PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
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REPURPOSING FROZEN RUSSIAN ASSETS: ANALYSIS UNDER INTERNATIONAL LAW

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Repurposing Frozen Russian Assets: Issues of International Law

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Repurposing Frozen Russian Assets: Issues of International Law

Statement of Purpose

This memorandum summarizes and analyzes issues in international law relevant to the repurposing of frozen Russian assets, specifically: Russia's obligation to make reparation; sovereign immunity protections that apply to Russia and its assets; and potential vehicles to update international law to allow for the repurposing of frozen Russian assets. This document is a corollary memo to the Policy Planning White Paper on Repurposing Frozen Russian Assets. The legal analysis outlined within this document served as the underlying basis for that White Paper, which can be found **here**.

Introduction

This document provides an analysis of two issues of international law that are fundamental to understanding the repurposing of frozen Russian assets: (1) Russia's obligation to make reparation; and (2) sovereign immunity protections.

This analysis first discusses Russia's obligation under international law to make reparation following its war of aggression against Ukraine. This includes whether there is a right to set-off[1] that would justify confiscating Russian assets and using them to fulfill Russia's obligation to make reparation to Ukraine, and whether the frozen assets can be held indefinitely until Russia complies with its obligation to make reparation. This analysis concludes that there is no such right to set-off. Rather, the only applicable justification under international law is the right to take countermeasures for the purpose of inducing the breaching State to cease the internationally wrongful act, or to make reparation for the internationally wrongful act. In order for a measure to qualify as a lawful countermeasure, however, it must be proportionate, reversible, and temporary. While international law likely does not allow the appropriation of Russian assets, it does allow their use as leverage to induce Russia to make reparation. This is discussed further in the final section.

This analysis then discusses relevant issues of immunity from jurisdiction and enforcement or execution. While specific jurisdictional immunity rules apply to certain State assets, none of them allow for the seizure of Russian assets to make reparation for Russia's unlawful acts in Ukraine. In particular, diplomatic property and central bank property are considered immune from seizure. Although the property of Russian State-owned enterprises may not enjoy immunity from

[1] A form of right that generally allows a party to seize the assets of a party that has failed to meet its obligations.

jurisdiction in foreign States, such enterprises cannot, as entities distinct from the State, automatically be held responsible for acts of the Russian State. However, it may be possible to seize their property if it can be shown that they contributed to and are responsible for (at least in part), certain internationally wrongful acts committed in Ukraine.

Finally, this analysis discusses potential legal vehicles that could be used to change or create customary international law to allow for the seizure of Russian assets and the payment of such assets to Ukraine, in reparation for the internationally wrongful acts committed by Russia.

The Obligation To Make Reparation

Russia has an Obligation to Make Reparation for its Acts of Aggression Against Ukraine and other Internationally Wrongful Acts

Aggression is an Internationally Wrongful Act

United Nations General Assembly ("General Assembly") resolution 3314 defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[2] The United Nations Security Council ("Security Council") never adopted a definition of aggression and the attempts of the International Law Commission to include a specific crime of aggression in its Articles on State Responsibility were unsuccessful.[3] While there is some debate regarding whether aggression can encompass acts that do not constitute a use of force, it is undisputed that the illegal use of armed force constitutes aggression.[4]

The prohibition on aggression is codified in Article 2(4) of the UN Charter, prohibiting the "threat or use of force against the territorial integrity or political independence of any State," and is explicitly referenced in Articles 1(1) and 39 of the Charter.[5] The International Law Commission has determined that the

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[2] General Assembly Resolution 3314 (XXIX), Annex: Definition of Aggression, art. 1, U.N. Doc. A/Res/3314 (Dec. 14, 1974).

[3] James Crawford, *The International Law Commission's Work on Aggression*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 233, 240-241 (Claus Kreß & Stefan Barriga, eds., 2017).

[4] Yoram Dinstein, *Aggression*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated Sept. 2015), *available at* https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e236?rskey=CpuPMd&result=1&prd=MPIL.

[5] U.N. Charter, arts.1(1), 2(4), 39 (Art. 1(1): "The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of

prohibition on aggression is a peremptory norm of general international law (*i.e., jus cogens*).[6] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice also recognized the *jus cogens* character of the prohibitions enshrined in Article 2(4) of the UN Charter.[7]

Russia is Engaging in a War of Aggression

On March 2, 2022, the General Assembly adopted Resolution ES-11/1, which explicitly characterized Russia's actions in Ukraine as acts of aggression in violation of Article 2(4) of the UN Charter.[8]

Article 3 of General Assembly Resolution 3314 lists specific instances that may constitute an act of aggression, regardless of a declaration of war, several of which are applicable to the Russian acts in Ukraine, including "invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion, or attack, or any annexation by the use of force of the territory of another State or part thereof." Resolution 3314 further specifies that "[t]he first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." Russia's use of its armed forces to attack and invade the sovereign territory of Ukraine plainly falls within the definition of aggression established in General Assembly Resolution 3314.

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international disputes or situations which might lead to a breach of the peace", Art. 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

[6] *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries ("DARSIWA with Commentaries"), art. 40, cmt. 4; *see also id*., ch. III, cmt 4 (referring to Articles 53 and 64 of the Vienna Convention on the Law of Treaties and defining "peremptory norms of international law" as "substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty").

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986 I.C.J. Reports, p. 14, at pp. 100-101, para. 190 (June 27).

[8] General Assembly Resolution ES-11/1, para. 2, U.N. Doc. A/RES/ES-11/1 (Mar. 2, 2022) (stating, *inter alia*, that the General Assembly "*[d]eplores* in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter") (emphasis in original).

Russia's Other Internationally Wrongful Acts

In addition to the act of aggression, Russia has engaged in several other types of internationally wrongful acts in Ukraine, and continues to do so, including violations of international humanitarian law and international human rights law. Already in March 2022 the UN Human Rights Council expressed its "[g]rave[] concern[...] at the ongoing human rights and humanitarian crisis in Ukraine, particularly at the reports of violations and abuses of human rights and violations of international humanitarian law by the Russian Federation, including gross and systematic violations and abuses of human rights." The UN Human Rights Council called for Russia to cease such conduct.[9] In April 2022, the General Assembly voted to exclude Russia from the Human Rights Council, following the discovery of "hundreds of civilian bodies [...] in the streets and in mass graves following Russia's withdrawal from [Bucha, a suburb of Kyiv]."[10] This is only one example of the mass killing of civilians.[11] Attacks directed at civilians are a breach of the principle of distinction between civilians and combatants under international humanitarian law.[12] Many of the Russian killings of civilians may also be in violation of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which requires, for example, that:

> Protected persons [be] entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[13]

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[9] Human Rights Council Resolution 94/1, preamble para. 11, op. para. 3, U.N. Doc. A/HRC/RES/49/1 (Mar. 4, 2022).

[10] *UN General Assembly votes to suspend Russia from the Human Rights Council*, U.N. NEWS (Apr. 7, 2022), *available at* https://news.un.org/en/story/2022/04/1115782.

[11] *UN General Assembly votes to suspend Russia from the Human Rights Council*, U.N. NEWS (Apr. 7, 2022), *available at* https://news.un.org/en/story/2022/04/1115782.

[12] *See*, *e.g.*, International Committee of the Red Cross, *Rule 1.The Principle of Distinction between Civilians and Combatants*, INTERNATIONAL HUMANITARIAN LAW DATABASES (last visited Dec. 21, 2022), *available at* https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1.

[13] The Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva, pp.153-221, art. 27.

Common article 3 of the 1949 Geneva Conventions further prohibits "at any time and in any place whatsoever" "violence to life and person" against any "[p]ersons taking no active part in the hostilities."[14]

Reports indicate Russia has engaged in many other internationally wrongful acts, such as rape, torture, and mistreatment of prisoners of war.[15] These acts are likely prohibited under customary international law, as well as by treaties, at least some of which Russia is a party to, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[16] Russian attacks on civilian infrastructure, including power plants and hospitals, likely also violate international humanitarian law.[17]

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[14] The Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva, pp.153-221, art. 3.

[15] *See* Bethan McKernan, *Rape as a weapon: huge scale of sexual violence inflicted in Ukraine emerges*, THE GUARDIAN (Apr. 4, 2022), *available at* https://www.theguardian.com/world/2022/apr/03/all-wars-are-like-this-used-as-a-weapon-of-war-in-ukraine; Cora Engelbrecht, *Reports of sexual violence involving Russian soldiers are multiplying, Ukrainian officials say*, NY TIMES (Mar. 29, 2022), *available at* https://web.archive.org/web/20220329184716/https://www.nytimes.com/2022/03/29/world/europe/russian-soldiers-sexual-violence-ukraine.html?smid=tw-nytimes&smtyp=cur; *Russians use abduction, hostage-taking to threaten Ukrainian journalists in occupied zones*, REPORTERS WITHOUT BORDERS (Mar. 25, 2022), *available at* https://rsf.org/en/russians-use-abduction-hostage-taking-threaten-ukrainian-journalists-occupied-zones; Roman Olearchyk and Felicia Schwartz, *Mass grave found in retaken Ukrainian city of Izyum*, FINANCIAL TIMES (Sept. 16, 2022), *available at* https://www.ft.com/content/74ab5209-7df9-4eab-ba2b-8a189dcaf4ee; *Chilling account of Radio France fixer who was kidnapped and tortured by Russian soldiers in Ukraine*, REPORTERS WITHOUT BORDERS (Mar. 21, 2022), *available at* https://rsf.org/en/chilling-account-radio-france-fixer-who-was-kidnapped-and-tortured-russian-soldiers-ukraine; *Ukraine: Executions, Torture During Russian Occupation*, HUMAN RIGHTS WATCH (May 18, 2022), *available at* https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation; Michael Weiss and Niamh Cavanagh, *Horrifying footage appears to show Russian captors castrating a Ukrainian prisoner of war*, YAHOO NEWS (July 29, 2022), *available at* https://news.yahoo.com/horrifying-footage-appears-to-show-russian-captors-castrating-a-ukrainian-prisoner-of-war-221414554.html?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAAAJCHkHbAaaeckQGi5pAjIoHXDQ0-KUcuVKo6WYM_XycP24Wvkuoa5gTaLC7szgkNAyEpwVukaks7IrOzRTZtgvzRmCflSHOSDs-C3n7irT7bMBOJv7HWGCNkj2C5_gjqMjBhfw_QXPZo2AFzr4RcBIVz58UAVDe94DTJyexRpuV.

[16] *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en (last visited Jan. 4, 2023) (showing the Russian Federation and Ukraine have been party to the Convention since the late 1980s).

[17] *See*, *e.g.*, *Ukraine: Russia's attacks against energy infrastructure violate international humanitarian law*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (Dec. 23, 2022), *available at* https://www.fidh.org/en/region/europe-central-asia/ukraine/russia-attacks-against-energy-infrastructure-ukraine; *Under-Secretary-General Rosemary A. Dicarlo's Remarks to the Security Council on Ukraine*, U.N. POLITICAL AND PEACE BUILDING AFFAIRS (Nov. 23, 2022), *available at* https://dppa.un.org/en/dicarlo-relentless-widespread-attacks-against-civilians-and-critical-infrastructure-continuing; *Ukraine: Russian Attacks on Energy Grid Threaten Civilians*, HUMAN RIGHTS WATCH (Dec. 6, 2022), *available at* https://www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians.

