

# **MAKE RUSSIA PAY: ON THE CONFISCATION OF ASSETS OF THE RUSSIAN CENTRAL BANK IN GERMANY**

**#MakeRussiaPay**

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Over 250 billion euros from the Central Bank of the Russian Federation (Bank Rossii) have been frozen in the G7 countries and the EU due to sanctions in connection with the attack on Ukraine, which violated international law. The vast majority of this, around 210 billion euros, is in the EU. Around 180 to almost 200 billion euros of this is held by the clearing organisation Euroclear in Brussels.<sup>1</sup> For Germany, it is assumed that only 210 million euros from the Russian central bank are frozen there.<sup>2</sup> However, Germany's voice carries weight within the G7 and the EU when it comes to coordinating a joint approach to these funds. Even if the Russian government is prevented from accessing the assets due to the sanctions

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<sup>1</sup> Hansueli Schöchli, "Die EU will russische Zentralbankgelder in die Ukraine schicken - muss die Schweiz auch über die Bücher über?", NZZ.ch, 30 October 2023, <https://www.nzz.ch/international/eu-russische-zentralbankgelder-sollen-nach-kiew-geschickt-werden-ld.1763208>, last accessed 12.02.2024; Christoph Sackmann, "EU rätselt, was sie mit 200 Milliarden Euro der russischen Zentralbank machen soll", FOCUS.de, 03.07.2023, [https://www.focus.de/finanzen/news/eingefrorenes-vermoegen-eu-raetselt-was-sie-mit-200-milliarden-euro-der-russischen-zentralbank-tun-soll\\_id\\_197082264.html](https://www.focus.de/finanzen/news/eingefrorenes-vermoegen-eu-raetselt-was-sie-mit-200-milliarden-euro-der-russischen-zentralbank-tun-soll_id_197082264.html), last accessed 12.02.2024; Laura Dubois, Nikou Asgari, "Euroclear earns €3bn from Russian assets frozen by west", FT.com, 26.10.2023, <https://www.ft.com/content/88ff88c4-6efe-40b7-b635-80eb6bd73c2c>, last accessed 12.02.2024.

<sup>2</sup> Laura Dubois, Sam Fleming, "The legal case for seizing Russia's assets", FT.com, 20.12.2023, <https://www.ft.com/content/adb09fd6-e5f7-4099-9994-806814b4c9b4>, last accessed 12.02.2024.

ban, they still belong to the Russian central bank for the time being. By contrast, the funds that Ukraine will need for the reconstruction required as a result of the Russian war of aggression were already estimated at 411 billion euros in March 2023.<sup>3</sup>

That a state is liable to another state for acts violating international law that it commits against another state follows from the law of state responsibility.<sup>4</sup> After armed conflicts, such claims are usually settled by peace treaty (reparations). One historical exception was the case of Iraq, for example, which the UN Security Council – based on Chapter VII of the UN Charter – obliged to pay reparations to Kuwait after the Baghdad regime invaded its southern neighbour in 1990.<sup>5</sup> However, due to Russia's right of veto, the Security Council cannot fulfil its task of overseeing the UN monopoly on the use of force and enforcing a rules-based peace order.

Particularly at a time when Western parliaments are less willing to support Ukraine with budgetary funds, the confiscation of the assets of the Central Bank of the

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<sup>3</sup> World Bank/Ukrainian Government/EU/UN (eds.), "Ukraine: Rapid Damage and Needs Assessment. February 2022–February 2023", March 2023, <https://documents1.worldbank.org/curated/en/099184503212328877/pdf/P1801740d1177f03c0ab180057556615497.pdf>, last accessed on 12 February 2024.

<sup>4</sup> Art. 31 and 36 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

<sup>5</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 54 with further references. N., <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

Russian Federation without compensation and their transfer to Ukraine could provide crucial assistance. Some countries, such as Canada, are already creating the legislative prerequisites for this,<sup>6</sup> while the Russian Federation has apparently begun to prepare itself legally for such a scenario.<sup>7</sup> Some of the legal literature raises concerns about such confiscations under international law. Even if Russia is breaking elementary rules of international law in Ukraine, Germany and the European Union are insisting on a rules-based order. They would jeopardise their credibility if they themselves broke the rules of international law in their dealings with Russia. However, the states in question would not have to breach international law in order to seize the assets: the arguments put forward against the confiscation of Russian central bank assets are by no means compelling. As a result, no norm of international law can be found that explicitly prohibits such a measure. In any case, neither Union nor national law precludes expropriation from the German side. The federal legislator could therefore order the confiscation of Russian central bank assets located in Germany in favour of the reconstruction of Ukraine.

