Legal Basis of Sanctions against Russia and Asset Confiscation

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Abstract

This study provides an in-depth examination of the legal bases for current asset freezes in the European Union (EU) and the United States (US), and how these differ from confiscations of Russian state assets. It explores the evolving political deliberations that have led to new goals of making reparations to Ukraine, which has suffered extensive damage estimated at more than 600 billion euros as a result of Russia’s invasion. The primary focus of this study is on the potential confiscation of frozen state assets of Russia as a means to achieve reparations. Western governments have initiated comprehensive assessments of avenues to perform permanent asset seizures, with the overarching goal of strengthening the tracing, identification, freezing and management of assets as preliminary steps for potential confiscation. The study discusses the legislative pitfalls associated with sovereign asset confiscation, its challenges and limitations. It highlights how the principle of sovereign equality of states can hinder such actions, protecting the assets of Russia’s central bank from court proceedings and execution in another state. Despite Russia’s actions contravening the fundamental norms of international law, interpretations of customary international law maintain Russia’s immunity from legal proceedings in foreign courts. Therefore, it can be concluded that there are no legal bases for the expropriation of Russian sovereign assets.

Keywords

confiscation of assets • Russian assets • reparations • legal considerations • International law • sanctions • sovereign equality

INTRODUCTION

An appreciable amount of research on sanctions focuses on their effectiveness – legal scholars argue whether gauging economic damage, cancelling out achieved concessions or evaluating new political ambitions are what determine their success in the foreign policies of states. The validity of the answer, however, is strictly dependent on the existence of a legal basis of the imposed measures. In other words, examining the effectiveness of sanctions in the absence of legitimacy would not just be contentious but wholly incomplete and arbitrary. International law governing sanctions and other economic statecraft ensures an equal playing field through crucial principles, one of which is the sovereign equality of states (Tzouvala, 2023). To neglect those principles would be to strip sanctions of any legal norm upon which they operate. Although economic sanctions are not novel in international relations, the first recorded instance is traced to the Meganian Decree (circa BCE 432); its most intensive use arose during the 1990s – this period was so revolutionary that it was acclaimed as the Sanctions Decade. After the Cold War, following the dramatic inflow of UN sanctions1, countries developed new national policies of joint measures in addition to ‘unilateral’ sanctions to promote global security and diplomatic reproach (Cortright and Lopez, 2000). Initial phases of the new sanctions era revealed negative externalities of comprehensive sanctions, notably after the humanitarian disaster in Iraq. Systematic faults of an all-encompassing approach were recognised and redesigned to be ‘smarter’ through targeted sanctions (Drezner, 2011). While comprehensive sanctions usually target an entire country or a significant sector of its economy, targeted sanctions focus on specific individuals, groups, or entities believed to be responsible for objectionable actions. Targeted sanctions aim to minimise collateral damage to the broader population and evolved to be in the daily bulletin of activities for superpowers such as the United States (US) and the European Union (EU). In the context of international diplomacy, the use of sanctions usually stems from the sender country’s objective to intervene in the decision-making of a sovereign state, without the immediate employment of the military. With regard to the EU, for example, sanctions are one of its main coercive instruments

1 See Iraq (Invasion of Kuwait), Yugoslavia (Violations of Human Rights), Libya (International Terrorism), Rwanda (Genocide), Afghanistan (Taliban’s Rule), North Korea, Iran (Nuclear proliferation) and others
as an economic power short of its own military capacity (Portela, 2011). The US has also often utilised sanctions as a means to establish its dominance in global affairs. However, sometimes target regimes insulate themselves from these economic weapons, and the imposition of sanctions can be based solely upon the cost of inaction of the sender country (Hufbauer, 2007).

In recent decades, sanctions have been pursued for a much broader range of international goals: forestalling war; hastening the achievement of freedom and democracy; cleaning up the environment; strengthening human rights or labour rights; nuclear nonproliferation; the freeing of captured citizens; the reversal of captures of land (Davis and Engerman, 2003) and others. The UN Security Council and the Court of Justice of the EU affirm the inherently preventive nature of sanctions, denying any punitive undertone. However, it is contended that punitive effects also constitute a new or add onto an existing motive (Walterskirchen et al., 2022). In a recent case, new and much wider sanctions were implemented on Russia in an attempt to deter its invasion of Ukraine in 2022. However, when these sanctions proved ineffective in achieving their intended goal, new objectives emerged. These included punishing Russia for its invasion, constraining the ability of Russia to produce or buy ammunition and weapons, indirectly supporting Ukraine in its defence against the invasion and pressuring Russia to bring an end to the war. As the US Secretary of Defense stated, the aim was to weaken Russia to a point where it would be incapable of undertaking similar aggressive actions.