Russia has an Obligation to Make Reparation for its Internationally Wrongful Acts

States have an obligation under international law to make reparation for internationally wrongful acts. In *Factory at Chorzow (Germany v. Poland)*, the Permanent Court of International Justice determined 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."[18] Similarly, Article 31 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on the Responsibility of States") provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[19] Such an obligation arises as soon as the act is committed, and the obligation of the State committing the act is independent from any rights of injured or non-injured States.[20]

The obligation to make reparation applies when a State commits an unlawful act of aggression. For example, following Iraq's invasion of Kuwait, the Security Council "[r]eaffirm[ed] that Iraq […] is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."[21]

Further, the UN General Assembly passed a resolution on 14 November 2022 recognizing 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."[22] The resolution was adopted by a vote of 94 in favor to 14 against, with 73 States abstaining.[23]

The Scope of the Obligation to Make Reparation

As noted by the Permanent Court of International Justice in the *Factory at Chorzów* case, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have

[18] *Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, p. 29 (Sept. 13).

[19] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on the Responsibility of States"), art. 31.

[20] DARSIWA with Commentaries, art. 31, cmt. 4.

[21] Security Council Resolution 687, op. para. 16, U.N. Doc-S/RES/687 (Apr. 3, 1991).

[22] General Assembly Resolution ES-11/5, U.N. Doc. A/RES/ES-11/5, op. para. 2 (Nov. 14, 2022).

[23] U.N. press release No. GA/12470, *General Assembly Adopts Text Recommending Creation of Register to Document Damages Caused by Russian Federation Aggression against Ukraine, Resuming Emergency Special Session* (Nov. 14, 2022), *available at* https://press.un.org/en/2022/ga12470.doc.htm.

existed if that act had not been committed."[24] The Articles on the Responsibility of States, Article 31 confirms that the breaching State has an "obligation to make *full reparation* for the injury caused by the internationally wrongful act."[25]

There are three different ways to make reparation. The default preference is for restitution, if feasible.[26] For example if the property at issue has not been destroyed, then it should be returned. Alternatively, monetary compensation is available if the damage is one that can be monetarily quantified.[27] In practice, most types of damages can be quantified, including compensation for death.[28] Finally, there is satisfaction, which can take the form of "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."[29] A combination of the three forms of reparation may be necessary to make full reparation.[30]

International Law Remedies for Russia's Internationally Wrongful Acts Committed in Ukraine

Who Can Invoke the Responsibility of Russia for its Act of Aggression?

There are two categories of States that can invoke Russia's responsibility for its internationally wrongful acts.

First, an injured State has the right to invoke the responsibility of the breaching State when the obligation breached is owed to it individually, and when it is owed to the international community as a whole but specially affects that State.[31] Ukraine can be considered an injured State under both cases. Other States, such as Poland, might qualify as specially affected States, though they would need to show they were impacted in a way that goes beyond the general negative impact of Russia's war of aggression on all States. As noted by the International Law Commission, "[f]or a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."[32]

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[24] *Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, p. 47 (Sept. 13).

[25] Articles on the Responsibility of States, art. 31 (emphasis added).

[26] Articles on the Responsibility of States, art. 35.

[27] Articles on the Responsibility of States, art. 36.

[28] *See*, *e.g.*, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment on Quantum (Feb. 9, 2022), *available at* https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf.

[29] Articles on the Responsibility of States, art. 37(2).

[30] Articles on the Responsibility of States, art. 34.

[31] Articles on the Responsibility of States, art. 42.

[32] DARSIWA with Commentaries, art. 42, cmt. 12.

As explained in Articles on the Responsibility of States, Article 48, States other than injured States are also entitled to invoke the responsibility of the breaching State when "the obligation breached is owed to the international community as a whole" (*i.e.*, an obligation *erga omnes*) or when "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group" (*i.e.*, an obligation set out in a multilateral treaty, referred to as an obligation *erga omnes partes*).[33] In its recent judgment on jurisdiction in *Gambia v. Myanmar*, the International Court of Justice recognized the right of non-injured States to invoke the responsibility of the breaching State and to have standing before the Court for an alleged breach of the Genocide Convention, which contains obligations *erga omnes partes*.[34]

In *Barcelona Traction*, the International Court of Justice recognized the prohibition on aggression is an obligation *erga omnes*.[35] Separately, the prohibition of use of force and aggression set out in Article 2(4) of the UN Charter is an obligation *erga omnes partes*, meaning an obligation owed to all States party to the UN Charter.[36] As a result, any State can invoke Russia's responsibility for its unlawful acts of aggression against Ukraine.

Rights of Injured States and Non-Injured States vis-à-vis Russia for Failing to Make Reparation

As a general matter, with certain limited exceptions, international law does not allow States to unilaterally seize and expropriate the assets of another State or its nationals for a breach of international law committed by that State. As discussed further in Section III below, the State is generally protected from such seizures under the law of jurisdictional immunities, even if the breach in question was a violation of a *jus cogens* norm.[37]

Further, it is generally recognized under international law that nationals and their assets, as entities that are distinct from the State, cannot be held liable for the

[33] Articles on the Responsibility of States, art. 48.

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections (Jul. 22, 2022), *available at* https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf.

[35] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 1970 I.C.J. Reports, p. 3, para. 33 (Feb. 5).

[36] Nawi Ukabiala, Duncan Pickard & Alyssa Yamamoto, *Erga Omnes Partes before the International Court of Justice: From Standing to Judgment on the Merits*, 27 ILSA Journal of International and Comparative Law 233, 238-239 (2021).

[37] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, para. 97 (Feb. 3).

acts of the State.[38] However, individuals may be held criminally liable under international law and civilly or criminally liable under domestic law for their own unlawful actions. As the International Law Commission noted in its commentary to the Articles on the Responsibility of States, both the State and individuals may be liable for the same violations, as "[i]n certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility."[39] As noted in the press by Professor Jean Marc Thouvenin, who also is counsel to Ukraine before the International Court of Justice in the cases concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* and *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, in order to seize Russian oligarchs' assets and restitute them to Ukraine, one would need to demonstrate that the oligarchs participated in the war effort and in Russia's war crimes, which could lead to judgments and compensation decisions in domestic courts resulting in the confiscation of these assets.[40]

Although international law generally does not permit States to unilaterally expropriate assets of other States or their nationals, several other methods exist for obtaining reparation from States that breach international law. This includes diplomatic means and international dispute resolution mechanisms, for example, mediation, arbitration, and international courts such as the International Court of Justice.[41]

International law further provides that injured States may take countermeasures in certain circumstances, as set out in Articles on the Responsibility of States, Article 49. Countermeasures are acts an injured State may take against a State that is responsible for an internationally wrongful act, in

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[38] *See*, *e.g.*, DARSIWA with Commentaries, art. 2, cmts. 5-6 (explaining the particularity of the legal personality of the State under international law, as well as the principle of attribution of acts of individuals with distinct legal personality to the State under international law.).

[39] DARSIWA with Commentaries, art. 58, cmt. 3.

[40] Emile Benech, *Guerre en Ukraine: que peut faire la France avec les actifs russes présents sur son sol ?*, OUEST FRANCE (Mar. 25, 2022), *available at* https://www.ouest-france.fr/leditiondusoir/2022-03-25/guerre-en-ukraine-que-peut-faire-la-france-avec-les-actifs-russes-presents-sur-son-sol-f4717548-4af8-470a-98bf-f6c257e2a8bb ("Une autre approche pourrait consister à démontrer que les oligarques participent d'une manière ou d'une autre à l'effort de guerre et aux crimes de guerre de la Russie. On pourrait voir fleurir des actions contre les oligarques devant la justice criminelle française pour complicité de crimes de guerre, pouvant donner lieu à des jugements et des décisions de dédommagement, entraînant la confiscation de ces biens.").

[41] *See*, *e.g.*, U.N. Charter, art. 33.

order to induce that State to cease the internationally wrongful act or to make reparation for the internationally wrongful act.[42] Further, countermeasures can be acts that are usually not legal under international law, as long as they respect certain principles, discussed below.[43]

The Articles on the Responsibility of States do not directly address whether non-injured States invoking the responsibility of a State breaching an obligation *erga omnes (partes)* pursuant to Article 48(1)(b) can take countermeasures. Given the more limited scope of actions afforded to such States under Article 48, it appears that the Articles on the Responsibility of States may not authorize non-injured States to take countermeasures. Indeed, Article 48(2) provides only that "[a]ny State entitled to invoke responsibility [for breach of an obligation *erga omnes (partes)*] may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached."[44] These rights are more limited in scope than those afforded to an injured State.

Articles on the Responsibility of States Article 54 does not provide a clear answer on whether non-injured States can take countermeasures. It provides that "[the chapter on countermeasures] does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."[45] The International Law Commission made a purposeful choice here, choosing this ambiguous phrasing over a previous version that provided, in part, that "1. Any State entitled under article 49, paragraph 1, to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this chapter. 2. In the cases referred to in article 41, any State may take countermeasures, in accordance with the present chapter in the interest of the beneficiaries of the obligation breached."[46] This version of the article

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[42] Articles on the Responsibility of States, art. 49 (referring to arts. 28-33).

[43] *Infra*, paras. 22-23.

[44] Articles on the Responsibility of States, art. 48.

[45] Articles on the Responsibility of States, art. 54.

[46] Report of the International Law Commission, 52th Session, International Law Commission Yearbook 2000, Vol. II(2), draft art. 54, pp. 70-71 ("Article 54. Countermeasures by States other than the injured State. […] 3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled.").

clearly recognized the right of non-injured States to take countermeasures. The International Law Commission, however, did not adopt this version, and preferred an ambiguous phrasing.

As one author noted, "to treat multiple or even all States as possessing authority to react by means of countermeasures risks impinging upon the powers of the Security Council under Chapter VII of the Charter of the United Nations."[47] Under the UN Charter, the Security Council is the entity tasked with taking action in these types of situations. Through its Chapter VII powers, the UN Security Council has imposed sanctions on many States, and has authorized and required the other members of the UN to impose similar sanctions. For example, after the Iraqi invasion of Kuwait, the UN Security Council passed resolutions 687 and 692 under Chapter VII of the UN Charter in 1991, establishing the UN Compensation Commission for individuals, corporations, and States to bring claims against Iraq.[48] UN Compensation Commission awards were paid by revenues from Iraq's (UN-supervised) oil sales.[49]

That being said, in the absence of Security Council action, non-injured States have frequently taken countermeasures to attempt to put an end to actions that constitute a breach of an obligation *erga omnes*. For example, following the Iraqi invasion of Kuwait, but before the Security Council issued sanctions against Iraq, the United States and the European Community froze Iraqi assets and imposed a trade embargo.[50] The International Law Commission's commentary to Articles on the Responsibility of States Article 54 lists a number of other examples, including collective measures taken against Argentina in 1982, and against the Federal Republic of Yugoslavia in 1998.[51]

The UN Charter also lends some support to the idea that non-injured States may be able to take countermeasures to protect an injured State from armed aggression. Article 51 of the UN Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an

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[47] Linos-Alexandre Sicilianos, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 1137, 1137 (James Crawford, Alain Pellet, & Simon Olleson, eds., 2010).

[48] Security Council Resolution 687; op. paras. 16-19, U.N. doc. S/RES/687 (April 8, 1991).

[49] Security Council Resolution 687; op. paras. 16-19, U.N. doc. S/RES/687 (April 8, 1991); Security Council Resolution 692, op. para. 3, U.N. doc. S/RES/692 (May 20, 1991).

[50] Executive Order No. 12724, 55 Federal Register 33089 (Aug. 9, 1990) ("Section 1. Except to the extent provided in regulations that may hereafter be issued pursuant to this order, all property and interests in property of the Government of Iraq that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked."); *see also* DARSIWA with Commentaries, art. 54, cmt. 3, p.138.