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<sup>6</sup> Bill S-278, An Act to amend the Special Economic Measures Act (disposal of foreign state assets), First Reading, 04.10.2023, [https://publications.gc.ca/collections/collection\\_2023/sen/YB441-278-1.pdf](https://publications.gc.ca/collections/collection_2023/sen/YB441-278-1.pdf), last accessed on 12.02.2024.

<sup>7</sup> "Russia Prepares Legal Battle to Stall Seizure of Frozen Reserves", BNNBloomberg.ca, 12 January 2024, <https://www.bnbbloomberg.ca/russia-prepares-legal-battle-to-stall-seizure-of-frozen-reserves-1.2021207>, last accessed on 12 February 2024.

## A. INTERNATIONAL LAW

There are no obstacles under international law to the confiscation of the assets of the Russian Central Bank. The starting point here is not to find a legal basis for such action under international law. This is because, according to the so-called Lotus principle <sup>8</sup>, sovereign states do not require any authorisation under international law to act vis-à-vis other states. Instead, as I will demonstrate, the decisive factor is that international law does not prohibit the confiscation of Russian central bank assets.

## I. SOVEREIGN IMMUNITY LAW

It is often argued that the assets of the Russian Central Bank are subject to sovereign immunity and are therefore protected from confiscation by other states. The principle of state immunity, according to which no state should sit in judgement over another, is derived in particular from the principle of sovereign equality of states standardised in Art. 2 para. 1 of the UN Charter.<sup>9</sup>

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<sup>8</sup> According to the Lotus principle, the scope of action of sovereign states under international law is limited only by its positive prohibitions, see the judgement of the Permanent Court of International Justice of 07.09.1927, S.S.Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) §§ 44-46, [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm), last accessed on 12.02.2024.

<sup>9</sup> Juliane Kokott, "Expropriation of Russian assets for the reconstruction of Ukraine?", lto.de, 06/02/2023, <https://www.lto.de/recht/hintergruende/h/enteignung-russischer-vermoegenswerte-wiederaufbau-ukrainie-kommission/>, last accessed on 12/02/2024.

However, this line of reasoning does not hold up to scrutiny. It is true that with regard to the protection of immunity from measures ordered by a court against the assets of another state, there is both a common practice of states (*consuetudo*) and a legal conviction (*opinio iuris*) across states. This is expressed, for example, in Art. 1 and Art. 19 of the United Nations Convention on the Immunity of States and their Property of 2 December 2004, even if the convention itself has not yet entered into force. However, this protection explicitly refers only to judicial measures and not to those of the executive or legislative branches.<sup>10</sup> No further-reaching *opinio iuris* can be recognised.<sup>11</sup> Nothing further can be derived from the principle of sovereign equality of states in Art. 2 para. 1 of the UN Charter either.<sup>12</sup> In this respect, the customary international law rule of immunity only represents a *lex*

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<sup>10</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 72, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

<sup>11</sup> See also Christian Tietje, "Enteignen für den Wiederaufbau?", Verfassungsblog.de, 3 February 2023, <https://verfassungsblog.de/enteignen-fur-den-wiederaufbau/>, last accessed on 12 February 2024; Ingrid (Wuerth) Brunk, "Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?", LAWFARE, 7 March 2022, <https://www.lawfaremedia.org/article/does-foreign-sovereign-immunity-apply-sanctions-central-banks>, last accessed on 12 February 2024.02.2024; left open, however, in Wissenschaftlicher Dienst des Deutschen Bundestags, elaboration "Entzug von Geldvermögen ausländischer Staaten als Sanktion" of 01.04.2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. II, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d2lade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12.02.2024.

<sup>12</sup> Christian Tietje, "Enteignen für den Wiederaufbau?", Verfassungsblog.de, 3 February 2023, <https://verfassungsblog.de/enteignen-fur-den-wiederaufbau/>, last accessed on 12 February 2024.

*specialis* in court proceedings, which should not be watered down through the back door of the sovereign equality of states.<sup>13</sup>

In any case, an expropriation by the parliamentary legislature (legislative expropriation) is not subject to the immunity protection of customary international law, even if the expropriating law remains reviewable by a court.

Ultimately, the idea that the assets of the Russian central bank enjoy state immunity and are therefore (or for other reasons) untouchable is also inconsistent: the European Union has already frozen these assets and is considering taxing the interest income in favour of Ukraine, without the permissibility of these measures being seriously questioned.<sup>14</sup>

## II. OTHER CUSTOMARY INTERNATIONAL LAW ON THE PROTECTION OF PROPERTY

Other customary international law beyond the law of state immunity also does not preclude the confiscation of assets of the Central Bank of the Russian Federation.