**RESEARCH RESULTS AND DISCUSSION**

**The complex case of Russian asset confiscation**

Present-day political deliberations warrant new objectives and methods: to make reparations to Ukraine – damage of which is estimated at more than 600 billion euros only by December 2022 – through confiscation of frozen Russian funds. Western governments initiated the exploration of avenues to execute permanent asset seizures with the objective of identifying methods to enhance the tracing, identification, freezing and management of assets as initial steps toward potential confiscation.

Changes in international legislation have not been absent in light of Russia’s aggression: The Canadian government enabled a new legal outlet for confiscation through new amendments to the Special Economic Measures Act, which allows the seizure and forfeiture of property and assets owned by sanctioned Russian oligarchs. However, the attempted forfeiture and redistribution of the assets may trigger legal challenges in Canadian courts or through international arbitration pursuant to Canada’s Foreign Investment Protection and Promotion Agreement with Russia. In the US, the Senate passed amended provisions mandating the seizure and transfer of liquidated assets from persons subject to sanctions for Russia’s invasion of Ukraine and related crimes. The media has greatly dedicated itself to investigating Russian elites and searching for their assets, seizure of which could be possible within the framework of criminal proceedings. However, the value of frozen assets owned by sanctioned persons is estimated at US$30 billion, a sum trivial in comparison to the US$300 billion of assets held by the Russian Central Bank (RCB). Additionally, it would be necessary to establish a link with criminal conduct and while some of the funds may be connected to pertinent crimes, very little would contribute towards the substantial relief needed for Ukraine (Emmanuel Joel Aikins Abakah, David Adeabah, Aviral Kumar Tiwari, Mohammad Abdullah, 2023).

Although these measures of expropriation preclude little to no wrongdoings under contemporary legal systems, a matter absent of easy circumvention is that of the Russian state assets. Notably, proposals such as the UK Seizure of Russian State Assets and Support for Ukraine Bill have been accused of muddying the legal doctrine with wishful thinking. Central bank assets are protected by the principle of State immunity, which is derived from the principle of sovereign equality of states and would require further legal justification. Frameworks, which entertain the concept of seizure of state assets under the existing legal basis, belittle its significant footprint on the future of international law.

**International sanctions against Russia**

While the term ‘sanction’ is not officially used in the EU’s legal terminology, it is commonly employed in political discussions, having the same legal meaning as ‘restrictive measures’. The EU first introduced economic restrictive measures against Russia on 31 July 2014 via Regulations (EU) 833/2014 and on 17 March 2014 via Regulations (EU) 269/2014 in the form of targeted sanctions. These consisted of freezing assets and travel bans on Russian and Ukrainian persons and entities for their involvement in the annexation of Crimea, deemed responsible for threatening Ukraine’s territorial integrity. Asset freezing ensures that the funds of targeted entities and persons cannot be accessed, and travel bans prohibit their entry into senders’ states. The scope of those sanctions, however, became massive and unprecedented in history after February 2022, in response to Russia’s act of aggression and the illegal annexation of Ukraine’s Donetsk, Luhansk, Zaporizhzhia and Kherson regions. As of March 2022, Russia became the world leader in the number of imposed sanctions, surpassing Iran. As of June 2023, an estimated €21.5 billion worth of assets were frozen in the EU and €300 billion worth of assets from the RCB were blocked in the EU and G7 countries. Table 1 provides an overview of various types of
sanctions imposed on Russia or Russian nationals on multiple grounds by the EU.

**Legal framework of freezing assets by the EU and USA**

Within the EU’s sanctions policy, it is important to distinguish between restrictive measures that are made in accordance with the UN Security Council resolutions and sanctions that are adopted by the EU independently. The sanctions on Russia have a few distinct features with those on Bush’s denominated Axis of Evil. In contrast to Iran and North Korea, there are no UN sanctions against Russia. The partisans of the sanctions are the EU and the US, which became a point of reference for all other states and in this way preserved alignment to a certain extent in the absence of a multilateral design. Because Russia is an economically crucial player, even in the absence of the Security Council, there was stronger global motivation to take immediate action for its breaches of international law. The above-mentioned features thus distinguish and raise questions about their legal character, outside of political realities.