[51] DARSIWA with Commentaries, art. 54, cmt. 3, p.138.

armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[52] Further, Article 1 of the Charter explains that "[t]he Purposes of the United Nations are: … to maintain international peace and security, *and to that end: to take effective collective measures* for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[53] While cessation is different from reparation, in the case of invasion, cessation and reparation can overlap, such as when the primary goal is to cease the invasion and stop the use of force.[54]

In sum, it has not been clearly established whether non-injured States may lawfully take countermeasures for breaches of obligations *erga omnes*. However, even if non-injured States could lawfully take countermeasures against Russia for its aggression against Ukraine, such countermeasures must respect several principles, as explained below.

The Articles on the Responsibility of States specifies that countermeasures must be proportionate, reversible, and temporary.[55] In addition, countermeasures may not affect "the obligation to refrain from the threat or use of force …, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, [nor] other obligations under peremptory norms of general international law."[56] The International Court of Justice also noted in various judgments predating the Articles on the Responsibility of States that countermeasures must meet these conditions.[57] For example, in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice found that Czechoslovakia's unilateral diversion of the Danube, a shared resource, was not a proportional response to Hungary's abandonment of works on the project, and thus not a valid countermeasure.[58] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court similarly held that the United States' use of force was not a proportional answer to Nicaragua's support of the armed opposition in El Salvador, Honduras,

[52] U.N. Charter, art. 51.

[53] U.N. Charter, art. 1 (emphasis added).

[54] *See, e.g.*, DARSIWA with Commentaries, art. 30, cmts. 7-8.

[55] Articles on the Responsibility of States, arts. 49, 51.

[56] Articles on the Responsibility of States, art. 50.

[57] *See*, *e.g.*, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1997 I.C.J. Reports, p. 7, paras. 83-87 (Sept. 25).

[58] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1997 I.C.J. Reports, p. 7, paras. 83-87 (Sept. 25).

and Costa Rica, noting that Nicaragua's actions were not an armed attack allowing an intervention by a third State involving use of force.[59]

The seizure and expropriation of frozen assets, resulting in change of ownership over such assets or in the destruction of the value of such assets, likely would not constitute valid countermeasures because they are neither reversible nor temporary. Therefore, international law likely does not give States a "right to set-off" that would allow the confiscation of Russian assets to fulfill Russia's obligation to make reparation to Ukraine.

As to whether the frozen assets may be held indefinitely until Russia complies with its obligation to make reparation, it may depend on how "temporary" and "indefinitely" are interpreted. "Indefinitely" merely means the period is not defined, so an indefinite period of time may also be temporary. However, such assets likely cannot be held beyond the time at which the purpose for their freezing (here: inducing Russia to comply with its obligation to make reparation) has been achieved.

Finally, Articles on the Responsibility of States Article 52 prohibits the use of countermeasures if "(a) the internationally wrongful act has ceased; *and* (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties."[60] This limitation on the use of countermeasures may become relevant if and when Russia ceases its acts of aggression and the court or tribunal has the power to order reparation.

What is Immunity from Jurisdiction in International Law?

General Principles of the Jurisdictional Immunity of the State ("Jurisdictional Immunity")

<u>Introduction</u>

Based on the foundational principle of sovereign equality of States under international law, jurisdictional immunity protects sovereign States and their property from the jurisdiction of another State's courts.[61] Jurisdictional immunity applies to administrative, civil and criminal proceedings, and it acts as a procedural

[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986 I.C.J. Reports, p. 14, para. 249 (June 27).

[60] Articles on the Responsibility of States, art. 52 (emphasis added) (providing further that the prohibition does not apply "if the responsible State fails to implement the dispute settlement procedures in good faith.").

[61] Peter-Tobias Stoll, *State Immunity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, paras. 1, 4 (last updated Apr. 2011), *available at* https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106.

bar to protect sovereign States from being made party to proceedings in another State's courts.

Jurisdictional immunity is distinct from, but closely related to, head of State immunity and diplomatic and consular immunity, which exempt certain categories of officials of one State from the jurisdiction of another State's courts. Head of State immunity and diplomatic and consular immunity are immunities *ratione materiae*, which means that they cover government officials by virtue of their official functions.[62] By contrast, jurisdictional immunity is an immunity *ratione personae*, which means that it applies to the foreign State as an independent legal personality.[63]

Understanding the scope of jurisdictional immunity in international law will be directly relevant to any attempt to initiate proceedings against the Russian Federation or Russian-held assets in foreign courts, as a predicate for seizing the assets in connection with Russia's unlawful actions in Ukraine. The Russian Federation would likely argue that any such proceedings are barred, because it benefits from jurisdictional immunity as a matter of customary international law, and any applicable national laws. While the scope of jurisdictional immunity in international law is broad, it is typically not absolute, and there are circumstances where States can be successfully sued in foreign courts.

Absolute and Restrictive Theories of Jurisdictional Immunity

Broadly speaking, there are two principal theories of jurisdictional immunity: one of 'absolute' immunity, and the other, 'restrictive' immunity. The theory of absolute immunity, which prevailed throughout the nineteenth century, serves as a complete procedural bar on a State being subject to lawsuits brought against it in another State's courts. Under the restrictive immunity approach, which has come to dominate since the twentieth century, the plea of jurisdictional immunity is restricted to acts of a governmental (*iure imperii*) nature only.[64] This means that, while a State cannot be sued with respect to purely governmental acts, disputes that concern the commercial actions and property interests of a government (also known as acts *iure gestionis*), do not benefit from immunity

[62] Peter-Tobias Stoll, *State Immunity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, paras. 13, 21 (last updated Apr. 2011); Vienna Convention on Diplomatic Relations, art. 31, *opened for signature* Apr. 18, 1961, 1964 U.N.T.S. 96 (*entered into force* Apr. 24, 1964); *see also id*., art. 3(1) (defining diplomatic functions); *see also,* Vienna Convention on Consular Relations, art. 43, *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 261 (*entered into force* Mar. 19, 1967); *see also id*., art. 5 (defining consular functions).

[63] UN Convention on Jurisdictional Immunities of States and their Properties ("Jurisdictional Immunities Convention"), art. 5, General Assembly Resolution 59/38, U.N. Doc. A/RES/59/38, annex (Dec. 16, 2004).

[64] Hazel Fox, *The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 118, 119 (Cambridge University Press, 2019).

protections.[65] This means that as a matter of customary international law, the Russian Federation would not be able to claim jurisdictional immunity before a foreign court in any proceedings brought against it concerning a breach of contract, or other transactions of a commercial nature. However, Russia would be able to claim immunity in lawsuits where the cause of action concerns acts of a governmental nature. The International Court of Justice's decision in *Jurisdictional Immunities of the State (Germany v. Italy)* confirms that Russia would benefit from jurisdictional immunity in any lawsuit where the cause of action concerned acts of aggression against, or human rights violations in, Ukraine.

Today, restrictive immunity is the dominant approach adhered to by the vast majority of States.[66] The theory of restrictive immunity is also reflected in key codifications of the international law on jurisdictional immunity discussed below, including the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and their Properties. Nonetheless, a limited number of States, including China, still afford absolute immunity in their courts.[67]

Russia itself appears to adhere to the principle of restrictive immunity. On January 1, 2016, Russia's Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property entered into force.[68] The Law allows Russian courts to limit the jurisdictional immunity of foreign States in disputes concerning commercial activities. While some commentators have held that this new law demonstrates Russia's acceptance of the restrictive doctrine,[69] other commentators consider this law to be a rejection of the restrictive approach to jurisdictional immunity. This is because the law declares that the principle of reciprocity is the main principle under which Russian courts will consider the limits of a foreign State's jurisdictional immunity.[70] This means that Russia will determine the limits

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[65] For an overview of developments in solving these differences, *see* Council of Europe, *Explanatory Report to the European Convention on State Immunity*, paras. 2-7, European Treaty Series No. 74 (Mar. 16, 1972).

[66] *See* Council of Europe, *Explanatory Report to the European Convention on State Immunity*, para. 7, European Treaty Series No. 74 (Mar. 16, 1972) ("By limiting the number of cases in which States can invoke jurisdictional immunity, the Convention is consistent with the trend taking place in the case-law and legal writings in the majority of countries ….").

[67] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC,* Court of Final Appeal of the Hong Kong Special Administrative Region, Final Appeal Nos. 5, 6 and 7 of 2010 (Civil), Judgment (June 8, 2011), *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=76750&currpage=T (holding that since Hong Kong's reversion to the People's Republic of China in 1997, sovereign States have enjoyed absolute immunity before its courts consistent with China's position on sovereign immunity).

[68] Russia, Federal Law on Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation (2015), No. 297- FZ, 3 November 2015 (*entered into effect* Jan. 1, 2016).

[69] *See,* Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 193-194 (2019).

[70] Hazel Fox, *The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 118, 131-132 (2019).

of jurisdictional immunity afforded to foreign States in Russia based on the degree of reciprocal immunity that Russia enjoys in a given foreign State.

Potential Limits of Jurisdictional Immunity for Serious Violations of International Law

A key question that arises with respect to jurisdictional immunity is the extent to which adherence to this rule of international law could come into conflict with another rule of international law. For example, a State's obligation under Article 41(2) of the International Law Commission Articles on State Responsibility not to recognize as lawful a situation created by a serious breach of a peremptory norm of international law.[71] In *Jurisdictional Immunities of the State (Germany v. Italy)*, the International Court of Justice clarified that there is no conflict between the rules of jurisdictional immunity and the prohibition on recognizing serious breaches of international law committed by another State.[72] Rather, the Court held that the rules of jurisdictional immunity are procedural in nature, and their application does not bear upon the question of whether the conduct regarding which the proceedings are brought is lawful or not.[73] This has led some commentators to argue that international law has adopted a 'values-free' approach to immunity.[74]

In *Jurisdictional Immunities of the State (Germany v. Italy)*, Germany argued that the development of the concept of *jus cogens* had not overturned the regime of jurisdictional immunity, and that when States recognized *jus cogens* as a special class of rules of international law, they did not implicitly waive their right to immunity.[75] On the other hand, Italy argued that the case before the Court represented an 'exceptional situation' of a 'clear and inescapable' conflict between the application of immunity rules, and the enforcement of a rule of *jus cogens*.[76] According to Italy, recognizing Germany's entitlement to jurisdictional immunity

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[71] *See* Articles on the Responsibility of States, Art. 41(2) ("No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."); *id*., Art. 40 ("1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.").

[72] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at p. 140 (Feb. 3).

[73] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at p. 140 (Feb. 3).

[74] Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 204 (2019).

[75] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Reply of the Federal Republic of Germany, p. 35 (Oct. 5, 2010), *available at* https://www.icj-cij.org/public/files/case-related/143/16650.pdf.

