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EIGHTH ANNUAL VAGTS ROUNDTABLE ON TRANSNATIONAL LAW: SANCTIONS, IMMUNITY, AND CENTRAL BANK ASSETS

This panel was convened on Thursday, March 30, 2023 at 12:00 p.m. by its moderator Ingrid Brunk of Vanderbilt University Law School, who introduced the panelists: Chiara Giorgetti of Richmond Law School; Maryam Jamshidi of the University of Florida Levin College of Law; Anton Moiseienko of the Australian National University College of Law; and Philippa Webb of King's College London.

Introductory Remarks by Michael Cooper*

Good afternoon, ladies and gentlemen. My name is Michael Cooper. I am the Executive Director of the American Society of International Law. It is my pleasure to welcome you to this panel this afternoon. I imagine that most of you in the room are already members of the American Society of International Law, but if for any reason you are not yet a member, I would encourage you to join us. You have had a bit of a taste of what ASIL is about today already, and you will learn more over the next couple of days. If you are interested in joining, inside your program, you will see there is a QR code. You just point your phone at that, and it will ask you for your credit card number, and you will be in the family after that.

I did not know Detlev Vagts, but many of you did know him. You know that he made enormous contributions to the field of transnational law, a longtime dedication to the Society. He was a very active member of the Society. By the end of his career, Detlev was acknowledged to be one of the fathers of transnationalism, in fact.

Those who knew him tell me that he was always a gentleman, a scholar. He was an amazing teacher and a mentor to many young people. And we here at ASIL could not be more pleased to be able to honor his life and his memory, including through this roundtable, which is now in its eighth year.

I also want to take a moment to thank Det's daughters, Karen and Lydia Vagts, who unfortunately could not be with us here today. They normally will travel to the annual meeting to represent the family, but they were not able to do so this year. But I would like to thank them for their generous gift that has made this roundtable possible for these many years and will make it possible for many years to come, in fact.

I would also like to thank Ingrid Wuerth Brunk for organizing this year's panel and doing a fantastic job. She is a brilliant professor. She is an internationally recognized expert on foreign relations, public international law, and transnational litigation. She also serves as the co-editor of the *American Journal of International Law*, and she has done a fantastic job organizing that as well.

With that, Ingrid, I would like to invite you, please, to moderate the Eighth Annual Detlev Vagts Roundtable.

* ASIL Executive Director.

Introductory Remarks by Ingrid Brunk*

Thank you so much. For those of you who are not familiar with the way the Vagts Roundtable works, it is a roundtable that focuses on the work of an emerging scholar. It is a tribute to Detlev Vagts and the mentorship that he provided to junior scholars. The junior scholar writes a paper, and then the scholars on the panel comment on and engage with the paper. The topic this year, of course, is central bank immunity and sanctions, and the paper that we are commenting on is now available on the ASIL Annual Meeting app.

I am going to introduce our panelists extremely briefly and then I am going to turn it over to them. My role here is moderating and staying out of the way while you hear from these tremendous experts.

Our presenter is Anton Moiseienko. He is a lecturer at the Australian National University. Our commentators are Chiara Giorgetti, Professor of Law at Richmond Law School; Maryam Jamshidi, Assistant Professor of Law at University of Florida; and Philippa Webb, Professor of International Law at King's College in London. I will not dwell on the stellar credentials of these folks, but if you do not know who they are, you can find them on Twitter and on the Web and in many other capacities.

Anton, thank you so much for the paper. Please introduce it for us now.

Remarks by Anton Moiseienko**

Thank you very much, Ingrid, and thank you also to Chiara, Maryam, and Philippa for taking the time to comment on this paper. As Ingrid says, the paper is now available to all of you. I realize that you will not have had the chance to read this before the panel discussion, but hopefully, some of you might be interested afterwards.