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<sup>13</sup> Anton Moiesienko, "The Freezing and Confiscation of Foreign Central Bank Assets: How Far Can Sanctions Go?", 17.04.2023, p. 29 ff,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4420459&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4420459&download=yes) , last accessed on 12.02.2024.

<sup>14</sup> Alberto Nardelli/Michael Nienaber, "EU Moves Ahead on Plan to Tax Gains of Frozen Russian Assets", Bloomberg.com, 23 January 2024,

<https://www.bloomberg.com/news/articles/2024-01-23/eu-moves-ahead-on-plan-to-tax-profits-of-frozen-russian-assets> , last accessed on 12 February 2024.

1. In this context, the *minimum standards of* property protection (*minimum standards of treatment*) are often mentioned.<sup>15</sup> These are internationally recognised rules relating to the protection of foreigners' property. However, at least traditionally, the *minimum standards* do not protect the property of foreign states themselves.<sup>16</sup>

It used to be argued that state assets are generally protected from confiscation as long as they are used for official purposes.<sup>17</sup> However, there is probably no cross-state consensus on the exact content of the *minimum standards* or exceptions to them, for example in times of war.<sup>18</sup> There are therefore many arguments in favour of not dealing with the question of confiscation of Russian central bank assets within the framework of the *minimum standards* under customary law.

2. Finally, some voices refer to the principle of *inviolability* under international law – the inviolability of property, including that of states – to protect Russian

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<sup>15</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 10,  
<https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d2lade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

<sup>16</sup> Moiesienko, loc. cit., p. 45 et seq.; see also Wissenschaftlicher Dienst des Deutschen Bundestags, elaboration "Entzug von Geldvermögen ausländischer Staaten als Sanktion" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 10,  
<https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d2lade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

<sup>17</sup> Ian Brownlie, Principles of Public International Law, 6th ed. 2003, p. 515.

<sup>18</sup> James Crawford, in: Brownlie's Principles of Public International Law, 9th ed. 2019, p. 599.

assets. One possible argument put forward in this regard is that international organisations stipulate the inviolability of their assets in their statutes. Relevant regulations here include, for example, Art. 1 Protocol No. 7 TFEU on the protection of the property of the European Union, Art. 39 Protocol No. 4 TFEU to the Statute of the European System of Central Banks and of the ECB, Art. 26 para. 2 Protocol No. 5 TFEU to the Statute of the European Investment Bank or Art. II, Section 3, Convention on the Privileges and Immunities of the United Nations.<sup>19</sup>

However, it is difficult to make a convincing argument in favour of the protection of state assets from this, and it is certainly not possible to identify any customary international law norm. The regulations mentioned are not about the protection of state assets, as inter- and supranational organisations are not states. Nor can the situation of a state bank be compared with that of an inter- or supranational organisation: Due to their lack of sovereignty or – in the case of supranational organisations such as the EU – merely derived sovereignty, the latter are far more dependent on the protection of their property than states in order to properly fulfil their tasks at all. In addition, the concept of *inviolability* is used in various contexts in international law and refers in particular to the

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<sup>19</sup> Christian Tietje, "Enteignen für den Wiederaufbau?", Verfassungsblog.de, 3 February 2023, <https://verfassungsblog.de/enteignen-fur-den-wiederaufbau/>, last accessed on 12 February 2024.

inviolability of state property that serves a diplomatic mission.<sup>20</sup> This is clearly not the issue here.

### III. BILATERAL INVESTMENT PROTECTION LAW

The Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on the Promotion and Mutual Protection of Investments of 13 June 1989, in particular Article 4 thereof, does not provide any protection for the Russian Central Bank against confiscation of the assets of the Russian Central Bank without compensation.

1. The Russian Central Bank's assets however do not fall within the scope of application of this international treaty, which continues to apply to the Russian Federation today. This is because the Central Bank of the Russian Federation is not an investor within the meaning of Article 1(l)(c) of the Agreement, which reads as follows:

*"In this agreement, the term 'investor' means a natural person with permanent residence or a legal entity with registered office in the respective area of application of this agreement that is authorised to make capital investments."*

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<sup>20</sup> Anton Moiseienko, "Sanctions, Confiscation, and the Rule of Law", Revue Européenne du Droit, <https://geopolitique.eu/en/articles/sanctions-confiscation-and-the-rule-of-law/>, last accessed 12/02/2024.

