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ARTICLE

State Immunity from Non-Judicial Measures of Constraint

Philipp Janig

Institute of Public Law and International Law, University of the Bundeswehr Munich, Neubiberg, Germany
Email: philipp.janig@unibw.de

Abstract

The discourse on State immunity has traditionally focused on its application in judicial proceedings. However, in recent years scholars have begun to address whether the law on State immunity also protects foreign States against measures taken against their property by the territorial State's executive and/or legislative organs. This question has been raised following unilateral sanctions regimes freezing property of foreign States. It has gained renewed attention in the context of the 'immobilization' of around €300 billion of the Central Bank of Russia's assets as a reaction to the invasion of Ukraine by the Russian Federation. In addition, there are recent suggestions to subject these sovereign assets to further steps, including confiscation, the generation of investment returns or taxing windfall profits accruing to the entities holding the assets. This article revisits the various conceptions of the law on State immunity to address the question of whether a principle of State immunity against non-judicial measures of constraint exists. Based on a review of existing State practice and *opinio juris*, it argues that customary international law does provide for State immunity in this context. However, the article further contends that the content of the norm should be construed differently than in relation to judicial proceedings, recognizing the weight of public policy concerns of the territorial State.

Keywords: Public international law; State immunity; measures of constraint; non-judicial measures; sanctions

1. Introduction

In reaction to the full-scale invasion of Ukraine in February 2022, the European Union (EU) and several States have imposed wide-ranging unilateral sanctions on the Russian Federation. In the financial sector, this included the freezing of assets of numerous individuals and entities with connections to the Kremlin, as well as the 'immobilization'[1] of assets of the Central Bank of Russia (CBR). While not

[1] The 'immobilization' of assets refers to the prohibition on engaging in transactions related to the management of reserves and assets of the CBR (art 5a(4)), while the 'freezing of funds' should prevent anything that would enable the use of those funds (art 1(f)), see Council Regulation (EU) No 833/2014

entirely unprecedented, the measures against the CBR are extraordinary in scale, implemented in over 30 States,[2] and concern an estimated total of around €300 billion.[3] These sanctions against the CBR have notably been brought through legislative and/or executive action, with no involvement of adjudicative bodies thus far.[4]

Debates have since taken place in a number of sanctioning States on whether actions should go further than the mere freezing (or 'immobilization') of those assets. The political commitment to explore all options is reflected in a Statement on Ukraine from May 2023 by the G7 Leaders, pledging to:

> continue to take measures available within our domestic frameworks to find, restrain, freeze, seize, and, where appropriate, confiscate or forfeit the assets of those individuals and entities that have been sanctioned in connection with Russia's aggression. … We reaffirm that, consistent with our respective legal systems, Russia's sovereign assets in our jurisdictions will remain immobilized until Russia pays for the damage it has caused to Ukraine.[5]

Some States have pushed for the outright confiscation of Russian sovereign assets. Following lengthy debate, in April 2024 the United States (US) passed legislation granting the President authority to seize Russian sovereign assets and transfer them to a 'Ukraine Support Fund'.[6] Similar legislative proposals have been or are being pursued in Canada[7] and the United Kingdom (UK).[8]

The Parliamentary Assembly of the Council of Europe (PACE) has called on States to 'co-operate and transfer [frozen Russian State financial assets] to an international

of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1. For the present purposes, the effects of these measures are the same.

[2] Being all EU Member States, the G7 countries outside the EU (Canada, Japan, the UK and the US) and Australia, Switzerland and New Zealand. See also European Commission, 'Joint Statement on Further Restrictive Economic Measures' (26 February 2022) STATEMENT/22/1423.

[3] 'Statement by President von der Leyen on Russian Accountability and the Use of Russian Frozen Assets' (30 November 2022) STATEMENT/22/7307.

[4] See, e.g. the prohibition of any '[t]ransactions related to the management of reserves as well as of assets of the Central Bank of Russia' (art 1a(4)) in Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L57/4. These sanctions had already been taken the day before the full-scale invasion and in reaction to the recognition of the so-called 'People's Republics' in the Donetsk and Lugansk oblasts.

[5] 'G7 Leaders' Statement on Ukraine' (19 May 2023) 5 <www.consilium.europa.eu/media/64494/g7-2023-statement-on-ukraine.pdf>.

[6] H.R.815—Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes (24 April 2024) section 101–8.