What I am going to do to begin with is to provide a 30,000-foot view of the issues that are involved in relation to the freezing and potential confiscation of Russian central bank property and the implications that that might have beyond the Russia-Ukraine situation. To begin with, as many of you will know, after Russia's full-scale invasion of Ukraine in February last year, a vast array of sanctions was put in place in relation to Russia as a state and individuals and companies affiliated or allegedly affiliated with the Russian government. Some of those measures are very familiar. For example, hundreds of members of the Russian parliament, as well as other officials and so-called "oligarchs," are now subject to asset freezes and travel bans across the United States, United Kingdom, European Union, Australia, Japan, and a range of other countries around the world. Those are the kinds of measures that we have seen time and time again in connection with many international crises.

Other forms of sanctions against Russia are somewhat more esoteric. For example, many of you will have come across the discussion in the news of the disconnection of a handful of Russian banks from the SWIFT payment network. The effects that this is going to have on the Russian economy and, indeed, the kinds of impact that are intended by that are very much a matter subject of ongoing discussion.

But there is a component of sanctions against Russia that is truly unprecedented (indeed, one of the key policy questions is whether it could become a precedent for the future). That is the freezing of approximately $350 billion worth of Russian central bank currency reserves across the G7 economies. That was done in a coordinated fashion literally in a matter of days after the full-scale

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invasion. Those assets remain attached, but they have not otherwise been touched. So, they are frozen but not confiscated. Therefore, the $350-billion question, in light of the ongoing destruction in Ukraine, is what is going to happen to that money. Will it be returned to Russia at some point, and if so, when and under what conditions? Or, alternatively, can it be confiscated and transferred to Ukraine, presumably to provide some sort of recovery for the destruction that has been wrought upon that country in the war?

The paper that I am presenting here deals with the legal aspects of that latter approach. What are the issues that would arise if confiscation were seriously contemplated? Leaving domestic law implications aside, there are three major sets of issues arising under international law. First, there is the overarching issue of sovereign immunities. We are talking about state property, and if sovereign immunities do apply, then surely even the freezing of those assets is illegal to begin with. On the other hand, if immunities do not apply, for example, because they do not cover executive action as opposed to measures ordered by courts, then presumably even confiscating that property would not give rise to sovereign immunity problems, which is a counterintuitive conclusion but one that is worth seriously considering. As the paper argues, this discussion is all the more complicated because we do not necessarily have a good sense of the rationale behind the immunity from execution and, therefore, whether it is in fact is intended to cover purely executive action.

The other issue is perhaps less esoteric but nonetheless fraught with complications, and that is the application of the doctrine of countermeasures. The very reason why we are talking about the potential confiscation of an immense amount of money is the prior breaches of international law that Russia has apparently committed: specifically, breaches of *erga omnes* obligations, such as those stemming from the prohibition of aggressive war. Therefore, we need to consider the potential for states other than Ukraine to lift Russian sovereign immunity, assuming that it applies in the first place. Whether this is legally possible is another issue with likely future ramifications in situations beyond the war between Russia and Ukraine.

Finally, we have a range of other considerations of international law that might bear on the situation. Of greatest importance are the implications of bilateral investment treaties (BITs) in place between some of the states that have frozen Russian assets and Russia. The United States does not have a valid BIT with Russia, but France, Germany, and the United Kingdom do. Furthermore, the minimum standard of treatment under customary international law likewise prohibits expropriation without compensation.

These are the sets of issues that I think we would be well-advised to engage with. What I referred to as the $350 billion question is important enough in its own terms, especially given what we are seeing happen in Ukraine. But, of course, it is also something that other nations will be looking to in terms of how this issue is resolved and what it portends for other situations of interstate conflicts and central bank property being frozen in response to such conflicts.

We often tend to assume that state-owned property, especially central bank assets, enjoy gold-plated protection in terms of their immunity. But, depending on how we answer the questions I have just mentioned, we might see that some of those safeguards are perhaps not quite as absolute as they appear at first sight.

So, with that by way of scene setting, I will hand it back to you, Ingrid.

Ingrid Brunk

Terrific. Thank you, Anton. We are going to move through the issues that Anton identified primarily as a conversation. The first issue, as he has already suggested, is a question about immunity that relates to a large number of sanctions. This is the question: Does foreign sovereign immunity apply only to judicial measures or measures related to the enforcement of a judicial judgment? Or

does foreign sovereign immunity also apply to measures that executive branches take that is not an exercise of judicial authority?