[76] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Rejoinder of Italy, p. 39 (Jan. 10, 2011), *available at* https://www.icj-cij.org/public/files/case-related/143/16652.pdf.

would have the effect of denying any remaining avenues for Italian victims to seek reparation from Germany, given that these victims had been mostly excluded from reparations schemes established after World War II.[77] Italy's written submissions referred to domestic legislation and case law purporting to show that the law of immunity is 'in a state of flux' and claimed that domestic judges and legislators were increasingly willing to challenge States' entitlement to jurisdictional immunity in cases involving breaches of *jus cogens*.[78] Italy's written submissions referred in particular to the European Court of Human Rights decision in *Al-Adsani v. United Kingdom* for support[79] although in its judgment the Court noted that, by an albeit narrow margin, the European Court of Human Rights was unable to discern in this case any firm basis for concluding that a State no longer enjoys jurisdictional immunity in a case concerning allegations of torture.[80]

The Court concluded that Germany was entitled to jurisdictional immunity despite the serious violations of international law for which it was responsible during World War II.[81] The decision confirms that the rules of jurisdictional immunity in customary international law are procedural in nature and apply regardless of whether the State in question is alleged to have violated *jus cogens* norms. However, there is evidence that not all States consider that the rules of jurisdictional immunity should be entirely separated from the severity of the norms that the State is accused of violating.[82] One example is the special exception that exists in the United States that removes the plea of jurisdictional immunity from foreign States that are designated sponsors of State terrorism, in proceedings brought by victims who are United States nationals. In 2012, Canada's State Immunity Act 1985 was also amended so that a foreign State cannot be immune from the jurisdiction of a court in proceedings against it concerning its support for terrorism.[83] These developments are noteworthy, and may indicate a willingness by certain States to develop further 'values-based' exceptions to sovereign immunity that may, in future, cover Russia's actions in Ukraine. However at present, these

[77] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Rejoinder of Italy, p. 38 (Jan. 10, 2011), *available at* https://www.icj-cij.org/public/files/case-related/143/16652.pdf.

[78] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Rejoinder of Italy, p. 36 (Jan. 10, 2011), *available at* https://www.icj-cij.org/public/files/case-related/143/16652.pdf.

[79] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Counter-Memorial of Italy, p. 67 (Dec. 22, 2009), *available at* https://www.icj-cij.org/public/files/case-related/143/16648.pdf.

[80] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, paras. 90-91 (Feb. 3).

[81] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, paras. 95-97, 139 (Feb. 3).

[82] Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 204 (2019).

[83] *State Immunity Act*, section 6.1(1) (Canada, 1985), *available at* https://laws-lois.justice.gc.ca/eng/acts/S-18/.

domestic law exceptions go further than the exceptions to jurisdictional immunity provided for in customary international law.[84]

Sources of International Law on Jurisdictional Immunity

Various attempts have been made over time to codify international law on jurisdictional immunity, however only a few regional conventions have entered into force with limited participation. Accordingly, the main source of international law on jurisdictional immunity is customary international law. Nonetheless, it is important to analyze the codifications, as they reflect customary international law to a large extent. Additionally, the work of the International Law Commission on State Immunity is an important subsidiary means to determine customary international law.[85] The main international conventions and sources of international law covering jurisdictional immunity are set out briefly below.

The 2004 UN Convention on Jurisdictional Immunities of States and Their Property ("Jurisdictional Immunities Convention")

The Jurisdictional Immunities Convention is the principal international law authority on jurisdictional immunity. While not yet in force, 23 States have ratified the Jurisdictional Immunities Convention as of December 2022.[86] Under its terms, this means that only seven more States must ratify the convention before it comes into effect as treaty law among the States parties.[87] In line with the restrictive approach to sovereign immunity, the Jurisdictional Immunities Convention sets out various exceptions of a private law nature, where States are procedurally barred from invoking jurisdictional immunity. These exceptions, which are discussed in further detail below, include in disputes concerning commercial transactions of the State,[88] contracts of employment,[89] the ownership and use of property,[90] and where

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[84] Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 202-204 (Cambridge University Press, 2019).

[85] *See* Statute of the International Court of Justice, Art. 38(1)(d) ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

[86] *See* Status of the United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations Treaty Collection (last visited Dec. 14, 2022), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

[87] Jurisdictional Immunities Convention, Article 30.

[88] Jurisdictional Immunities Convention, Article 10.

[89] Jurisdictional Immunities Convention, Article 11.

[90] Jurisdictional Immunities Convention, Article 13.

the State participates in companies or other collective bodies in the jurisdiction of another State.[91]

The 1972 European Convention on State Immunity

The European Convention on State Immunity is a multilateral regional treaty of the Council of Europe.[92] Similar to the Jurisdictional Immunities Convention, the European Convention on State Immunity endorses a restrictive approach to jurisdictional immunity, with the signatories to the Convention confirming that foreign States will generally be immune from civil proceedings brought before their courts.[93] The European Convention on State Immunity also lists a number of private law exceptions to the general rule – many of which have helped to give shape to the exceptions found in national legislation across Europe, including the UK State Immunity Act 1978.[94] Those exceptions include exceptions for contracts entered into by the State,[95] the participation of a State in companies, associations or other legal entities,[96] and where the State engages in commercial activities "in the same manner as a private person."[97]

The 1982 United Nations Convention on the Law of the Sea ("Convention on the Law of the Sea")

The Convention on the Law of the Sea is the leading international law convention which regulates the conduct of all marine and maritime activities. The Convention on the Law of the Sea entered into force in 1994 and is now in force in 168 States, although the United States is not a signatory to the Convention. Among the Convention on the Law of the Sea's provisions are protections for the immunities of vessels, which are understood to reflect customary international law.[98] Those provisions include Article 95, which confirms that warships shall benefit from immunity, and Article 96, which generally extends the same immunity protections afforded to warships to vessels exclusively used in government non-commercial service.

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[91] Jurisdictional Immunities Convention, Article 15.

[92] Hazel Fox & Philippa Webb, THE LAW OF STATE IMMUNITY 101, 118 (3rd ed., 2013).

[93] Hazel Fox, *The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status,* in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 118, 120 (2019).

[94] Hazel Fox & Philippa Webb, THE LAW OF STATE IMMUNITY 101, 118 (3rd ed., 2013).

[95] European Convention on State Immunity , Article 4.

[96] European Convention on State Immunity , Article 6.

[97] European Convention on State Immunity , Article 7.

[98] Notably, 168 States have ratified the Convention on the Law of the Sea. There are no known reservations to the Convention on the Law of the Sea provisions regarding immunity of warships and/or other government ships operated for non-commercial purposes.

Resolutions of International Bodies

In addition to the codifications of jurisdictional immunity in the Jurisdictional Immunities Convention and other conventions, a key source for interpreting customary international law on immunity from jurisdiction comes from the work of the International Law Commission, particularly its 1991 Commentary to the Draft Articles on the Jurisdictional Immunities of States and their Property. The relevance of the International Law Commission's Commentary has been heightened by the fact that the International Law Commission's Articles themselves have, since 2004, been adopted verbatim in the text of the Jurisdictional Immunities Convention.[99] The International Law Commission's Commentary makes clear that jurisdictional immunities apply to exempt sovereign States from having a case adjudicated before a judge or magistrate in a foreign court, *and* in relation to the exercise of all other administrative and executive measures and procedures relating to any judicial proceeding. In other words, the plea of jurisdictional immunity extends to the initiation of any proceedings, the service of writs, investigations, trials and provisional measures.[100]

Decisions of International Courts and Tribunals

Decisions of the International Court of Justice are important for understanding and interpreting customary international law on jurisdictional immunity. The key decision of the International Court of Justice on the scope of jurisdictional immunity in customary international law is the 2012 judgment in *Jurisdictional Immunities of the State (Germany v. Italy)*, discussed above.

General Exceptions to Jurisdictional Immunity

Pursuant to the restrictive theory, international law instruments have codified limitations to the doctrine of jurisdictional immunity for acts that are of a commercial and/or private law nature. These exceptions, which will be discussed in further detail below, include exceptions for proceedings relating to commercial transactions, employment, property, and intellectual property rights. In all of these instances, a sovereign State can be sued in proceedings before a foreign court. Several of the key exceptions which may be most relevant to proceedings brought against the Russian Federation are outlined below.

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[99] Hazel Fox & Philippa Webb, THE LAW OF STATE IMMUNITY 101, 118 (3rd ed., 2013).

[100] *Report of the International Law Commission on the work of its forty-third session*, at 13, [1991] 2 YEAR BOOK OF THE INTERNATIONAL LAW COMMISSION 56, U.N. Doc. A/46/10 (1991).

Waiver

It is generally accepted that a State will not be entitled to jurisdictional immunity if it consents to the relevant court proceedings, or is deemed to have otherwise waived its immunity. Article 7 of the Jurisdictional Immunities Convention prohibits a foreign State from invoking jurisdictional immunity rights if the State has expressly consented to the exercise of jurisdiction by a foreign court - either through an international agreement, a written contract, or declaration by the court.[101] While the Jurisdictional Immunities Convention itself is silent on what representatives of the State can waive the State's immunity, national legislation tends to make this clear. For example, in the United Kingdom persons entitled to expressly waive immunity include the head of State, the government of the State, or any department of the government.[102]

One of the most frequent ways that States expressly waive their immunity from jurisdiction before foreign courts is through arbitration clauses in investment treaties. In *Gold Reserve Inc. v. Venezuela (2016)* for example, the English High Court found that by agreeing to arbitration in writing, Venezuela had lost its right to plead immunity from jurisdiction. States also expressly waive their immunity in contracts. In proceedings brought before the English courts to enforce the decision in *NML Capital v Argentina*, a case concerning Argentina's default on international bond agreements, the UK Supreme Court found that Argentina had waived its immunities through broad provisions included in the terms of the relevant bond agreements.[103] That States can waive their immunity from jurisdiction in this way is significant when considering potential claims that may be brought against the Russian Federation. In 2022, Russia defaulted on its international bonds for the first time in recent history.[104] Depending on the provisions included in those bond agreements, and in other commercial transactions Russia has entered into, Russia may face an uphill battle pleading jurisdictional immunity in any ensuing court proceedings.

Further, States can also impliedly waive their right to immunity as a matter of customary international law, by engaging in conduct that indicates consent to the exercise of the foreign court's jurisdiction. Article 8 of the Jurisdictional Immunities Convention provides that States cannot invoke immunity from

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[101] Jurisdictional Immunities Convention, art. 7.

[102] State Immunity Act, section 14(1) (United Kingdom, 1978).

[103] *NML Capital Ltd v. Argentina,* U.K.S.C. 31, 22 (2011), *available at* https://www.supremecourt.uk/cases/docs/uksc-2010-0040-judgment.pdf.

[104] *Russia slips into historic default as sanctions muddy next steps*, BLOOMBERG (June 26, 22), *available at* https://www.bloomberg.com/news/articles/2022-06-26/russia-defaults-on-foreign-debt-for-first-time-since-1918?leadSource=uverify%20wall.

jurisdiction if the State itself instituted the proceedings, or if the State took any steps relating to the merits of the claim. The Jurisdictional Immunities Convention is clear that a State's failure to appear at proceedings shall not be interpreted as consent to the exercise of jurisdiction, and neither will the appearance of a State representative as a witness.[105]

Commercial Transactions

The main exception to the doctrine of jurisdictional immunity in customary international law concerns disputes relating to a State's commercial transactions.[106] Article 10 of the Jurisdictional Immunities Convention provides that where a State engages in a commercial transaction with a foreign national, and a dispute arises concerning that commercial transaction, then a foreign State cannot invoke immunity from jurisdiction in proceedings arising in the forum State.[107] The definition of 'commercial transaction' in the Jurisdictional Immunities Convention is notably wide.[108] It covers three categories of transactions and contracts, namely: (i) any commercial contract or transaction for the sale of goods or supply or services; (ii) any contract for a loan or other transaction of a financial nature; and (iii) any other contract or transaction of a commercial, industrial, trading or professional nature (excluding employment contracts).[109]

When determining whether or not a transaction falls within the definition of a 'commercial transaction,' the Jurisdictional Immunities Convention States that reference should be primarily made to the *nature* of the contract or transaction, i.e. whether it concerns the selling a service or product, the leasing of property, or the borrowing of money, etc. If the contract does concern such a private law act, then the contract will, by this definition, be a 'commercial transaction'. Notably however, the Jurisdictional Immunities Convention does not exclude the Parties to a dispute from taking into consideration the purpose of the transaction as well, if it is the practice of the forum State to do so.[110] While the majority of national courts focus only on investigating the *nature* of the foreign State act (for example, the United States, Switzerland, Austria and Germany), a minority of States, including Canada and Italy, also take into consideration the *purpose* of the foreign State's

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[105] UNSCI, art. 8(3).