As of July 2023, EU Member States have adopted 11 packages of sanctions against Russia which are not adopted independently but as a part of the 2014 sanctions. The sanctions aimed to weaken Russia’s ability to finance the war, produce and buy weapons and ammunition and specifically target the political, military and economic elite responsible for the invasion. In the present case, legal experts who invoke the principle of noninterference, should not disregard that Russian policies are *prima facie* violations of prohibition of use of force in international law, which is an *erga omnes* obligation, that is, an obligation it holds not only to Ukraine but to all countries. Thus, asset freezes have a strong legal basis under the justification of third-party countermeasures. ‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties’ (Article 5(2) TEU). According to Article 23 of the TEU within the framework of Common Foreign and Security policy (CFSP), the Union may ‘provide for the interruption or reduction … of economic and financial relations with one or more third countries’. In such cases, the Council has the power to adopt restrictive measures targeting individuals, groups, non-State entities or legal persons, as explicitly mentioned in Article 215(2) TFEU. The legal basis for the adoption of EU sanctions is Article 29 TEU, as well as Article 215 TFEU.

Similar to the EU’s sanctions, the US has implemented sanctions against Russia in reaction to the conflict in Ukraine. Economic sanctions pertaining to the Russian invasion of Ukraine are currently executed via two mechanisms: the Ukraine-/Russia-related Sanctions programme and the Russian Harmful Foreign Activities Sanctions programme. Although OFAC upholds sanctions against Russia under the Magnitsky Sanctions programme and the Countering America’s Adversaries Through Sanctions Act of 2017, these programmes have not been employed as a response to the 2022 invasion. The Ukraine-/Russia-related sanctions include the sanctions that were issued by the former US President Obama based on Executive Orders (EO) 13660, 13661, 13662 and 13685. These orders authorise the freezing of assets, and imposing travel bans on individuals and entities from Russia and Ukraine who were involved in the annexation of Crimea. EO 13685 also includes a provision that prohibits the trading of goods, services or technology to or from the Crimean region of Ukraine. Additionally, it forbids US persons

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**Table 1. Overview of sanctions on Russia by the EU**

<table>
<thead>
<tr>
<th>Targeted Russian activity</th>
<th>Type of sanction</th>
<th>Legal basis</th>
<th>Date initially adopted</th>
</tr>
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<tbody>
<tr>
<td>Violations of Ukrainian Sovereignty (Donetsk, Kherson, Luhansk, Zaporizhzhia)</td>
<td>Economic; geographical</td>
<td>Council Decision 2022/266/CFSP; Council Regulation 2022/263</td>
<td>2/23/2022</td>
</tr>
<tr>
<td>Chemical weapons</td>
<td>Individual; thematic</td>
<td>Council Decision (CFSP) 2018/1544; Council Regulation 2018/1542</td>
<td>10/15/2018</td>
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Confiscation of Russian assets: Legal avenue and considerations

Brussels' plans to confiscate Russian assets as a substitute for reparations or assistance, though motivated, raise questions about the legal avenue for such a direction. By criminalising any form of transaction or benefit derived from sanctioned Russian assets, their present economic value is obliterated but does not in any way change ownership. The customary laws of warfare do allow for the confiscation of enemy state property and countermeasures permit the state against which the unlawful activity was directed to engage in otherwise unlawful actions against the responsible state. In the hypothetical event that the assets of Russia's central bank were discovered within Ukrainian territory, Ukraine, as a belligerent state engaged in conflict with Russia, would have the right to seize such assets. While Russia's immoral act of aggression allows Ukraine to take countermeasures, the EU itself has not been attacked by Russia, thus it cannot avail this provision.

In the attempt to consolidate freezing of assets as a preliminary step towards seizing them, legislation also presents a significant pitfall. Measures that aim to change the ownership of sovereign assets, rather than temporarily freezing them as mentioned earlier, require judicial action under domestic law. However, invoking such action is precluded due to the principle of sovereign equality of states. As a result, the assets of RCB are shielded from court proceedings and execution in another state unless an explicit waiver is provided. For example, assets blocked under the Council Regulation 833/2014, based on the CFSP, are justified as a countermeasure against Russia's war of aggression. However, their definitive taking is not justified under the current legal framework.

Under Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts, any State may claim from the responsible state 'performance of the obligation of reparation… in the interest of the injured state' in two cases:

1) Such that the obligation breached is established for collective self-defence;
2) If the obligation breached is owed to the international community as a whole.

However, in the case of Russia, the above-mentioned exceptions do not apply, and there are no existing precedents for such novel approaches. The invocation of collective self-defence would not come without consequences, as it has a far-reaching modus operandi. Russia could retaliate in a targeted manner, leading to further destabilisation of financial markets and a loss of faith in transnational protections of sovereign rights. Confiscation, as an irreversible action, would signify a departure from the objective of incentivising Russia to cease its aggression. Furthermore, seizing assets and directly allocating the proceeds for Ukraine's reconstruction is distinct from seeking reparations on behalf of the affected state. Therefore, confiscation lacks the essential attributes of a countermeasure and cannot be classified as such.