Bear with me. I know this sounds super technical, but here is why it is important. The asset freezes currently in place on the $350 billion dollars have been concluded through executive branch action without judicial involvement. One perspective would say, those do not involve foreign sovereign immunity at all. The other view is that if you are constraining foreign assets located in the domestic forum, even through executive action, that immunity should apply. This has been a debate that has been circulating in the academic community for a decade or more and now we have a very important case that raises it.

If immunity applies to purely executive branch measures, that means a very large number of sanctions and asset freezes also violate immunity, and this would suggest that the asset freezes currently in place, even if they are not confiscations, violate foreign sovereign immunity. That is the first issue we want to take up and I will turn it over to Anton to say just a little bit, and then we will have some commentary from the other panelists.

Anton Moiseienko

Thank you. When I first heard about this discussion and the debate that has been percolating around the academic communities, I was flabbergasted. On a superficial level, it makes little sense that if the courts are involved, the resulting measures are in breach of sovereign immunities: whereas the same measures taken without judicial involvement are supposedly compatible with sovereign immunities.

But where does that argument come from? What lends any plausibility to the view that sovereign immunities are, in fact, not triggered by executive action? The answer lies in the wording of the International Law Commission's (ILC) Draft Articles on Jurisdictional Immunities of States and Their Property and the resultant UN Convention on State Immunity, which envisage a clear link between immunities and judicial measures. That is simply a feature of the existing sources of the law of state immunities.

But that itself only compounds the uncertainty rather than dispelling it. Is that wording reflective of a genuine limitation in customary international law or is it there because it was at some point almost inconceivable that non-judicial confiscation or, indeed, freezing of another state's property could be contemplated? One would be hard-pressed to find a definitive answer to that question, and it is likewise difficult to identify authoritative statements that would give us a clear sense of the rationale behind the immunity from execution. Is it meant to protect certain state-owned assets from all interferences or all takings by another state or merely from the exercise of judicial power? To my mind, that issue remains fuzzy and unsettled, given that we simply do not have a definitive means of resolving that contradiction.

Ingrid Brunk

Alright, Maryam and Philippa, on this issue?

Remarks by Maryam Jamshidi*

First of all, thank you, Anton, for writing this paper and for, in particular, addressing this challenging issue. I am with those who see a strange inconsistency in applying foreign sovereign immunity doctrines to judicial action but not to executive action, and so I want to offer another

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argument in favor of applying them to both. And that has to do with the slippage between executive action and judicial action. There are two examples I would like to provide.

First, there are statutory frameworks within the United States that allow private parties to execute against the sanctioned assets of state sponsors of terrorism. There are two primary laws here, the Terrorism Risk Insurance Act, which is the most expansive, and then a provision of the Iran Threat Reduction and Syria Human Rights Act, Section 502, which applies to a very specific case. Both of these laws require that the executive take action pursuant to its main sanctioning authorities, the IEEPA statute or the TWEA statute, before plaintiffs can execute against the assets of state sponsor defendants. In other words, without executive action, there could be no judicial action. If foreign sovereign immunities protections applied to executive action, that would potentially make the sovereign immunity protections that apply to judicial actions more robust while also preserving judicial resources. Certain assets simply would not be available for judicial restraint.

The other example has to do with judicial action that facilitates executive action. I am thinking here of criminal prosecutions the U.S. government brings against foreign state-owned entities. There is a case right now before the Supreme Court, the *United States v. Halkbank*. This case involves a criminal prosecution the U.S. government brought against a state-owned bank owned by the state of Turkey. The question this case raises is, if executive action is not subject to foreign sovereign immunity protections, what happens when that executive action can only occur through judicial action? What regime should apply to that sort of case?

What is so incredible about this moment is that it is forcing us to suss out these tensions within foreign sovereign immunity doctrine that existed under the radar for a long time. Perhaps the answer is simply that foreign sovereign immunity applies both to judicial action and executive action. Another potential answer to the problem is that maybe it depends on who is bringing the judicial action. Is it a private party? Is that when foreign sovereign immunity ought to apply versus a government that is bringing the case?