[106] *See* Yas Banifatemi, *Jurisdictional Immunity of States – Commercial Transactions*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 289, 289 (2019).

[107] Jurisdictional Immunities Convention, art. 10.

[108] *See* Yas Banifatemi, *Jurisdictional Immunity of States – Commercial Transactions*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 289, 289 (2019).

[109] Jurisdictional Immunities Convention, Article 2(1)(c).

[110] Jurisdictional Immunities Convention, Article 2(2).

act.[111] An example is found in a claim for breach of contract by a group of creditors concerning a bond issuance by Argentina. The Italian courts determined that while a bond issuance was a private law act, the purpose of Argentina's extension of payment terms, in the context of a serious national emergency, meant that the court considered this act to be an exercise of sovereign authority.[112]

Therefore, commercial contracts and transactions entered into by the Russian Federation relating to its actions in Ukraine may be exempt from the plea of jurisdictional immunity.

Disputes concerning the Ownership, Use and Possession of Property

Customary international law provides a further exception to the doctrine of jurisdictional immunity in proceedings that involve the determination of any rights or interests of a foreign State in its possession of, or use of, moveable or immovable property. Article 13 of the Jurisdictional Immunities Convention provides that States cannot invoke immunity in proceedings, which relate to the determination of any right or interest in property situated in the forum State – including the administration of any trust property or the property of a company. Similarly, Article 9 of the European regional convention, the European Convention on State Immunity , provides that a State cannot claim immunity from the jurisdiction of the court of another State if those proceedings relate to the State's rights, or interests in immovable property, or obligations arising out of those rights and interests, and that property is situated in the forum State.

This exception to jurisdictional immunity effectively permits local courts to determine disputes concerning the ownership and use of a foreign State's property, including property held in complex legal arrangements and proxy companies. However, while this exception to jurisdictional immunity permits local courts to determine a dispute concerning the ownership of these assets, this exception does not permit a forum State to unilaterally seize the movable or immovable property that is the subject of the dispute, unless a separate exception to immunity from execution also applies.

Participation in Companies or Other Collective Bodies

Similarly to the above exception, customary international law also provides an exception to immunity from jurisdiction where a State participates in a foreign company or other collective body. This exception has been codified in Article

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[111] *See* Peter-Tobias Stoll, *State Immunity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 27 (last updated Apr. 2011).

[112] Hazel Fox & Philippa Webb, THE LAW OF STATE IMMUNITY 241, 264 (3rd ed., 2013).

15(1)(b) of the Jurisdictional Immunities Convention, which provides that a State cannot invoke immunity in proceedings concerning its relationship to a company or other collective body, if that body is incorporated or constituted under the law of the forum State, or has its principal place of business there.

Certain Ships Owned or Operated by a State

A further category of disputes, which is exempt from jurisdictional immunity protections, are disputes involving certain categories of State-owned and operated ships. Pursuant to Article 16 of the Jurisdictional Immunities Convention, a foreign State will benefit from jurisdictional immunity in proceedings involving the operation of a ship, only if that ship is used in government, non-commercial service.

In a similar vein, the Convention on the Law of the Sea also sets out the immunities that apply to warships. Article 32 of the Convention on the Law of the Sea provides that a State's warship will be immune from proceedings before a foreign court. The term "warship" in international law was defined broadly by the International Tribunal for the Law of the Sea ("ITLOS") in *ARA Libertad (Argentina v. Ghana)*, which held that even an unarmed training vessel owned by a foreign State will have immunity from civil claims when calling in foreign ports.

Compensation for Personal Injuries or Damage to Property

International law instruments provide for an exception to immunity from jurisdiction in the case of personal injuries, death, damage to or loss of property attributable to a foreign State. This exception, which is also commonly referred to as the 'non-commercial torts exception', is set out in Article 12 of the Jurisdictional Immunities Convention, and Article 11 of the European Convention on State Immunity. Article 12 of the Jurisdictional Immunities Convention stipulates that immunity is excluded in proceedings which relate to pecuniary compensation for death or injury to the person, or damage to or loss of property, if that act or omission 'occurred in whole or part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission. Commentators point to two principal legal issues that are raised by the non-commercial tort exception to jurisdictional immunity.[113] The first issue is whether or not the non-commercial tort exception applies to actions committed by the armed forces of a foreign State. The second issue is whether or not there needs to be a territorial nexus between the foreign State act and the forum State for this exception to apply. Both issues are addressed in brief below, and may

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[113] *See* Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 200-202 (2019).

have direct relevance to any actions brought against Russia for its actions in Ukraine in foreign courts.

The International Court of Justice clarified the first issue in the *Jurisdictional Immunities of the State (Germany v. Italy)* case. After reviewing State practice in the form of judicial decisions from national courts, the Court determined that customary international law requires a State to be accorded with immunity in tort proceedings relating to acts committed by that State's armed forces.[114] As the Court remarked, State practice supports the proposition that immunity from jurisdiction extends to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces of a State in the conduct of armed conflict - even if the acts take place on the territory of the forum State.[115]

The ruling in *Jurisdictional Immunities of the State (Germany v. Italy)* appears to confirm that under customary international law, Russia would be immune from civil proceedings brought in Ukraine, or other jurisdictions, where death, personal injury or property damage have been caused by Russia's armed forces. However, in his dissenting opinion in *Jurisdictional Immunities of the State (Germany v. Italy)*, Judge Gaja described this area of the law as one that is "developing"[116] and remarked that in his view it would be "extraordinary" if the non-commercial tort exception could apply to breaches of a minor nature, while not to breaches of peremptory norms by States.[117]

Regarding the second issue of whether a territorial nexus is required between the State action and the forum State, Article 12 of the Jurisdictional Immunities Convention provides that the non-commercial tort exception applies only if the act or omission occurred "in whole or in part in the territory" of the forum State, and if the author of the act or omission "was present in the territory when the act or omission occurred." While the Jurisdictional Immunities Convention therefore appears to require a territorial nexus between the act or omission and the author of the conduct, commentators have pointed to divergent approaches in national law,

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[114] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J Reports 99, 134-135, para. 77 (Feb. 3).

[115] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J Reports, p. 99, at pp. 134-135, para. 77 (Feb. 3).

[116] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Dissenting Opinion of Judge *ad hoc* Gaja, 2012 I.C.J Reports, p. 99, at p. 309, para. 1 (Feb. 3).

[117] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Dissenting Opinion of Judge *ad hoc* Gaja, 2012 I.C.J. Reports, p. 99, at p. 321, para. 11 (Feb. 3).

including in the United States. [118] The United States Foreign Sovereign Immunities Act ("FSIA") only requires that the injury is "occurring in the United States" for the tort exception to apply – a lower threshold that may open up the prospect for the territorial application of this tort exception.[119]

Application of State Jurisdictional Immunity Law to Property of Foreign States

As a matter of customary international law, not only States but also their property is entitled to jurisdictional immunity before foreign courts. Article 5 of the Jurisdictional Immunities Convention codifies this rule, specifying that States enjoy immunity from jurisdiction, not only in respect of themselves, but also their property in the forum State. Below are some practical examples of how the rules of jurisdictional immunity and the exceptions described above apply in practice to certain classes of State assets.

Diplomatic Property

Diplomatic property is the movable and immovable property belonging to a foreign diplomatic or consular mission. Diplomatic property includes embassy buildings, and other buildings used for the mission and by embassy staff. In addition to physical diplomatic premises, diplomatic property also extends to embassy bank accounts, which are often the most significant asset of a foreign State in any overseas jurisdiction.[120]

As a matter of customary international law and treaty law, diplomatic property is always considered immune from jurisdiction. This has been codified by Article 21 of the Jurisdictional Immunities Convention which confirms the special status of diplomatic property. Pursuant to Article 21, diplomatic property constitutes a specific category of property that shall not be considered anything other than property used for governmental, non-commercial purposes.

Property of Foreign Central Banks

The property of foreign central banks will generally enjoy immunity from jurisdiction like the property of any other State entity. Recognizing the high level of immunity afforded to central bank property, Article 21 of the Jurisdictional

[118] Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 201-202 (2019).

[119] Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 187, 201-202 (2019).

[120] Cedric Ryngaert, *Immunity from Execution and Diplomatic Property*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 564, 564 (2019).

Immunities Convention stipulates that the property of a central bank or any other State monetary authority, will always be treated as property used for governmental, non-commercial purposes.

As with diplomatic property, the assets of the Russian Central Bank are some of the Russian Federation's most significant overseas assets, and will be afforded a high degree of jurisdictional immunity. However, not all national legislation appears to follow the approach set out in the Jurisdictional Immunities Convention with respect to central banks. In the United Kingdom for example, the UK State Immunity Act provides that central banks may not always be immune from adjudicative proceedings, with the degree of immunity that will be afforded dependent on the relationship between the central bank and the foreign government. Where a foreign central bank is an organ of the government, the UK State Immunity Act provides that the central bank will be immune from adjudicative proceedings. This is subject to the normal exceptions, which apply with respect to any other organ of the State,[121] principally where the proceedings relate to a commercial transaction.[122] However, in contrast, if a central bank is deemed to be a separate entity of the government, as defined in § 14(1) of the UK State Immunity Act, then foreign central banks will only be able to plead jurisdictional immunity where: (i) the proceedings relate to anything done by it in the exercise of sovereign authority; and (ii) where the circumstances are such that the State itself would be immune as per § 14(2) of the State Immunity Act.

A further example where national legislation appears to deviate from the position in customary international law is Switzerland, as demonstrated by the ruling of the Swiss Supreme Court in *Sarrio proceedings against the Kuwait Investment Office and Kuwait Investment Authority*.[123] This case concerned an appeal to an order attaching the Kuwait Investment Authority's assets in Geneva and Zurich for a contract claim pending before the Spanish courts. While the Kuwait Investment Authority conceded that Sarrio's claim against it concerned private rather than sovereign acts carried out by the Kuwait Investment Authority, the Kuwait Investment Authority nevertheless argued that it was immune from jurisdiction because the Kuwait Investment Authority was set up to provide for the future needs of the Kuwaiti people. The Swiss Supreme Court rejected this argument however. The issue of whether or not the Kuwait Investment Authority

[121] State Immunity Act, sections 2-11, (United Kingdom, 1978).

[122] State Immunity Act, section 3(1)(a), (United Kingdom, 1978).

[123] *Kuwait v. X*, Swiss Federal Tribunal, Judgment of Jan. 24, 1992, partially reproduced in 5 Revue Suisse de Droit International et Européen p. 593 (1995), as cited in David Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors, pp. 16-17 (OECD Working Papers on International Investment 2010/02), *available at* https://www.oecd.org/daf/inv/mne/WP-2010_2.pdf.

was part of the State was deemed to be irrelevant, because the private law nature of the acts to which this contract claim concerned excluded the plea of jurisdictional immunity.[124]

These examples show that while as a matter of customary international law central banks have a high level of protection from being sued in foreign courts, the situation is not uniform across the national laws of various jurisdictions. However, even if central banks are excluded from pleading jurisdictional immunity, their assets are likely to be protected from enforcement measures, as discussed in further detail below.