Despite the challenges posed by the confiscation, analogous proposals surged not only in Europe but also in the US. In

From making new investments in the Crimean region of Ukraine. This programme also encompasses the EO 14065 that pertains to the 2022 invasion, alongside the Ukraine-/Russia-related Sanctions Regulations found in 31 C.F.R. Part 589.

In the US, the legal basis for sanctions is rooted primarily in two statutes: the National Emergencies Act and the International Emergency Economic Powers Act (IEEPA). Enacted in 1977, IEEPA authorises the president to block property, prohibit transactions or otherwise regulate assets in which a foreign person has an interest, in response to the president's declaration of a national emergency. The US and EU have historically taken different approaches in enforcing economic sanctions, with the US adopting a more aggressive stance compared with the EU. However, in a bid to make joint Western economic and financial punishments more effective against Russia and other countries, both the US and EU are now making new efforts to coordinate their sanction policies.

The economic sanctions imposed on Russia serve as a tool of nonrecognition policy, by underscoring that the countries which impose these sanctions do not recognise the Russian annexation of Crimea. The mere freezing of Russia's state assets, that is, the property of the central bank, is placed under scrutiny in legal debate. Despite the general dissatisfaction by Russian authorities, neither the RCB nor the government has made any official statements or actions to enact legal challenges regarding the freezing of assets. This follows from the context of sovereign immunities, in which only measures imposed by the judiciary provide protection to assets of a sovereign state from being confiscated to satisfy court judgements.

On the other hand, the extrajudicial freezing of assets based on sanctions refer to actions taken by states or international bodies outside the realm of judicial proceedings – thus not implicating immunity under domestic or international law, since it is not related to the enforcement or execution of a court judgement. In other words, because temporary freezing of assets on the basis of executive action are sufficiently distinct from attachment of property, sovereign immunities are irrelevant to sanctions. Claims of an illegitimate nature are unfounded as they imply that the expansion of the law of immunities to encompass any sanctions directed at assets of a foreign government, signify a notable deviation from established state practices. A conclusion that the aforementioned asset freezing and asset freezing of similar nature violated international customs, would therefore be illogical.

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June 2023, US senators have also introduced a bipartisan bill aimed at addressing the situation. If approved, this bill would grant the president the authority to ‘confiscate’ frozen Russian sovereign assets located within the US and allocate them to Kyiv. Additionally, the bill calls on President Biden to advocate for the establishment of a ‘common international compensation mechanism’ in collaboration with foreign partners. This mechanism would provide an additional avenue for the confiscation and redirection of funds and also calls for the establishment of an international compensation mechanism.

Legal precedents: Case studies and international implications

The IEEPA incorporates a limited exception stated in 50 U.S.C. § 1702(1)(C), which grants the president the authority to confiscate foreign-owned property and dispose it at their discretion. This exception applies specifically in cases where the US is involved in armed hostilities or has been subjected to an attack by a foreign country or foreign nationals. A notable example of the exercise of this provision occurred in 2003 during the Bush administration, when approximately US$1.7 billion in Iraqi funds held in American banks were seized and directed towards assisting the Iraqi population and compensating terrorism victims. In that particular case, the provision was applicable due to the US being actively ‘engaged in armed hostilities’ with Iraq.

An interesting question arises as to whether the latter aspect of this provision (‘attacked by a foreign country or foreign nationals’) could be relevant in the context of a cyberattack. If this interpretation is applicable in the event of a cyberattack, it would mean that confiscation could be pursued if Russia were to engage in additional cyberattacks against the US (Moisienko, 2022). However, in the case of Russia’s aggression towards Ukraine, it is again important to note that this exception does not apply as Russia has not attacked the US in the context of international law, and the US is not currently engaged in armed hostilities with Russia. Thus, to confiscate Russian assets would be to violate international investment law triggering duties of repayment under the Takings Clause of the Fifth Amendment and customary international law.

Currently, the Foreign Sovereign Immunity Act does not permit parties to initiate civil actions against foreign states or enforce judgements against foreign central bank reserves for injuries sustained during armed conflicts. Some suggestions have been made to Congress proposing the elimination of Russia’s sovereign immunity from civil litigation in domestic courts. The Ukrainian Sovereignty Act of 2022, introduced in the US House of Representatives in March 2022, advocates that ‘sovereign assets of an aggressor state should not be immune from attachment or execution upon a judgment entered by an American court’. However, the compatibility of this act with international law remains uncertain.