According to Art. 31 Nr. 1 of the Vienna Convention on the Law of Treaties, the ordinary meaning, object and purpose of a provision of international law must be determined when interpreting it. Even if the wording of the regulation here does not clearly exclude the Central Bank of the Russian Federation from being an "investor", this exclusion corresponds to the usual understanding of investment protection treaties. This is because such treaties regulate the three-party relationship between the host state, the investor and the investor's home state and are intended to protect the investor as a private individual in international capital investments.<sup>21</sup>

The Central Bank of the Russian Federation is not a private actor, but fulfils sovereign tasks in the state interest of the Russian Federation. It is therefore not a three-party relationship in which a private investor is particularly in need of protection, but rather a relationship of equality between the German and Russian states. The investment protection agreement between Germany and the Soviet Union or the Russian Federation as its legal successor makes no statement about this relationship.

The view that a contracting party itself cannot act as an investor is confirmed in particular by *Krajewski* in the Model Investment Protection Treaty and his explanations for the Federal Ministry for Economic Affairs and

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<sup>21</sup> Markus Krajewski, *Wirtschaftsvölkerrecht*, 5th ed. 2021, Part 3, II, para. 548-549, p. 170.

Energy.<sup>22</sup> Even if the 1989 agreement between Germany and the Soviet Union does not yet contain an explicit exclusion, the corresponding provision in the Model Investment Protection Treaty is likely to be a declaratory addition for clarification purposes and not a provision that substantially deviates from the previous understanding.

2. Even if state assets enjoyed such bilateral protection, this would not result in mandatory protection against confiscation without compensation. This is indicated by the recent case law of the International Court of Justice (ICJ) on protection against expropriation under bilateral treaties. Accordingly, not every seizure of a state bank's assets should amount to an expropriation requiring compensation:

*"A specific element of illegality related to that decision is required to turn it into a compensable expropriation. Such an element of illegality is present, in certain situations, when a deprivation of property results from a denial of justice, or when a judicial organ applies legislative or executive measures that infringe international law and thereby causes a deprivation of property."*<sup>23</sup>

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<sup>22</sup> Markus Krajewski, Model Investment Protection Treaty with Investor-State Arbitration for industrialised countries, including the USA, pp. 6-7, [https://www.bmwk.de/Redaktion/DE/Downloads/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmwk.de/Redaktion/DE/Downloads/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten.pdf?__blob=publicationFile&v=1), last accessed on 12 February 2024.

<sup>23</sup> Certain Iranian Assets (Islamic Rep. of Iran v. United States), Judgment, 2023 I.C.J. Rep. Mar. 30, 2023 - § 184.

It is true that the judgement cited deals with expropriation through court decisions. However, there is nothing to suggest that anything different applies to other expropriation measures. There must therefore also be a special element of illegality inherent in a legislative expropriation in order for it to trigger an obligation to pay compensation. It can be deduced from the aforementioned judgement in §§ 186 and 157 that the characteristic of "*illegality*" can follow from the "*unreasonableness*" of a measure, which in turn is the case if a measure is "*manifestly excessive*". It follows from this that a disproportionate measure in particular must be compensated. However, the support of Ukraine as the purpose of the confiscation in question here outweighs the need to protect Russian assets, as will also be shown below.

#### IV. RIGHT OF COUNTERMEASURES

Customary international law concerns are also expressed with regard to the permissibility of confiscating state assets as a *countermeasure*.

1. This applies first of all with regard to the proportionality and reversibility of such a measure. Opponents claim that confiscation leads to irreparable damage for the state concerned and is therefore irreversible and thus inadmissible. According to these concerns, it is difficult to recognise a measure with the aim

of persuading the state concerned to behave lawfully, since punitive and retaliatory measures are inadmissible.<sup>24</sup> Indeed, the law of state responsibility places limits on unilateral or multilateral countermeasures (including sanctions). First of all, it is important to realise the conceptual differences: It is true that the confiscation of state assets is typically not counted as a sanction measure. But the concept of sanctions is only partially congruent with the concept of countermeasures. In international law, which relies on decentralised enforcement, countermeasures fulfil the function of requiring a state in breach of international law to comply with international law. To this end, means may also be taken that impair the rights of the violating state, such as its property and assets.