Ingrid Brunk

Ok, you are next, Philippa.

Remarks by Philippa Webb*

Thank you, and I also want to congratulate Anton on an excellent paper. I will be speaking in my personal capacity because I have advised on some of these issues. To add just another late-breaking, scene-setting point, just over an hour ago, the International Court of Justice (ICJ) gave its judgment in the *Certain Iranian Assets* case. The question of the immunity of central bank assets had initially been before the court, but it found that in an earlier judgment that it did not have jurisdiction over that question, and just today it has found, ten judges to five, that it has no jurisdiction to rule on the treatment accorded to the Bank of Markazi, vis-à-vis the 1955 Treaty of Amity. It did find other violations by the United States of treaty obligations on the taking of property, but not central bank property due to this jurisdictional finding. The questions in Anton's paper very much remain live and open.

I wanted to provide another rationale for the separate treatment of judicial and executive action, and my position is that there is a difference: that immunity does attach to judicial action and not necessarily to executive action, accepting that there can be blurry lines like Maryam has pointed out. That is because judicial action in domestic courts is, by and large, triggered by private parties,

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and immunities will arise when they are suing sovereign states or perhaps their entities. Whereas executive action against assets is the action of authorities for which the state is making a determination of the considerations and consequences for its international relations.

In the Brower Lecture held in this room in the previous session, Judge Sir Christopher Greenwood observed that in courts, the legal issue has to be isolated and, "not muddled up with the broader political environment." That is a point in support of the separation of judicial and executive action, though I am not sure that he would agree with the overall point on immunities.

One other point to add on this: we can see some parallels with the Foreign Act of State Doctrine, which is a common law doctrine, not an international law rule, in the UK, the United States, and some other jurisdictions. In the UK Supreme Court, at least, there are three or four rules about the acts of foreign states that preclude the English courts pronouncing on them (*Belhaj v. Straw* [2017] AC 964). The first rule is that English courts will recognize and not question the effect of a foreign state's legislation in relation to any acts that take place within its own territory. The second rule is that English courts will recognize and not question the effect of an act of a foreign state's executive in relation to acts within its territory. The third rule is that English courts will not resolve a challenge to the lawfulness of the act of a foreign state that it would be inappropriate for courts to resolve. The fourth rule, which the Supreme Court has said is only a possible rule, is that English courts will not investigate acts of a foreign state where it would embarrass a government, but that would need to be brought to the court's attention by the Foreign Office.

It is a domestic doctrine, though it appears in several jurisdictions, but we see here support for Anton's position that courts can be precluded from action while the executive is not.

Remarks by Chiara Giorgetti*

Thank you very much. And congratulations also from my side to Anton for this very interesting paper, and thank you ASIL for having me.

I want to say that I agree with the previous speakers that it may seem counterintuitive to think that on one side we guarantee sovereign immunity on judicial measures but, on the other side, we do not do so on executive actions. However, it seems to me that when we think more carefully, I would agree with your conclusions, Anton, that there is no real reason to create new limitations. It is *prima facie* tempting to say that foreign sovereign immunity should apply to measures that executive branches take in the same fashion as they apply to judicial measures or measures related on the enforcement of a judicial judgment if we consider these actions similar. However, first, when one looks at the text of the treaty, the treaty language, it is clearly limited to judicial measures only. The treaty is called the UN Convention on Jurisdictional Immunities of States and Their Property, and although the UN treaty, of course, is not yet enforced, the language is very clear. and I think it is very important, as I think you mentioned in your paper, that it is being supported by the General Assembly resolution. We should not add language to a treaty without any good reason.

We also have the same language in the 1972 European Convention on State Immunity, which entered into force in 1976, whose Chapter I refers to "Immunity from Jurisdiction," and in application of the Lotus Principle, we should not create obligations that do not exist on states, unless they choose to bind themselves by voluntary agreement. There are no explicit restrictions in international law.

I think the interesting question we should ask is why we should distinguish between actions by the state that derive from its executive branch and actions that are undertaken by the judiciary. Is

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there a rationale for this difference? I think looking from this point of view might provide some interesting insight and explain the difference.