Foreign State-Owned Enterprises

As a principle of international law, the property of an State-Owned Enterprise is not entitled to immunity from jurisdiction. Article 10(3) of the Jurisdictional Immunities Convention provides that where a State enterprise is capable of being sued and suing, and acquiring, owning or disposing of property, and is involved in proceedings concerning a commercial transaction, the State-Owned Enterprise will not be entitled to immunity from jurisdiction. Similarly, Article 27 of the European Convention on State Immunity makes clear that a Contracting State for the purposes of the Convention, does not include any legally distinct entity capable of suing or being sued, even if that entity has been entrusted with public functions.

The fact that State-Owned Enterprises do not generally benefit from jurisdictional immunity is significant. Despite large-scale privatization in Russia in the 1990's, State ownership is still important in the Russian Federation, and Russia's State-Owned Enterprises will not benefit from jurisdictional immunity in proceedings brought against them in foreign courts. However, the question as to whether, and under what circumstances, Russian State-Owned Enterprises could be sued for their actions in foreign courts requires further consideration. This is because although these entities will not benefit from jurisdictional immunity, other procedural and jurisdictional hurdles are likely to arise. Another area for further consideration is whether, absent jurisdictional hurdles, there is sufficient basis to sue Russian State-Owned Enterprises for their complicity in crimes against humanity. The complicity of corporations in international crimes is an emerging area of international human rights law, and there is precedent for companies being sued for their role in perpetrating these crimes. They include, for example, the

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[124] *Kuwait v. X*, Swiss Federal Tribunal, Judgment of Jan. 24, 1992, partially reproduced in 5 Revue Suisse de Droit International et Européen p. 593 (1995), as cited in David Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors, pp. 16-17 (OECD Working Papers on International Investment 2010/02), *available at* https://www.oecd.org/daf/inv/mne/WP-2010_2.pdf.

French industrial company Lafarge, which faces charges of complicity for crimes against humanity in France, over alleged payoffs made to the Islamic State and other Jihadist groups during Syria's civil war.[125]

Because State-Owned Enterprises are separate entities from the State, under customary international law State-Owned Enterprises cannot be held responsible for acts committed by the State itself in its sovereign capacity. This is unless it can be shown that the separateness between the State and the State-Owned Enterprise is merely a device for committing fraud or otherwise evading legal obligations.[126] Therefore, State-Owned Enterprises lack of jurisdictional immunity does not, absent exceptional circumstances, allow States to file actions against an State-Owned Enterprise (or its assets) following unlawful actions by the State that owns the State-Owned Enterprise, so long as the State-Owned Enterprise itself was not involved or complicit in, and did not facilitate, the unlawful actions.

Application of the Above Principles to the Jurisdictional Immunity of Russia and Russian Assets

Under customary international law, the Russian Federation is immune from jurisdiction in foreign courts for wrongful acts related to its invasion of Ukraine, because these acts qualify as acts *jure imperii*. The gravity of the alleged violation has no bearing on the application of the rules of jurisdictional immunity. While exceptions to immunity exist for certain acts of the State of a commercial or private law nature, use of military force in an armed conflict does not fall within one of these exceptions.

The only exception that could potentially apply to Russia is the non-commercial tort exception. However, as the International Court of Justice noted in response to Italy's argument that such an exception applied to Germany's actions relating to its military invasion of Italy during WWII, this exception does not apply to acts of a State's military.[127] Further, only States in which the torts were committed could exercise jurisdiction over Russia for said acts.

While specific jurisdictional immunity rules apply to certain State assets, none of them allow for the seizure of Russian assets to make reparation for

[125] *Lafarge Lawsuit (re complicity in crimes against humanity in Syria)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *available at* https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/ (last visited Dec. 14, 2022).

[126] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 1970 I.C.J Reports 3, 39-40, paras. 56-58 (Feb. 5).

[127] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J Reports, p. 99, at pp. 134-135, paras. 76-77 (Feb. 3).

Russia's unlawful acts in Ukraine. As explained above, diplomatic property and central bank property is considered immune from seizure. Although the property of Russian State-Owned Enterprises may not enjoy immunity from jurisdiction in foreign States, State-Owned Enterprises cannot, as entities distinct from the State, automatically be held responsible for acts of the Russian State. However, it may be possible to seize State-Owned Enterprise property in connection with the Russian invasion if it can be shown that such State-Owned Enterprises contributed to and are responsible, at least in part, for certain internationally wrongful acts committed in Ukraine.

What is the Immunity from Enforcement/Execution in International Law?

General Principles of Enforcement Immunity

Immunity from enforcement is a principle of international law that protects the property of a foreign State from being subject to arrest, attachment and execution by foreign courts. While the meaning of these terms will differ from jurisdiction to jurisdiction, broadly speaking, the process of arrest involves property being detained by judicial process for the purpose of satisfying a future or present claim. Meanwhile, attachment is a legal process where, at the request of a creditor, the court designates property owned by the debtor to be transferred to the creditor or sold for the creditor's benefit. Finally, execution refers to the process which takes place after a judgment has been entered. In this process the court takes possession of property in order to sell it, and uses the proceeds to pay a judgment in favor of the winning party, including proceeds that might be in the hands of a third party, such as in a commercial bank.

As a matter of customary international law, immunity from enforcement tends to extend further than immunity from jurisdiction. This means that even if a foreign State is found to have waived its immunity from jurisdiction, or otherwise does not have jurisdictional immunity, the State may still have immunity from enforcement. As confirmed by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy)*, the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory "goes further than the jurisdictional immunity enjoyed by those same States before foreign courts."[128] This means that even if the Russian Federation can be successfully sued in foreign courts in connection with any of its activities in Ukraine, there remains an uphill battle for enforcing any proceedings against Russia's assets overseas.

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[128] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J Reports, p. 99, at p. 146, para. 113 (Feb. 3) (our emphasis).

Another key principle that arises with respect to enforcement immunity is the requirement for a nexus between the property sought for enforcement measures, and the subject matter of the underlying claim. Article 19(c) of the Jurisdictional Immunities Convention provides that measures of constraint may only be taken against property that has a connection with the entity against which the proceeding is directed. This principle does limit the circumstances in which measures of constraint may be taken against a foreign State's property. However, the drafters of the Jurisdictional Immunities Convention omitted a second, more onerous requirement that appeared in the earlier International Law Commission Draft Articles on Jurisdictional Immunities of States and Their Property: that the property at hand also has a connection with the claim which is the object of the proceeding.[129] The omission of this second requirement means that, in accordance with the Jurisdictional Immunities Convention, plaintiffs only have to show a connection between the property that is the subject of the enforcement measure and the entity being sued, and not also that the property in question is related to the underlying claim.

Sources of International law on Enforcement Immunity

The leading codification on the customary international law of enforcement immunity is the Jurisdictional Immunities Convention. Article 19 of the Jurisdictional Immunities Convention prohibits foreign State property from being subject to attachment or arrest in the case of pre-judgment measures, and from attachment, arrest and execution in the case of post-judgment measures. In addition to the Jurisdictional Immunities Convention, the European Convention on State Immunity includes similar language, in so far as it applies between Contracting States. Article 23 of the European Convention on State Immunity states for example, that no execution or preventative measures should be taken against the property of a Contracting State to the Convention, except and to the extent that the State agrees in writing to these measures. The Vienna Convention on Diplomatic Relations also specifically protects overseas diplomatic property from being subject to any enforcement proceedings before foreign courts. Article 22(3) of the Vienna Convention on Diplomatic Relations stipulates that the premises of a mission, as well as its furnishings, property and vehicles, are all immune from search, attachment and execution.[130]

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[129] Peter-Tobias Stoll, *State Immunity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para.76 (last updated Apr. 2011); *see also, Report of the International Law Commission on the work of its forty-third session*, [1991] 2 YEAR BOOK OF INTERNATIONAL LAW COMMISSION 56, U.N. Doc. A/46/10 (1991).

[130] Vienna Convention on Diplomatic Relations, art. 22(3), *opened for signature* Apr. 18, 1961, 1964 U.N.T.S. 96 (*entered into force* Apr. 24, 1964).

Exceptions to Enforcement Immunity in International Law

As confirmed by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy)*, there are three exceptions to the general rule in customary international law that measures of constraint cannot be taken against the property of a foreign State.[131] Those exceptions are: (i) where the property is in use for non-governmental, commercial purposes; (ii) where the foreign State has expressly consented to the measure of constraint; and (iii) where the foreign State has allocated the property for the satisfaction of a judicial claim.[132] While all three of these exceptions are codified in Article 19 of the Jurisdictional Immunities Convention, the most important of these exceptions is Article 19(c), which provides that property of a foreign State can be enforced against if it is used for non-governmental, commercial purposes. This exception was examined by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy)*, where the Court was called to determine whether the registration of a legal charge on Villa Vigoni, a German-Italian cultural center, constituted a measure of constraint by Italy in violation of Germany's entitlement to immunity from enforcement. The Court determined that because Villa Vigoni was the seat of a cultural center intended to promote cultural exchange between Germany and Italy, and that Germany had in no way consented to the taking of any enforcement measures against the property, the registration of the legal charge violated Germany's entitlement to enforcement immunity.[133]

The exception to enforcement immunity for property used entirely for non-governmental commercial purposes, is also reflected in national law. In the United Kingdom for example, the UK's State Immunity Act provides that there will be no immunity from enforcement before the UK High Court if the property being enforced against is exclusively used for commercial purposes.

Application of Enforcement Immunity to Classes of Assets

Diplomatic Property

One of the most important (and protected) classes of State assets is diplomatic and consular property. As a matter of customary international law and treaty law, diplomatic and consular property is afforded absolute immunity from

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[131] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at pp. 146-147, para. 118 (Feb. 3).

[132] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at pp. 146-147, para. 118 (Feb. 3).

[133] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at pp. 146-147, para. 118 (Feb. 3).

execution. This means that, regardless of national legislation, any enforcement measures taken against Russian diplomatic property overseas would very likely violate international law. Article 21(1) of the Jurisdictional Immunities Convention provides that diplomatic property is always immune from execution; a fact that commentators have suggested reflects customary international law.[134] In addition to the Jurisdictional Immunities Convention, the Vienna Convention on Diplomatic Relations confirms that diplomatic and consular property should be immune from enforcement. According to Article 22(3) of the Vienna Convention on Diplomatic Relations, no State is allowed to intervene in the activities of a diplomatic mission, including its premises, furnishings, property and vehicles.

Diplomatic property includes not only the physical property of diplomatic and consular missions, but also their bank accounts. While the Vienna Convention on Diplomatic Relations is silent on the immunity that should be afforded to a mission's bank account, Article 21(1)(a) of the Jurisdictional Immunities Convention makes specifically clear that property 'including any bank account' used in the performance of a State's diplomatic mission will not be amenable to constraint - a position that is also understood to be supported by overwhelming State practice.[135]

State Military Property

State military property is a further class of asset that benefits from a high degree of immunity from enforcement in customary international law. Article 21(1)(b) of the Jurisdictional Immunities Convention classifies military property as one of the key categories of State property that is presumed not to be used by the State for anything other than for governmental, non-commercial purposes. While Article 21 of the Jurisdictional Immunities Convention does not refer specifically to State military aircraft, commentators agree that military aircraft are also immune from execution as a matter of customary international law.[136]

The absolute immunity given to State military property is significant, because military property, most frequently military vessels, have been the subject of attachment orders when docked in foreign ports. A leading case on the immunity of foreign military vessels is the United States Supreme Court decision in *The Schooner Exchange*. This case concerned the attachment of a French public armed

[134] Cedric Ryngaert, *Immunity from Execution and Diplomatic Property*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 564, 564-565 (2019).

[135] Cedric Ryngaert, *Immunity from Execution and Diplomatic Property*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 564, 566 (2019).

