Greg/KHURSHUDYAN Isabelle, *Ukrainian spies with deep ties to CIA wage shadow war against Russia*, The Washington Post, 23 October 2023, available at: https://www.washingtonpost.com/world/2023/10/23/ukraine-cia-shadow-war-russia/ (retrieved 25 November 2023).

[366] PEREZ Christian/NAIR Anjana, *Information Warfare in Russia's War in Ukraine*, Foreign Policy, 22 August 2022, available at: https://foreignpolicy.com/2022/08/22/information-warfare-in-russias-war-in-ukraine/#cookie_message_anchor (retrieved 25 November 2023).

# VI. Conclusion

## A. Summary

This master thesis examined whether it is in conformity with international law if allies of Ukraine seize assets of Russia to pay for the damages it has inflicted on Ukraine and its people. Russia has committed several internationally wrongful acts. Most notably, Russia has violated the *jus ad bellum* by invading Ukraine. Russia must make reparation for the damages resulting from its internationally wrongful acts. Based on current proposals, seizing assets of Russia means that the executive authorities of the allies of Ukraine decide to permanently deprive Russia of certain assets located on their territory and without granting any compensation. The targeted assets of Russia most notably include the frozen assets of the CBR. More than USD 300 billion worth of immobilized assets could be used to enforce Russia's obligation to pay reparations.

If the allies of Ukraine seize assets of Russia on their territory based on a decision by the executive, this does not breach state immunity. Furthermore, the seizure does not violate the prohibition of intervention, as long as the allies of Ukraine do not seize more assets than is required to cover the obligations of Russia to pay reparations. The rules of inviolability do not pose a problem, provided that the seizure does not concern diplomatic property. International investment law does not prevent the seizure in the case of the UK and the USA. However, whether this finding also applies to other allies of Ukraine, must be assessed on a case-by-case basis on the existing BITs. Lastly, there seem to exist no general rules under international law protecting due process in proceedings conducted by a state against another state.

In other words, the master thesis has shown that the seizure of assets based on a decision by the executive does not breach international law, provided that two conditions are fulfilled. First, diplomatic assets must not be seized. Second, the allies of Ukraine must not seize more assets than is required to cover the obligations of Russia to make reparations.

Based on these findings, the allies of Ukraine do not have to rely on circumstances precluding wrongfulness. The seizure of assets of Russia by the executive is merely a retorsion. However, if one held the view that the seizure breaches an international obligation, the concept of countermeasures could not justify this breach. The allies of Ukraine do not qualify as injured state. Furthermore, current international law does, at least for the enforcement of obligations to pay reparations, not permit third-party countermeasures. By contrast, the concept of collective self-defence could justify the seizure of assets of Russia. It is not convincing to limit the right to self-defence to the use of force. Non-forcible measures are also covered.

## B. Concluding observations

The most surprising finding of this master thesis is the limited scope of state immunity. Immunity from jurisdiction only protects a state against the exercise of jurisdiction by the courts of another state. It does not protect a state against the exercise of jurisdiction by other authorities. Immunity from execution only protects a state against measures of constraints in relation to court proceedings. It does not protect a state against measures of constraints in general. This finding seems inconsistent. It does not seem plausible that state immunity only protects against courts and against measures of constraint relating to court proceedings. Yet, as RUYS put it, "international law is no stranger to paradoxes".[367] Neither current treaty law nor current customary international law offers state immunity beyond the jurisdiction of courts and court proceedings. The observation that the current rules of international law do not seem coherent in this regard does not change the existence of these rules.

International law is not carved into stone. It is open for development.[368] While current international law does not offer a broader protection under state immunity, the question arises whether one should wish for a development towards a broader notion of state immunity. In the case of seizing assets of Russia, there might be little sympathy for such development. In this particular case, one might welcome the lack of protection by state immunity. However, the implications of the limited scope of state immunity do raise some concerns. Do we want to live in a world where a state can lawfully deprive another state of its assets without having to respect strict requirements? This is particularly problematic for small and less powerful states. Powerful states enjoy a *de facto* protection by virtue of their political and economic weight. By contrast, less powerful states do not have this factual protection. They are much more dependent on protection by law. However, as this master thesis has shown as well, the prohibition of intervention has the potential of offering protection. If a state does not have an international obligation to pay reparations, another state is barred from seizing the assets of that state. Seizing assets of a state to make it pay for something it does not have to pay would be a prohibited intervention. It would be a coercive interference in the *domaine réservé* of this state. By contrast, if an international obligation does exist to pay reparations (as it is in the case of Russia), seizing assets for enforcing this obligation does not constitute an interference in the *domaine réservé* and thus no intervention. However, this is a very basic protection. Arguably, it would be better if the scope of state immunity were broader. This would make it easier to establish that states

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[367] RUYS, p. 708.
[368] WEBB, point 4, par. 4.

need to rely on one of the circumstances precluding wrongfulness if they exercise jurisdiction over another state or apply measures of constraints against another state.

In any case, this master thesis has shown that states can seize assets of Russia to enforce its international responsibility in a way which does not violate international law. At the same time, states must also ensure that any action taken against Russia complies with national law. Russia has blatantly violated the rule of law. States reacting to Russia's acts cannot afford to disrespect the rule of law themselves. On the contrary, they must meticulously respect and uphold the law.

Lastly, besides the legal requirements, decision-makers must also consider non-legal issues when assessing how to go forward. In particular, they must also consider the economic and geopolitical repercussions of any actions taken against Russia.