Indeed, the ICJ specifically looked into this question in *Jurisdictional Immunities of the State*, a case brought by Germany against Italy (with Greece Intervening).

In the judgment, the Court explained that the rule of State Immunity derives from the principle of sovereign equality of states. The Court states that the sovereign equality principle has to be seen together with "the principle that each State possesses sovereignty over its own territory and that there flows from the sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality" (*Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 ICJ Rep. 99, para. 57 (Feb. 3)). The ratio of the provision is that a domestic courts should be in judgment of a state in the courts. But if you have an executive decision and what you are thinking about is an executive measure, the rationale is very different. Here the rationale is based on the fact that one does not want to curtail executive actions, and you want to ensure that states have the power of deciding their own foreign policy.

Thinking about the rationales and why we have these different principles is very important and explain the differences, and I think the bases of each principle is separate. On one side, we have limitations that arise in the context of judicial measures, but, on the other side, these do not apply on executive action.

Ingrid Brunk

Terrific. Thank you. If immunity does not attach or does not prevent executive branch action, one way to deal with the Russian central bank assets that avoids foreign sovereign immunity would be to confiscate them through purely executive measures. Now, this raises domestic constitutional problems, potentially, and I personally do not think that is possible at the moment under domestic legislation in the United States. But legislation could absolutely be introduced to do this.

Part of Anton's paper talks about wartime precedent in this context, to which we now turn. And then, Maryam, I think you have some responses to the wartime precedent.

Anton Moiseienko

Yes, thank you. This is another provocative idea, because when you even utter the words "wartime precedent," the intuitive answer is to say, "Well, maybe for Ukraine but surely not for the other countries. No one else is at war with Russia." But the question is this. We seem to accept, almost unquestioningly, that in times of war, a state can confiscate the property of a belligerent state. That is widely recognized as lawful. But the same issues of sovereign immunity are in principle apt to be applied in those circumstances as well. Is there some exception to be found to the application of sovereign immunities at times of war? Intuitively, the answer must be yes, but that position has never been articulated. As far as I could see, in most cases of wartime confiscation, the issue of sovereign immunities is simply never raised.

One explanation for that is to say that there is something special about confiscation during times of war. Another explanation, though, is to say that there, we are talking precisely about the kind of purely executive confiscation that potentially marks the outer boundaries of the law of sovereign immunities.

Consider the example of the United Kingdom and the United States during the First and Second World Wars. The management of enemy property was in the hands of, respectively, the Alien Property Custodian and the Board of Trade. Those were executive agencies authorized by statute to freeze enemy property without any involvement of courts or private plaintiffs. So, while it is

very sensible to view those situations through the lens of how sovereign immunities apply in wartime, I wonder whether they could also be considered through the lens of how sovereign immunities apply to executive measures: after all, those are the major instances of executive freezing. It is also worth noting that the official U.S. and UK position was precisely that they were freezing but not confiscating enemy assets: and they largely, but not entirely, lived up to that commitment. So, the parallels with the "freeze to seize" debates we are having today are striking.

Lastly, we do not even have to go back to the times of the First and Second World Wars for a sovereign immunities-related legal mystery, Shortly after the U.S. invasion of Iraq, of the United States confiscated the property of the Iraqi Central Bank based on the provisions of the IEEPA applicable to "armed hostilities" involving the United States. Once again, as far as I know, the issue of immunities was simply not raised with any prominence in the expert or public debate.

Ingrid Brunk

Terrific. Thank you.

Maryam Jamshidi

I am wading in here as an amateur historian of wartime confiscations of property. My understanding, in particular, of World War I but also of World War II, is that the vast majority of permanent confiscations—I will say freezing for temporary seizure—is that the vast majority during World War I, at least, were freezings, not permanent confiscations, and that most of the assets that were frozen were privately owned assets. In other words, the majority of frozen assets were not state-owned assets. Perhaps this makes sense given the time period. Would there have been that many German state-owned assets or Austrian state-owned assets in the United States during World War I?