It is generally accepted that the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) of the *International Law Commission* (ILC) reflect the state of development of customary international law in the area of countermeasures. Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question (Art. 51 ARSIWA). However, the confiscation of Russian central bank assets is unlikely to be disproportionate to

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<sup>24</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, pp. 7-9,  
<https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d2lade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

the sanctioned behaviour, as Russia is waging a war of aggression against Ukraine with at least genocidal elements, which violates a large number of elementary provisions of international law.<sup>25</sup> Neither is the amount of central bank assets to be confiscated somewhere near the amount of damage that Russia has inflicted on Ukraine through its war of aggression.<sup>26</sup> Nor could milder measures such as the freezing of central bank assets persuade the Russian Federation to cease its war of aggression or even compensate for the resulting damage.<sup>27</sup> Finally, it should be borne in mind that this is exclusively about the confiscation of Russian state assets,<sup>28</sup> whereas the Russian Federation began confiscating private Western assets some time ago, as in the case of Danone and Carlsberg.<sup>29</sup>

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<sup>25</sup> See, among other things, the official summary of the decision of the International Court of Justice of 16 March 2022, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf>, last accessed on 12 February 2024.

<sup>26</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 66, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

<sup>27</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 67, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

<sup>28</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 70, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

<sup>29</sup> Patricia Huber, "Kremlin snaps up Danone and Carlsberg: Now Putin is distributing the assets to loyal oligarchs", FR.de, 20 July 2023, <https://www.fr.de/wirtschaft/verteilung-russland-danone-carlsberg-uebernahme-vermoegen-putin-kreml-unternehmer-92411077.html>, last accessed on 12 February 2024.

According to Art. 49 No. 2 ARSIWA, countermeasures do indeed have a temporal dimension: they may only last as long as the act of the violating state in violation of international law continues. However, this only means that the confiscation of Russian central bank assets and their transfer to Ukraine would have to be terminated as soon as the Russian Federation ceases its aggression and independently pays reparations in full. However, repayment would then only be considered if the sums transferred to Ukraine from the assets of the Russian central bank exceeded the damage suffered. As things stand at present, this is very unlikely.<sup>30</sup>

In addition, countermeasures under Article 49(3) ARSIWA must be taken as far as possible in a manner that allows the violating state to resume fulfilment of the obligations in question. According to the *ILC*'s official commentary, this means that states should only take reversible countermeasures if they are able to do so.<sup>31</sup> The requirement to take reversible countermeasures is therefore not absolute. In the present case in particular, merely freezing the assets of the Russian Central Bank

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<sup>30</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 35, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

<sup>31</sup> Comment on Art. 49 ARSIWA, para. 9, [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); last accessed on 12/02/2024.

proved to be insufficient to persuade the Russian Federation to comply with international law. Reparations for the damage caused by Russia to Ukraine (and other states) must also be made as quickly as possible if they are to be effective. Otherwise, there is a risk that the damage will reach a level that can no longer be compensated.<sup>32</sup>

It is also very doubtful that the Russian state can suffer any irreversible damage at all in the event of a confiscation of the central bank's assets without compensation, insofar as these assets benefit Ukraine. This is because the Russian Federation is in any case obliged under international law to make reparation payments to Ukraine in an amount that far exceeds the value of the assets of the Central Bank of the Russian Federation to be confiscated. The confiscation and allocation to Ukraine therefore have a debt-discharging effect for the Russian Federation<sup>33</sup> (which is why, incidentally, counterclaims by the Russian Federation based on the law of state responsibility should have no substance in the absence of damage). Finally, countermeasures may indeed only have the objective of compelling the state concerned to act in accordance with

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<sup>32</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 36, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

<sup>33</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 66, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024.

international law (Art. 49 No. 1 ARSIWA). However, it is quite conceivable that a confiscation of Russian central bank assets could exert pressure on Russia not to continue its war against Ukraine. Furthermore, confiscation would pursue the goal of compliance with international law insofar as it could be used to partially settle Russia's war debts to Ukraine. It is therefore not a measure that serves the purposes of punishment and retribution, but that of reparation.

2. Further objections concern the question of the extent to which states other than Ukraine may take measures against Russia in this context. According to Art. 41 No. 1 ARSIWA, states are called upon to co-operate in order to put an end to serious violations of international law such as those committed by Russia against Ukraine. Art. 42 and Art. 49 No. 1 ARSIWA initially assume that those states are called upon to take countermeasures that are themselves injured by actions contrary to international law (*injured states*). However, Art. 48 No. 1 lit. b ARSIWA also allows states other than the injured states to claim responsibility for internationally wrongful acts if the violated obligation is owed to the international community as a whole. This is generally assumed in the case of such serious violations as the violation of the prohibition of the use of force under international law.<sup>34</sup> According to Art. 48 No. 2 lit. b ARSIWA, these third states can in particular demand the

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<sup>34</sup> Comment on Art. 48 ARSIWA, para. 9,