In a significant ruling in 2012, the International Court of Justice (ICJ) pronounced that customary international law grants states immunity from civil litigation in foreign courts for claims arising from war-related injuries. The ICJ upheld the principle of sovereign immunity, even in cases where war crimes committed by German armed forces during World War II violated fundamental norms of international law. Although the ICJ’s opinion does not carry binding legal authority as a precedent, it has influenced the interpretation of customary international law concerning state immunities. Based on this analysis, it can be inferred that Russia would likely enjoy sovereign immunity in US courts, given that its aggression involves the exercise of sovereign powers.

Some of US primary precedents of asset ‘seizes’ outside of a warfare moulded the ruling in *Zivotofsky v. Kerry*. This ruling determined that the president’s authority, as outlined in Article II of the Constitution, to ‘receive Ambassadors and other public Ministers’ includes the exclusive power to recognise foreign states and their governments, as well as to make other decisions related to this power. Based on this recognition power, the Trump administration declared its intention to release frozen Venezuelan assets to the government it recognised, namely that of Juan Guaidó. Similarly, the Biden administration has also used its statutory authority and designated an unnamed individual to transfer control over certain Afghani state assets. These decisions can be seen as matters of recognising a government rather than confiscation, since the US did not retain control over the assets. For example, if President Biden were to recognise an alternative Russian government and grant it authority over the frozen assets, the Zivotofsky ruling might serve a mighty play. However, this remains as speculative as abhorring Russia’s sovereign immunity.

A second case is that of the transfer of Irani sovereign assets as repercussions following the landmark case of the Iran Hostage Crisis. However, in negotiating the release of American hostages, the result of compensation was only attained with Iran’s agreement to transfer of funds. As a result, confiscation of assets was not pertinent to the legal basis of the matter. This precedent gravely diverges from the war in Ukraine; however, it potentially gives arrangement for a bilateral claims-settlement body akin to the Iran–U.S. Claims Tribunal.

Another Iranian precedent, involving the pursuit of nuclear weapons and other chemical activities, catalysed the creation of a separate Statute *Iran Threat Reduction and Syria Human Rights Act of 2012* passed by the Congress invoking the ‘state sponsors of terrorism’ exception to the Foreign Sovereign Immunities Act. This allowed frozen Iranian central bank assets to be attached to compensate...
victims of terrorism not pursuant to IEEPA, but because of a separate statute. Iran brought the case before the ICJ, arguing that the US breached sovereign immunity by besieging Bank Markazi assets. However, the Court found that it lacked jurisdiction to consider this claim, because a claim based on the right to sovereign immunity under customary international law did not fall within its scope.

**CONCLUSION**

Standing before the ICJ, Italy’s Corte di Cassazione emphasised that immunity of Germany cannot be recognised in claims brought by the victims or their heirs before the Italian courts. The Court determined that the decision of the Italian courts to deny Germany immunity constituted a violation of Italy’s international obligations. This historic verdict underscores that it is simply not true that grave violations of international law justify or legitimise retaliatory actions by the international community that would themselves violate international law.

Even in attempts to reconcile the aforementioned precedents with the redirection of Russian state funds to Ukraine, the dispersion and colossal amount of the reserves reveal the need for complex international consensus and cooperation, for which a framework currently does not exist. Beyond legislative pitfalls, the reality involves the exact knowledge of the location of these assets, which remains uncertain to this day. A careful examination thus concludes that a confiscation of this magnitude is entirely unprecedented.

Despite Russia’s armed attacks flagrantly contravening fundamental norms of international law, such as the prohibition against aggression, war crimes and crimes against humanity, interpretations of customary international law uphold Russia’s immunity from legal proceedings in foreign courts. Therefore, it can be concluded that there are no legal bases for the expropriation of Russian sovereign assets. Moreover, there is a possibility that the transfer of these funds could destroy the leverage that the holders of the assets currently hold over Russia for future negotiations. Once Russia’s hostilities are ended, the West can condition the return of the assets on the Russian state agreeing to provide reparations to Ukraine. Although these measures might appear modest in their impact, it is crucial to evaluate them within the context of a long-term outlook: their combination with the current strain on Russia’s ability to finance its economic isolation and criminal activities. While legal shortcuts may be appealing, countries must be mindful of compromising on fundamental principles of the due process, as doing so has the potential to inspire other economic powers to follow and abuse this path in the future.

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