There was also a lot of controversy during and after World War I regarding those properties that were permanently confiscated. Indeed, a few years after the war, Congress directed that the vast majority of permanently confiscated property be returned to their owners. There were some efforts along these lines after World War II, as well, but the return of permanently confiscated property appears to have been more limited. Like World War I, though, there was much criticism of the government's permanent confiscation of foreign private property during the war.

With that on the table, from an empirical standpoint at least, it is hard to say that those confiscations establish some sort of useful rule when it comes to the permanent confiscation of state-owned property—beyond establishing the fraught nature of those confiscations, both politically and legally.

On the Iraq point, that was an amendment made to IEEPA after the 9/11 attacks. IEEPA initially was meant to eliminate the power to permanently confiscate, at least during peacetime. Also, those assets were confiscated for the benefit of the people of Iraq—though we might question whether or not that was, in fact, true. They were not confiscated for the benefit of the United States or some third-party.

Ingrid Brunk

With great difficulty, I think we should leave the historical precedent, although I think it is fascinating.

Let us turn to a different part of the argument. Let us assume that the use Western countries would like to make of Russian central bank assets does violate international law. Maybe it is done in a way that involves judicial measures and, therefore violates foreign sovereign immunity. Perhaps it

violates some other part of international law. Nonetheless, that which would otherwise be a breach of international law might be rendered not wrongful if those are countermeasures. Can we characterize the denial of sovereign immunity under these circumstances as a countermeasure?

This gets us into some not fully fleshed-out territory about what countermeasures mean, what their purpose is, what their requirements are. That is what we are going to turn to now, and we will start with Anton on countermeasures.

Anton Moiseienko

It is somewhat uncharted territory. But at least we are on solid ground in that, unlike the other topics that we have discussed so far, this area of law is less fraught with gaps or counterintuitive consequences.

There is a plausible argument that countermeasures can render lawful a departure from the observance of the rules of sovereign immunity. There are a couple of issues there. One is the right of states that have not been directly injured to take third-party countermeasures. This question has been, metaphorically speaking, litigated, not in front of courts, but in academic literature for quite some time. To my mind, there is at least a solid argument that, because the prohibition on aggressive war gives rise to obligations *erga omnes*, states other than Ukraine can take lawful countermeasures in response.

Then there is the question of whether countermeasures can, in principle, involve the lifting of sovereign immunities. The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) list a number of circumstances where departure from certain rules is not permissible: for example, in the context of human rights obligations. By contrast, the rules on state immunity are not so listed, and I do not think there is any other authority for the proposition that those rules cannot be deviated from.

Then the final issue, which is a key one, is the requirement for countermeasures to be, as far as possible, reversible. Some experts argue that confiscation is, in principle, irreversible, unlike freezing. One might probe that conclusion further: surely a state can confiscate a piece of property today and return it tomorrow once circumstances change, especially when we talk about liquid assets such as currency or securities. We also need to focus on the language in the ARSIWA that explicitly says "as far as possible," which seems to suggest that is contingent on the nature of the obligation in question.

My overall view of the ARSIWA is that a distinction should be drawn between (lawful) countermeasures that restore status quo ante on the one hand and (unlawful) punitive countermeasures. If the requirements for the imposition of countermeasures are interpreted in that light, then there is no obstacle to pursuing reparations through countermeasures, as distinct from punitive countermeasures. This is where I would argue the distinction lies that we should focus on, rather than reversibility strictly construed.

Chiara Giorgetti

Thank you very much. I think the argument on countermeasures is absolutely fascinating, and I really like the way that you write about it in your paper. I largely agree with what you say. I think it is very important to acknowledge that there might be a violation of international law if you do not guarantee sovereign immunity, why would you want to do this, and why would there be an exception? We want to really look at what are the objects and limits of countermeasures of Article 49 of the Articles on State Responsibility.

And then, of course, as you said, who are the actors? To whom are we applying these countermeasures? It is very important to say that here we are in a situation where there has been a violation,

erga omnes. And every state has a possibility to impose and to issue countermeasures, which would not then be in violation of international law.