[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); last accessed on 12/02/2024.

fulfilment of the obligation under international law to make reparation in the interests of the respective injured state. Whether Art. 48 ARSIWA authorises countermeasures, including the confiscation of state assets, is disputed in detail.<sup>35</sup> However, it is true that, according to its own commentary<sup>36</sup>, *the ILC* wanted to keep the provisions of Art. 48 ARSIWA open for further development.<sup>37</sup> This strongly suggests that the norms of international law on countermeasures at least do not prevent the confiscation of Russian central bank assets. In addition, the USA argues in the context of its corresponding G7 initiative (supported by the United Kingdom and Japan) that those states that significantly support the Ukrainian state budget through financial aid can be treated as injured within the meaning of Art. 42 and Art. 49 No. 1 ARSIWA.<sup>38</sup>

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<sup>35</sup> Rejecting, for example, Scientific Service of the German Bundestag, elaboration "US sanctions against the construction of the Nord Stream 2 pipeline from the perspective of international law" of 8 September 2020, Ref. WD 2 - 3000 - 075/20, p. 8, <https://www.bundestag.de/resource/blob/794744/5613bf9f65fa52fd7cld06ec6f52ebb3/WD-2-075-20-pdf-data.pdf>; last accessed on 12 February 2024.

<sup>36</sup> Comment on Art. 54 ARSIWA, para. 3, [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); last accessed on 12/02/2024.

<sup>37</sup> Dapo Akande et al, Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine" of 20 November 2023, para. 52 et seq, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>, last accessed on 12 February 2024; Mennó T. Kamminga, "Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?", *Netherlands International Law Review* (2023) 70:1-17 (10 f.), <https://doi.org/10.1007/s40802-023-00231-7>, last accessed on 12 February 2024.

<sup>38</sup> See Laura Dubois, Sam Fleming, "The legal case for seizing Russia's assets", *FT.com*, 20.12.2023, <https://www.ft.com/content/adb09fd6-e5f7-4099-9994-806814b4c9b4>, last accessed 12.02.2024.

Furthermore, there are important voices that consider a multilaterally initiated confiscation of Russian central bank assets to be justified as a measure of collective self-defence within the meaning of Article 51 of the UN Charter.<sup>39</sup> This argument is not inconsistent with treating confiscation as a permissible countermeasure, but can be put forward cumulatively.

## **B. NO COMPETENCE OF THE EUROPEAN UNION**

The overriding reasons speak in favour of the European Union not being responsible for a legislative confiscation of the assets of the Russian Central Bank. The basis for the sanctions against the Russian Federation described by the European Union as "restrictive measures" is Art. 215 TFEU. According to Art. 215 (1) TFEU, if a decision adopted within the framework of the Common Foreign and Security Policy (CFSP) provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council shall adopt the necessary measures, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission. According to legal

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<sup>39</sup> Amendments of the European Parliament of 17 October 2023 to the proposal for a Regulation of the European Parliament and of the Council establishing the Facility for Ukraine, para. 46a, [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0363\\_DE.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0363_DE.pdf), last accessed on 12 February 2024.

literature, this includes all restrictive measures relating to the common commercial policy (Art. 3 para. 1 lit. e TFEU). Insofar as the exclusive competence of the European Union under Art. 275 TFEU extends and the Union has made use of it, the Member States are no longer authorised to take their own restrictive measures without authorisation under Union law.

It is true that the concept of "necessary measures" – also in contrast to Art. 75 para. 1 TFEU, which mentions individual restrictive measures – is quite broad.<sup>40</sup> For example, some argue that the European Union could also be authorised to legislatively order the confiscation of Russian central bank assets; a corresponding clarification would ultimately have to be made by the European Court of Justice, which has not yet decided this question.<sup>41</sup> If the confiscation of Russian central bank assets were also to be counted among the "restrictive measures" in accordance with Art. 215 (1) TFEU, there would be much to suggest that the Union has made conclusive use of its competence in this respect with the sanctions it has already taken against the Russian Federation, so that national measures by the Member States would no longer be permissible.