[136] Matthew Happold, *Immunity from Execution of Military and Cultural Property*, *in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 602, 608 (2019).

vessel in a Philadelphia port, where it was seeking safe haven from a storm. The claim against the vessel was brought by two American men who claimed that the vessel had been illegally seized by the French authorities before being commissioned as a warship. The United States Supreme Court quashed the attachment order however, on the ground that national military ships entering the ports of a friendly power should be exempted from the jurisdiction of that power.[137]

State Cultural Property

Another important category of foreign State property is State cultural property. As States increasingly loan items abroad for exhibitions, the question of what degree of enforcement immunity attaches to these assets has gained increasing attention. Article 21 (d) and (e) of the Jurisdictional Immunities Convention refers to two categories of State cultural property that are considered to benefit from immunity protection: (i) property forming part of the cultural heritage of the State or its archives; and (ii) property forming part of an exhibition of scientific, cultural or historic interest. In both instances, the Jurisdictional Immunities Convention provides that enforcement immunity only applies when the property in question is one that is not placed on sale or intended to be placed on sale.

While the Jurisdictional Immunities Convention has codified immunity protections for two specific categories of State cultural property, commentators suggest that it is too early to treat these provisions of the Jurisdictional Immunities Convention as reflecting customary international law.[138] This may potentially make State cultural property a more vulnerable category of State property for enforcement proceedings. However, the law in this area is progressively developing. In 2013 for example, the Council of Europe adopted its Declaration on Jurisdictional Immunities of State Owned Cultural Property. This non-legally binding instrument has been signed by at least 20 members of the Council of Europe, and expresses a common understanding that, "in accordance with customary international law," State cultural property shall be immune from any measure of constraint.[139]

The treatment of State cultural property has differed markedly before national courts. Plaintiffs seeking to enforce measures of constraint against such property have in the past successfully argued that loaning artwork for a public

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[137] *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

[138] Matthew Happold, *Immunity from Execution of Military and Cultural Property, in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 602, 613 (2019).

[139] Council of Europe, *Declaration on Jurisdictional Immunities of State Owned Cultural Property* (March 2013), *available at* https://rm.coe.int/declaration-on-immunities-en/168071bb2d.

exhibition is a commercial activity, exempt from immunity protections. In *Malewicz v. City of Amsterdam*, for example, the United States courts determined that the City of Amsterdam engaged in 'commercial activities' when it loaned 14 Malewicz artworks to museums in the United States.[140] According to the United States District Court, there was 'nothing sovereign' about lending the artwork, despite the fact that the pieces themselves may have belonged to a sovereign.[141] However, while the District Court was persuaded that loaning the artwork was a commercial activity, and that it had jurisdiction to determine the dispute concerning its ownership, the artwork itself was nevertheless immune from seizure because of anti-seizure legislation adopted by the United States.[142] At least ten other countries have adopted anti-seizure legislation, which, depending on the content of these laws, may be a hurdle to overcoming enforcement immunities for State cultural property, even if not a settled matter of customary international law. Other countries where anti-seizure legislation has been adopted with respect to loaned artwork include Australia, France, Ireland, Germany, Austria, Belgium, Switzerland, Israel and the United Kingdom.

A further example of State cultural property being seized to enforce a judgment is the 2005 litigation that occurred in Switzerland, bought by Swiss company Noga to enforce a Stockholm Arbitration Award against Russia. Noga was successful in its motion to have 54 paintings seized for satisfaction of its judgment that belonged to the Russian State art museum and were on loan in Switzerland. Notably while Switzerland does have anti-seizure legislation, this law had not yet entered into force. While the paintings were eventually returned to Russia following what has been described by commentators as considerable diplomatic pressure by the Russian Federation, this case nevertheless highlights the possibility of State cultural property being subject to future enforcement proceedings.[143]

Central Bank Assets

It is widely acknowledged that the assets of central banks are entitled to immunity from enforcement proceedings. Article 21 of the Jurisdictional Immunities Convention excludes the property of a central bank or monetary authority of a foreign State from the definition of property used 'other than for

[140] *Malewicz v. City of Amsterdam*, June 27, 2007, 517 F.Supp.2d 322 (D.D.C. 2007).

[141] *Malewicz v. City of Amsterdam*, June 27, 2007, 517 F.Supp.2d 322, 339 (D.D.C. 2007).

[142] Matthew Happold, *Immunity from Execution of Military and Cultural Property, in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 602, 616 (2019).

[143] Matthew Happold, *Immunity from Execution of Military and Cultural Property, in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 602, 616 (2019).

governmental non-commercial purposes' –the main exception to enforcement immunity. This means that any attempt to bring measures of constraint against the assets of a central bank overseas would violate customary international law, unless one of the other exceptions to enforcement jurisdiction applies, namely that the State has specifically consented to the proceedings, or the State has earmarked its central bank assets to satisfy a claim.

That central bank assets should be entitled to absolute immunity from enforcement jurisdiction, is also reflected in leading domestic legislation. In *NML Capital v Republic of Argentina*, the United States courts clarified that central banks should be granted enforcement immunity regardless of whether they are independent from the sovereign State or not. In this case, the United States courts were tasked to consider whether assets held in the United States on account of Argentina's Central Bank, were immune from attachment and execution by the owners of debt instruments which Argentina had defaulted on. While at the District Court level, attachment was granted on the basis that the Argentina Central Bank was not independent, according to the test set out in a prior case, *First National City Bank v Banco Para El Comercio Exterior de Cuba (Bancec)*, the United States Court of Appeals for the Second Circuit overruled this decision. The Court determined that the Foreign Sovereign Immunities Act intended to give central banks special protections, regardless of whether or not they have separate legal personhood. Thus, the court clarified that there is no indication, in the text, history, or structure of the Foreign Sovereign Immunities Act that the legislation intended to make the immunity of a central bank's property contingent on the independence of the central bank.

State-Owned Enterprise Assets

Generally speaking, the assets of State Owned Enterprises will not benefit from enforcement immunity due to their independent legal personality. The independent legal personality of State Owned Enterprises means that their vulnerability to enforcement measures in foreign courts does not stem from an absence of immunity protection (to which they are not entitled). Rather, it comes from the separate question of whether or not the corporate veil can be pierced in respect of these assets.

As a matter of international law, Article 19(c) of the Jurisdictional Immunities Convention provides that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceedings were directed. The Annex to the Jurisdictional Immunities Convention clarifies that an 'entity' for the purposes of the Convention refers to the State as an independent legal personality. This generally means that when

seeking to enforce a judgment against the State, enforcement proceedings cannot be brought against State Owned Enterprises. That said, the Annex to the Jurisdictional Immunities Convention does clarify that Article 19 of the Jurisdictional Immunities Convention does not prejudge the question of piercing the corporate veil, in situations where a State entity has "deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues." Therefore a separate question may arise in enforcement proceedings as to whether it is appropriate or not to recognize Russian State Owned Enterprises as distinct entities from the Russian Federation.

The leading United States Supreme Court case on piercing the corporate veil of a State Owned Enterprise for a creditor of a State is the decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*. In *Bancec*, the Supreme Court held that while there exists a strong presumption that State Owned Enterprises will have a separate legal identity, a foreign sovereign can be liable for actions performed by a State-owned corporation when the entity is "so extensively controlled by its owner that a relationship of principal and agent is created," or when blindly recognizing separate legal status "would work fraud or injustice." However, as explained above, the question of whether the corporate veil can be pierced with respect to the assets of a State Owned Enterprise is a separate legal question that will turn on issues of liability, as opposed to the rules of sovereign immunity, which are procedural in nature.

Application of the Above Principles to the Enforcement Immunity of Russia and Russian Assets

If Russia is immune from the jurisdiction of a foreign State for certain acts pursuant to customary international law, then its property will by definition also be immune from enforcement in relation to such claims. That said, Russian property that is used for non-governmental, commercial purposes is not immune from enforcement and thus may be seized to satisfy a judgment against Russia. As stated above, however, a foreign State generally cannot seize the assets of a Russian State Owned Enterprise in order to enforce a judgment against the Russian State, as the entities are distinct. When it is issued, the International Court of Justice judgment in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* should help clarify the relationship between the State and State Owned Enterprises in these types of situations.

Potential Legal Vehicles to Allow the Confiscation of Assets

In this section, we discuss potential ways in which customary international law may be changed, or a new rule of customary international law may be created,

to provide for an exception to State immunity allowing for the seizure of a State's assets for the purposes of making reparation following acts of aggression or gross violations of international human rights law. To this end, we first explain general principles on how customary international law may be changed. Next, we address potential methods to influence the development of new rules of customary international law. This section concludes by discussing other means to circumvent the need to create or change customary international law on the immunity issue.

General Principles on Change of Customary International Law

Change of customary international law, like its formation, requires the existence of two elements: (i) a general State practice and (ii) the acceptance of that State practice as law ("*opinio juris*").[144]

State Practice

Regarding the element of State practice, the International Law Commission has explained that "[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent."[145] In *North Sea Continental Shelf*, the International Court of Justice clarified that such practice must be "both extensive and virtually uniform,"[146] and thus be a "settled practice."[147] Significantly, however, as the International Law Commission explained, "universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule."[148] The International Law Commission further noted that "[a] relatively small number of States engaging in a certain practice might thus suffice if indeed such

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[144] *See Continental Shelf (Libya/Malta)*, Judgment, 1985 I.C.J. Reports, p. 13, at p. 29, para. 27 (June 3) ("It is … axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States …."); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Reports, p. 226, at p. 253, para. 64 (same); Statute of the International Court of Justice, Art. 38(1)(b) (referring as a source of international law to "international custom, as evidence of a general practice accepted as law"); International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 2 (2018) ("To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).").

[145] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8(1) (2018).

[146] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 1969 I.C.J. Reports, p. 3, at p. 43, para. 74 (Feb. 20).

[147] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 1969 I.C.J. Reports, p. 3, at p. 44, para. 77 (Feb. 20); *see also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at p. 122, para. 55 (Feb. 3) (same).

[148] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8, cmt. 3 (2018).

practice, as well as other States' inaction in response, is generally accepted as law (accompanied by *opinio juris*)."[149]

The International Law Commission further noted that "[p]rovided that the practice is general, no particular duration is required."[150] It explained that "a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists."[151] In the *North Sea Continental Shelf* cases, the International Court of Justice similarly held that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[152] The International Law Commission, however, expressly rejected the notion of "instant custom."[153]

The International Law Commission cautioned that when determining what State practice is relevant, "regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found."[154] Applying the same contextual approach in *Jurisdictional Immunities of the State*, the International Court of Justice reasoned that, in the context of that case, which related to jurisdictional immunity from enforcement,

> State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property].[155]

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[149] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8, cmt. 3, n. 715 (2018).

[150] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8(2) (2018).

[151] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8(2), cmt. 9 (2018).

[152] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 1969 I.C.J. Reports, p. 3, at p. 43, para. 74 (Feb. 20).

[153] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8(2), cmt. 9 (2018) ("[S]ome period of time must elapse for a general practice to emerge; there is no such thing as 'instant custom.'").

[154] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 3(1) (2018).

[155] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at p. 123, para. 55 (Feb. 3).

Opinio Juris

As to the element of *opinio juris*, the International Law Commission concluded that "the practice in question must be undertaken with a sense of legal right or obligation."[156] The International Court of Justice held in the *North Sea Continental Shelf* cases that the acts forming the relevant State practice "must … be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[157] In *Jurisdictional Immunities of the State*, the International Court of Justice observed that, in the context of jurisdictional immunity,

> *Opinio juris* … is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.[158]

The International Law Commission pointed out that *opinio juris* must be shown "with respect to both the States engaging in the relevant practice and those in a position to react to it, who must be shown to have understood the practice as being in accordance with customary international law."[159] The International Court of Justice similarly held in *Military and Paramilitary Activities in and against Nicaragua* that "[e]ither the State taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'"[160]

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[156] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 9(1) (2018).