What are the requirements? In addition to what you said and regarding the issue of timing, Article 49 also says that an injured state may only take countermeasures against a state that is responsible for any international wrongful act in order to induce that state to comply with this obligation. I think it is important to think about how do we want to induce a state to comply with the obligations? I think here it is important that the obligation that we are thinking about is the obligation to provide reparations, and I think this is very important because this is not complying with international humanitarian law or the other violations of international law but the issue of provide reparations. You would use the funds to provide reparations until Russia started to do it itself, and so there is a possibility to induce the state to comply with that obligation until then. I think that would also fulfill the requirement that the countermeasures are limited to the non-performance for the time being only because it can be restored. When you think about the money, countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligation in question, so the obligation then again to provide reparation.

In terms of freezing or confiscating funds, you make an important argument when you think about the fact that you are seizing assets, and the assets are mostly money. And so the money is fungible. The fact that you seize or confiscate a certain amount of money, you can, in the end, once the obligation of reparation is restored, provide the money back. It is more difficult to think about other assets, but I think maybe the yachts, these are not public assets. These would be private assets. Because money is fungible, all the requirements of the countermeasures would be fulfilled.

Philippa Webb

My position is one of doubt on the countermeasures argument, but I am open to persuasion. First, I think you are going to run into limits in national courts, and I know that is not what you were arguing. But two weeks ago, there was a judgment in the UK Supreme Court, *The Law Debenture Trust Corporation plc v. Ukraine* [2023] UKSC 11, involving a trust acting on behalf of the Russian Federation in a dispute with Ukraine. It concerns events around Crimea, Eurobonds, and a contractual claim. But what is important for our purposes is that Ukraine invoked the doctrine of countermeasures to justify its non-payment to Russia of the Eurobonds, and the Supreme Court said that this argument was non-justiciable.

The second point I wanted to engage with is the fungibility reversibility argument, and in his paper, Anton quotes James Crawford who said that damage of a financial character is rarely irreversible, meaning that it could be justified as a countermeasure. There is some support for this position in the ICJ case law but also some doubts; this is ICJ case law not on countermeasures but on provisional measures. But I think that is relevant and possibly analogous because, when seeking a provisional measure, a party has to show that there is a risk of irreparable harm.

In two cases, the ICJ has accepted that there is a risk of irreparable economic harm and ordered provisional measures. The first was the *Anglo-Iranian Oil Company* case (*Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Order of 5 July 1951, p. 93). The UK said that it faced irreparable harm from, among others, the disruption to company operations and the loss of markets, and the court ordered the parties to ensure that no measure of any kind shall be taken that would hinder the carrying on of such operations.

The second case is the *Congo v. Uganda* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order, 2000 ICJ Rep. 111, para. 43 (July 1)), where the Congo argued the threat of irreparable harm to the integrity of its assets in the area of

conflict, and the ICJ made a broad order about preventing and refraining from action that might prejudice the rights of the other party.

However, the court in its most recent case on this question did not order the requested measure. This was the *Alleged Violations* case between Iran and the United States (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Order, 2018 ICJ Rep. 623, para. 83 (Oct. 3)). Iran argued that the announcement of further sanctions by the United States was producing irreparable harm to the whole Iranian economy, including withdrawal of companies and termination of contracts. The United States argued—and this is Anton's argument—if there was a risk of prejudice, it would not be irreparable because economic harm can be repaired. The court did not directly comment on that argument, but it did not grant Iran's requested measure on the basis of economic harm.

Ingrid Brunk

Terrific. Thank you all. I will not weigh in. I will say this, which I think people on the panel would agree. If the confiscation of Russian Central Bank currency reserves was explicitly justified as a countermeasure under international law, we would have a revolution in the law of countermeasures. There is very little state practice by states that is explicitly identified as countermeasures. Almost none of it involves *erga omnes* violations. None of it involves central bank immunity. I offer these comments to make the stakes clear. There is not a lot of clear state practice that provides much of a precedent here. It is a really important issue, and it is one that if these measures were taken would really be a dramatic development, both in the law of immunity and in the law of countermeasures.

Each of you has a few moments to conclude, if you would like to, on whatever topic, whether we have covered it or not, and then we may have a few minutes for audience questions.