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<sup>40</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 16, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d21ade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

<sup>41</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, pp. 16-18, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d21ade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

The point of reference for necessity within the meaning of Art. 215 (1) TFEU is a decision within the framework of the CFSP that provides for "the suspension, restriction or complete cessation of economic and financial relations with one or more third countries". However, the confiscation of the assets of the Russian Central Bank would go beyond the suspension, restriction or complete cessation of economic and financial relations. Moreover, as far as can be seen, the European Union has not yet taken any restrictive measures that also involved the confiscation of assets.<sup>42</sup> In view of the principle of conferral and the fact that the confiscation of the Russian Central Bank's assets has nothing to do with a common trade policy and is not covered by the traditional Union law concept of restrictive measures,<sup>43</sup> there are therefore overriding reasons against assuming that the European Union has competence for the legislative confiscation of the Russian Central Bank. Irrespective of this, it should be taken into account that, pursuant to Article 263(4) TFEU, the Russian Federation, as a "legal person" within the meaning of this provision, could bring an action before the European Court of Justice (ECJ) against a confiscation of its central bank assets by a directly applicable EU regulation.<sup>44</sup>

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<sup>42</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 16, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d21ade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

<sup>43</sup> See Cremer, in: Callies/Ruffert, EUV/AEUV, 6th ed. 2022, TFEU Art. 215 para. 29.

<sup>44</sup> Judgement of the Court (Grand Chamber) of 22 June 2021. République bolivarienne du Venezuela v Council of the European Union (Case C-872/19 P):

## C. PROVISIONS OF THE NATIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY

National law of the Federal Republic of Germany, in particular constitutional law, does not preclude the confiscation of Russian central bank assets by a parliamentary law; the federal legislature would be responsible for such a law.

1. Since a legislative confiscation of Russian central bank assets constitutes a countermeasure within the meaning of international law, the federal government would have the legislative power to do so under Article 73(1)(l) of the Basic Law ("foreign affairs").
2. Article 25 of the Basic Law grants the general rules of international law precedence over ordinary laws. This includes, in particular, customary international law as a source of legal knowledge within the meaning of Art. 38 para. 1 lit. c ICJ Statute.<sup>45</sup> In this respect, however, there are no requirements under international law that go beyond those described above. In particular, the constitutional principle of proportionality of the Basic Law (Art. 20 para. 3 GG), which primarily marks a barrier to overly intensive interference with fundamental rights in the state-citizen relationship, takes a back seat to the

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<https://curia.europa.eu/juris/liste.jsf?num=C-872/19&language=en>, last accessed on 12.02.2024.

<sup>45</sup> Streinz, in: Sachs, GG, 9th ed. 2021, Art. 25 para. 29 et seq.; Herdegen, in: Dürig/Herzog/Scholz, GG, Status: 08/2023, Art. 25 para. 34.

corresponding standards of international law in relation to foreign states (see Art. 25 GG).<sup>46</sup> Finally, the incorporation of the general rules of international law in Article 25 of the Basic Law does not establish a subjective constitutional right that could be asserted by means of a constitutional complaint.<sup>47</sup>

3. Art. 14 para. 3 GG only permits expropriation under strict conditions. However, Article 14 of the Basic Law is not applicable here as a whole, as the Russian central bank is not a holder of fundamental rights under the Basic Law. This is because according to Article 19 (3) of the Basic Law, the fundamental rights of the Basic Law only apply to domestic legal persons in addition to natural persons, insofar as they are applicable to them by their nature. At most, exceptions justified by European law are permitted in favour of legal persons from other EU countries.<sup>48</sup> However, the Russian Central Bank is a legal entity of a foreign EU country, so that the fundamental rights of the Basic Law do not protect it according to any conceivable view.<sup>49</sup>

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<sup>46</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 22, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d2lade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

<sup>47</sup> Heintschel v. Heinegg/Frau, in: BeckOK GG, Status: 08/2023, Art. 25 para. 37.

<sup>48</sup> See, for example, BVerfG, judgement of 6 December 2016 - 1 BvR 2821/11 -, juris Ls. 2 and para. 196 et seq.

<sup>49</sup> Research Service of the German Bundestag, elaboration "Withdrawal of financial assets of foreign states as a sanction" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 21, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d2lade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

4. According to the doctrine of the reservation of the law, the confiscation of Russian central bank assets can only be carried out by or at least on the basis of a parliamentary law. This is because, according to the Federal Constitutional Court's doctrine of materiality, which is decisive in this respect, parliament must regulate issues of fundamental importance and scope itself and may not leave them to regulation by the executive or judiciary.<sup>50</sup> The decisive factor here is in particular – but not only – the relevance of the respective state measure to fundamental rights.<sup>51</sup> As explained above, the confiscation of the Russian central bank assets of Ukraine is not relevant to fundamental rights. However, it is correct that such a comprehensive confiscation of assets of the Russian Federation is such a powerful and therefore essential measure in terms of foreign policy that the decision on this is reserved for the parliamentary legislature.<sup>52</sup>

5. The constitutional risks of a parliamentary law on the confiscation of Russian central bank assets are considered to be rather low:

- a) Since neither the Russian Federation nor the Russian Central Bank is entitled to fundamental rights, they

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<sup>50</sup> Grzeszick, in: Dürig/Herzog/Scholz, GG, Status: 05/2023, Art. 20 para. 105 f. m. w. w. N.  
<sup>51</sup> Rux, in: Epping/Hillgruber, BeckOK GG, Status: 08/2023, Art. 20 para. 176.1.