[157] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 1969 I.C.J. Reports, p. 3, at p. 44, para. 77 (Feb. 20).

[158] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Reports, p. 99, at p. 123, para. 55 (Feb. 3).

[159] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 9, cmt. 5 (2018).

[160] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 I.C.J. Reports, p. 14, at p. 109, para. 207 (June 27) (quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 1969 I.C.J. Reports, p. 3, at p. 44, para. 77 (Feb. 20)).

Potential Methods to Influence the Development of New Rules of Customary International Law

Resolution of the UN General Assembly

Unlike resolutions adopted by the UN Security Council under Chapter VII of the UN Charter, resolutions adopted by the UN General Assembly are merely recommendatory and are not as such legally binding on UN member States.[161] Accordingly, should the UN General Assembly adopt a resolution determining, for example, that there exists an exception to State immunities where the relevant State engaged in a war of aggression, such a determination *per se* would not be legally binding on UN member States.

Moreover, as the International Law Commission has concluded, "[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law."[162] As the International Law Commission explained,

> [T]he mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*). There is no "instant custom" arising from such resolutions on their own account.[163]

Such a resolution may, however, "provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development."[164] The International Court of Justice similarly has noted that UN General Assembly resolutions, "even if they are not binding ... can, in certain circumstances, provide evidence important for establishing the existence of a rule

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[161] *See* United Nations Charter, art. 11(1) ("The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and *may make recommendations* with regard to such principles to the Members or to the Security Council or to both.") (emphasis added); *see also id*., art. 48 ("1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security *shall* be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions *shall* be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.") (emphasis added).

[162] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12(1) (2018).

[163] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12, cmt. 4 (2018).

[164] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12(2) (2018).

or the emergence of an *opinio juris*."[165] The International Law Commission explained that "resolutions adopted by international organizations …, even when devoid of legal force of their own, may sometimes play an important role in the development of customary international law," especially when "a resolution (or a series of resolutions) provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms, or when it crystallizes an emerging rule."[166]

In order to determine whether a resolution provides evidence of the existence of a rule of customary international law, "the precise wording used is the starting point …; reference to international law, and the choice (or avoidance) of particular terms in the text, including the preambular as well as the operative language, may be significant."[167]

In addition to the content of a resolution, the conduct of States in connection with its adoption may constitute evidence of State practice or *opinio juris*.[168] Specifically, "the debates and negotiations leading up to the adoption of the resolution and especially explanations of vote and similar statements given immediately before or after adoption" are relevant.[169] Ultimately, "[t]he degree of support for the resolution (as may be observed in the size of the majority and where there are negative votes or abstentions) is critical."[170]

In this regard, however, caution is required, because "the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed

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[165] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Reports, p. 226, at pp. 254-255, para. 70 (July 8).

[166] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12, cmt. 7 (2018).

[167] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12, cmt. 6 (2018).

[168] *See* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 6(2) (2018) ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; *conduct in connection with resolutions adopted by an international organization* or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.") (emphasis added); *id*., Conclusion 6, cmt. 5 ("The reference to 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference' … includes acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding."); *id*., Conclusion 10(2) ("Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: … conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.").

[169] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12, cmt. 6 (2018).

[170] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12, cmt. 6 (2018).

by vote or otherwise, is often motivated by political or other non-legal considerations."[171]

With respect to Russia's aggression against Ukraine, the UN General Assembly on November 14, 2022 adopted a resolution titled "Furtherance of Remedy and Reparation for Aggression Against Ukraine."[172] In that resolution, as already noted, the UN General Assembly

> *Recognize[d]* that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law, and that it 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."[173]

The UN General Assembly also "[r]ecognize[d] the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine."[174]

The UN General Assembly further

> *Recommend[ed]* the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering."[175]

This resolution thus established Russia's obligation under international law to make reparation and addressed the need for an international mechanism for reparation, including an international register of damage. However, the resolution did not address the consequences of Russia failing to make such reparation, nor the issue of State immunity relating to frozen assets.

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[171] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 12, cmt. 6 (2018).

[172] UN General Assembly Res. ES-11/5 (Nov 14, 2022).

[173] UN General Assembly Res. ES-11/5, op. para. 2 (Nov 14, 2022).

[174] UN General Assembly Res. ES-11/5, op. para. 3 (Nov 14, 2022).

[175] UN General Assembly Res. ES-11/5, op. para. 4 (Nov 14, 2022).

It is worth noting, however, that the General Assembly did "[r]ecall its resolution 60/147 of 16 December 2005, the annex to which contains the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law."[176] Those Basic Principles and Guidelines call for an "effective judicial remedy" and "[a]dequate, effective and prompt reparation," for victims "of a gross violation of international human rights law or of a serious violation of international humanitarian law."[177] The Basic Principles and Guidelines expressly reference the obligation of a State "to provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."[178] They do not, however, address the consequences of that State's failure to make such reparation. Nor do they address the State immunity issue relating to frozen assets.

In order to establish the existence of a customary rule of international law providing an exception to State immunity allowing for the seizure of a State's assets for the purposes of making reparation following acts of aggression or gross violations of international human rights law, it would be most helpful if the UN General Assembly were to adopt a resolution expressly recognizing such an exception, or specifically recommending that States transfer Russian frozen assets to Ukraine for purposes of reconstruction in the event Russia fails to make reparation. It is difficult to assess the prospects of this happening, especially with a large majority of votes in favor. States may be reluctant to support a rule of general application that they may fear could be used against them in the future.

<u>Domestic Legislation Providing for an Exception to Jurisdictional Immunity</u>

States holding frozen Russian assets could enact domestic legislation creating an exception to jurisdictional immunity for claims seeking reparation for injury or damage suffered as a result of an unlawful aggression or gross violations of international human rights law. Indeed, if a large number of such States enacted substantially similar legislation, making clear that they considered a State was legally entitled to do so under international law, this arguably could lead to the formation of a similar rule of customary international law.[179]

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[176] UN General Assembly Res. ES-11/5, preambular para. 10 (Nov 14, 2022).

[177] UN General Assembly Res. 60/147, Annex, op. paras. 11, 12, 14 (Dec. 16, 2005).

[178] UN General Assembly Res. 60/147, Annex, op. para. 15 (Dec. 16, 2005).

[179] *See* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 6(2) ("*Forms of State practice include*, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an

A likely drawback of this scenario would be that Russia would protest persistently against the enactment and application of such legislation by other States, thus ensuring that Russia would not be bound by any such rule of customary international law. Moreover, it likely would take considerable time for domestic legislatures to enact such legislation.

The recent Canadian legislation allowing for the judicial forfeiture of frozen Russian assets and their use to compensate Ukraine does not expressly create an exception to jurisdictional immunity.[180] It is not clear whether the Canadian courts will treat this legislation as implicitly creating such an exception. So far, it appears the new legislation is being applied only to non-sovereign assets of Russian oligarchs to which jurisdictional immunity does not apply in any event.[181]

Other Means to Circumvent the Need to Create or Change Customary International Law on the Immunity Issue

Multilateral Treaty Providing for an Exception to Jurisdictional Immunity

As an alternative or in addition to seeking to create a new rule of customary international law, States holding frozen Russian assets could consider creating a new rule of treaty law by concluding a multilateral treaty providing for an exception to jurisdictional immunity for claims seeking reparation for injury or damage suffered as a result of an unlawful aggression.

It is likely, however, that it would take a long time to negotiate and conclude such a treaty, and it may take even longer for required legislative ratifications to occur for it to enter into force. As noted above, the Jurisdictional Immunities Convention, which was concluded in 2004, has not yet entered into force.

Multilateral Treaty Establishing a Reparation Mechanism

In order to avoid the immunity issue related to the seizure of frozen assets and their transfer to Ukraine, States holding frozen Russian assets may consider using the frozen assets as leverage to motivate Russia to conclude a multilateral treaty with those States and Ukraine establishing a reparation mechanism that would be funded by Russia directly, in exchange for the release of the frozen assets.

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intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; *legislative* and administrative *acts*; and decisions of national courts.") (emphasis added).

[180] *See* Bill C-19 (June 2022), *available at* https://www.parl.ca/legisinfo/en/bill/44-1/c-19.

[181] *See* Carly Olson, Canada Targets a Russian Oligarch's Assets to Redistribute in Ukraine, New York Times (Dec. 20, 2022).

Such an agreement was reached by the United States with Iran to resolve the hostage crisis through the so-called Algiers Accords in 1981.[182] The crisis began when Iranian students stormed the United States embassy in Tehran in November 1979 and took its American staff hostage, and the Government of Iran subsequently endorsed the students' actions. The United States reacted by imposing trade sanctions on Iran and freezing Iranian government assets held in the United States and in United States banks abroad, specifically:

> [A]ll property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.[183]

The Algiers Accords were a set of declarations issued by the Government of Algeria reflecting agreements by the United States and Iran as a result of extensive consultations conducted by Algeria separately with each of those two States. They included a General Declaration and a Claims Settlement Declaration.[184] Among other things, the Algiers Accords provided that:

- Iran would release the 52 American hostages;
- The United States would unfreeze the Iranian assets and remove the trade sanctions on Iran;
- The two States would establish the Iran-United States Claims Tribunal and ensure that all claims between the two States and their respective nationals would be referred exclusively to that Tribunal; and
- A portion of the Iranian funds held in the United States would be transferred to an escrow account, from which the awards against Iran of the Iran-United States Claims Tribunal would be paid.

Here, similarly, and consistent with the rule that countermeasures must be temporary and reversible, States could keep Russian assets frozen in order to induce Russia to make reparation. As in the case of Iran, the frozen assets themselves would not need to be unilaterally seized and transferred to Ukraine if an independent claims mechanism were established by agreement, with awards paid out of a trust fund.

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[182] Algiers Accords (Jan. 19, 1981).

[183] Executive Order 12170 (Nov. 14, 1979), 44 FR 65729.

[184] Algiers Accords, Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) and Claims Settlement Declaration (Jan. 19, 1981), *available at* https://iusct.com/documents/.

A potential downside of this scenario is that Russia may not agree to such a mechanism. In the case of Iran, the frozen assets exceeded the amount of the funds that were transferred into the escrow account. Accordingly, a substantial amount of the frozen assets were returned to Iran. In the case of Ukraine, however, the total amount of the reparation to be made by Russia may well exceed the total value of the frozen Russian assets. Russia thus may not have any interest in concluding such a multilateral treaty.

Invest Frozen Russian Funds and Provide the Interest to Ukraine

The President of the European Commission proposed in November 2022 to invest the frozen Russian assets, and to "then use the proceeds for Ukraine," while the principal amount of the frozen assets "should be used so that Russia pays full compensation for the damages caused to Ukraine" once the sanctions are lifted.[185] This proposal to use only the "proceeds" appears to refer to the interest earned from investing the frozen Russian assets. This may be legal under the international law rules governing countermeasures, because there does not appear to exist a rule requiring payment of interest on funds frozen pursuant to a lawful countermeasure. It is likely, however, that the amount of interest that could be earned would fall far short of the amounts needed for Ukraine's reconstruction. Moreover, the proposal does not address how the principal amount of the frozen Russian assets could be seized and transferred to Ukraine in accordance with international law.

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[185] European Commission, Statement by President von der Leyen on Russian Accountability and the Use of Russian Frozen Assets (Nov. 30, 2022), *available at* https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307.

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