Chiara Giorgetti

I want to take the floor just because the argument on the BIT is very interesting. I would like to take a moment to raise another issue, and that is the issue linked to the *jus cogens* violation. Here we are talking about a very unique kind of violation. We are talking about a war of aggression and the crime of aggression, and I think it is time to revise the argument that sovereign immunity applies because of the very nature of the norm that has been violated.

I know that the International Court of Justice has said in the *Jurisdictional Immunities* case (*Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*) that there is a difference between procedural norms and substantive norms, and then we want to think about that there is a finding that distinguishes and that procedural norms would apply first. There are substantive rules, even if they relate to *jus cogens*, that will apply later. The procedural norms will essentially impede the application of the substantive rules.

But it seems to me that this results in an unequal result, in a manifestly unjust result, because I think it is important when we think about sovereign immunity, for example, to think about the reason why we have sovereign immunity, and the distinction that we make sometimes between *jure imperii* and *jure gestionis*. We cannot say that a violation *jus cogens* is part of this *jure imperii*. Here we are talking about an unlawful behavior of the State and it would be an absurd result to say that we could grant sovereign immunity as a result of an unlawful behavior of the state.

I want to cite the dissenting opinion of Judge Cançado Trindade in the ICJ case who makes exactly this argument, stating that: "War crimes and crimes against humanity are not to be considered *acta jure gestionis*, or else "private acts"; they are crimes. They are not to be considered *acta jure imperii* either; they are *grave delicta*, crimes. . . . There is no immunity for grave violations of

human rights and of international humanitarian law, for war crimes and crimes against humanity. Immunity was never conceived for such iniquity. To insist on pursuing a strictly inter-State approach in the relationships of responsibility leads to manifest injustice" (diss. op., Cançado Trindade, J., paras. 178–79).

To conclude, I think that we might want to revise how we talk about violations of *jus cogens*, and sovereign immunity as a procedural issue. Coming out from the EU Commission setting up the Freeze and Seize Task Force and also in the UK where there is a bill to require the state to lay before parliament a proposal for the seizure of Russian state assets, and this make gives an opportunity to rethink the rationale underling sovereign immunity and the role of the State as a public person. I would love to hear what other panelists say about rethinking the reason and the rationale for these principles. Thank you.

PHILIPPA WEBB

I have something to add to Anton's paper. There are at least three routes to moving from freezing to seizing Russian state assets. The first is the *avoidance* of the immunity bar through executive action, as Anton set out. The second is a *justification* for the violation of immunity, either through wartime precedent or using countermeasures. But there is a third route that is not explored in his paper, which is an *exception* to immunity for the enforcement of judgments by international courts with jurisdiction over the foreign state.

This argument is that sovereign equality operates to prevent one state sitting in judgment on another state. This is a horizontal relationship. But if we move to a vertical axis where it is an international court, the ICJ or the European Court of Human Rights, ordering enforcement against a state's assets, then you are not in that horizontal sovereign equality situation. An international court is not a state organ, unlike a national court. Also, if a state has accepted a court's jurisdiction under the UN Charter or the European Convention, it will have no cause for complaint on a sovereignty basis if enforcement is ordered because holding a state to a treaty that is concluded is not an impermissible constraint on its sovereignty.

And the last point is that this is not unprecedented. There have been cases in which attempts have been made to enforce judgments of international courts in domestic courts against state assets, and immunity was not considered to be a bar.

I will just point to the ICJ *Corfu Channel* case where the ICJ ordered damages against Albania in favor of the United Kingdom (Judgment of December 15, 1949, Compensation Phase). The UK sought to enforce that against gold that was said to have an Albanian share. That gold was held by the United States, France, and the UK, and those states agreed that any interest in which Albania had in the gold, which in the end could not be proven, could be transferred to the UK in satisfaction of the judgment debt from the *Corfu Channel* case.

The great international lawyer and former editor-in-chief of *AJIL*, Oscar Schachter, wrote of the case at the time that: "It may be inferred that the right of the third state to attach assets to satisfy a judgment which is binding in international law prevails over the sovereign immunity that the debtor state may possess in respect of the assets in question" (Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AJIL 1, 10 (1960)).