<sup>52</sup> See also Wissenschaftlicher Dienst des Deutschen Bundestags, elaboration "Entzug von Geldvermögen ausländischer Staaten als Sanktion" of 1 April 2022, Ref. PE 6 - 3000 - 019/22, WD 2 - 3000 - 021/22, WD 3 - 3000 - 042/22, WD 5 - 3000 - 041/22, p. 23, <https://www.bundestag.de/resource/blob/917996/b2304db647abfle06245d21ade45db2f/WD-2-021-22-pdf.pdf>, last accessed on 12 February 2024.

could not lodge an admissible constitutional complaint against a federal law that orders the confiscation of the Central Bank's assets directly and without an intermediate administrative act (*self-executing law*). There is also no possibility of legal protection under Art. 19 para. 4 sentence 1 GG, as both foreign states and legal entities that are controlled by a foreign state are not considered "anyone" within the meaning of this provision and therefore do not fall within the personal scope of protection of the constitutional guarantee of legal recourse.<sup>53</sup> Insofar as legal recourse is opened up to foreign legal entities under international law on aliens, taking into account the concept of reciprocity, this also does not apply, since, as explained, aliens law only protects private individuals. Against this background, the US draft confiscation law (*Rebuilding Economic Prosperity and Opportunity for Ukrainians/REPO for Ukrainians*) even expressly excludes a *judicial review*.<sup>54</sup>

- b) Theoretically, an abstract judicial review procedure against a corresponding law would be conceivable. However, it is currently not apparent that the

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<sup>53</sup> Schmidt-Aßmann, in: Dürig/Herzog/Scholz, GG, Status: 08/2023, Art. 19 para. 4 para. 43 f.; Jarass, in: Jarass/Pieroth, GG, 17th ed. 2022, Art. 19 para. 56.

<sup>54</sup> "The confiscation of Russian sovereign assets under subsection (b)(1) shall not be subject to judicial review.", see H.R.4175 - REPO for Ukrainians Act, <https://www.congress.gov/bill/118th-congress/house-bill/4175/text?s=1&r=26>, last accessed 12/02/2024.

required quorum of a quarter of the members of the Bundestag could be found for this or that a state government could submit a corresponding application (Art. 93 Para. 1 No. 2 GG, Section 13 No. 6 BVerfGG). At best, the latter could change if the AfD or another extreme (Putin-friendly) party were to join the government in the upcoming state elections. However, in view of the lack of fundamental rights of the Russian Federation and its central bank as well as the international law considerations outlined above, it is rather unlikely that the Federal Constitutional Court would declare such a law incompatible with the Basic Law and null and void (Section 78 sentence 1 BVerfGG), even taking into account Article 25 of the Basic Law (see above), which must be examined in such proceedings.

- c) If the relevant law is drafted as *self-executing law*, i.e. the confiscation takes effect as soon as the law comes into force without an intermediate administrative act, preventive legal protection by the constitutional court could only be obtained via a temporary injunction pursuant to Section 32 BVerfGG. Irrespective of the fact that the Russian Federation and its central bank do not have the authority to file an application, the hurdles for this are particularly high in the case of a parliamentary

law.<sup>55</sup> If such a confiscation law is not temporarily suspended by the Federal Constitutional Court, it would not be necessary to wait until the conclusion of the main constitutional proceedings before the confiscated assets are transferred to Ukraine.

d) As a result, the Russian leadership's announcement that it intends to challenge a legislative confiscation in court over years of litigation<sup>56</sup> can be viewed rather calmly from the perspective of German constitutional law.

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<sup>55</sup> BVerfG, decision of 5 May 2021 - 1 BvR 781/21 -, para. 20 with further references. N., [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/05/rs\\_20210505\\_1bvr078121.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/05/rs_20210505_1bvr078121.html), last accessed on 12/02/2024.

<sup>56</sup> "Russia Prepares Legal Battle to Stall Seizure of Frozen Reserves", BNNBloomberg.ca, 12 January 2024, <https://www.bnbbloomberg.ca/russia-prepares-legal-battle-to-stall-seizure-of-frozen-reserves-1.2021207>, last accessed on 12 February 2024.