[7] Bill S-278: An Act to amend the Special Economic Measures Act (disposal of foreign state assets) <www.parl.ca/LegisInfo/en/bill/44-1/S-278>. In 2022 legislation was passed that allowed the responsible Minister to apply for a forfeiture order to permanently confiscate frozen assets, to be issued by a judge with only limited oversight. These may then be used for specific purposes. See Special Economic Measures Act (SC 1992, c 17) sections 4(1)(b), 5.4(1), 5.6. However, these amendments have not made changes to Canada's sovereign immunity legislation, which thus continues to apply to the judge making the forfeiture order.

[8] A bill titled 'Seizure of Russian State Assets and Support for Ukraine Bill' was pursued in 2022–2023 but has not been reintroduced since the UK general elections in July 2024.

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compensation mechanism'.[9] Within the EU, such steps were endorsed by the High Representative Josep Borrell[10] and the Baltic States together with Slovakia.[11] However, in light of legal and political concerns surrounding confiscation, much of the discussion has turned to finding other ways to use frozen or immobilized assets.[12] Thus, political actors have considered the 'temporary active management' of CBR assets,[13] or taxing windfall profits of asset holders and potentially using those tax returns to secure a loan extended to Ukraine.[14] Such a windfall tax would in particular affect central securities depositories (CSDs), most important among them being the Belgium company Euroclear, which (according to media reports) holds around €200 billion of Russian assets.[15]

The Council of the EU has since acted on proposals concerning windfall profits. It first prohibited the disposal of such profits,[16] before introducing a tax on 21 May 2024. Thus, CSDs holding CBR assets of more than €1 million are subject to a special financial contribution of 99.7 per cent of their net profits. These revenues will be used to support Ukraine, mainly through the European Peace Facility,[17] with the first payment of €1.5 billion having been made in July 2024.[18]

The adoption of these sanctions against Russian sovereign assets has reinvigorated an existing debate on the legal protection of sovereign assets under international law,

[9] Parliamentary Assembly of the Council of Europe (PACE), Resolution 2539 (2024) 'Support for the Reconstruction of Ukraine' (16 April 2024) para 6.

[10] S Fleming, 'EU Should Seize Russian Reserves to Rebuild Ukraine, Top Diplomat Says' (*Financial Times*, 9 May 2022) <www.ft.com/content/82b0444f-889a-4f3d-8dbc-1d04162807f3>.

[11] 'Joint Statement by Estonia, Latvia, Lithuania and Slovakia: Calling to Use the Frozen Russian Assets for Rebuilding Ukraine' <www.politico.eu/wp-content/uploads/2022/05/24/Joint-statement_RU-assets_Ukraine_final-05.2379.pdf>.

[12] Council of the EU, 'Ad Hoc Working Party on the Use of Frozen and Immobilised Assets to Support Ukraine's Reconstruction—Presidency Progress Report' (16 June 2023) Doc 10669/23 <https://data.consilium.europa.eu/doc/document/ST-10669-2023-INIT/en/pdf> (noting that there was 'no credible legal avenue allowing for the confiscation of frozen or immobilized assets on the sole basis of these assets being under EU restrictive measures').

[13] This might either be 'decentralized', by obliging those entities that hold CBR assets to invest them into certain asset groups and then transfer the returns, or 'centralized', by pooling all assets in one entity, which would then invest them. See P Tamma, 'EU Looks at Investing Frozen Russian State Assets to Raise Cash for Ukraine' (*Politico*, 24 March 2023) link 2: document obtained by POLITICO (EU Non-paper on the generation of resources to support Ukraine from immobilised Russian assets) <www.politico.eu/article/eu-looks-at-investing-vladimir-putin-russia-state-assets-to-raise-cash-for-ukraine/>.

[14] 'G7 Finance Ministers and Central Bank Governors' Communiqué' (Stresa, 23–25 May 2024) para 8 <www.g7italy.it/wp-content/uploads/Stresa-Communique-25-May-2024.pdf>.

[15] See S Fleming, M Arnold and P Stafford, 'Why the EU is Split Over Raiding Russian Assets' (*Financial Times*, 28 June 2023) <www.ft.com/content/b09dd675-6f76-48ed-aad5-c3a056f743f3>.

[16] Council Decision (CFSP) 2024/577 of 12 February 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2024] OJ L 2024/577.

[17] Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2024] OJ L 2024/1469.

[18] European Commission, 'First Transfer of €1.5 Billion of Proceeds from Immobilised Russian Assets Made Available in Support of Ukraine today' (26 July 2024) <https://neighbourhood-enlargement.ec.europa.eu/news/first-transfer-eu15-billion-proceeds-immobilised-russian-assets-made-available-support-ukraine-today-2024-07-26_en>.

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which thus far has largely focused on the law of State immunity. In most instances, sanctions are taken by executive and/or legislative bodies of the territorial State, without the involvement of the judiciary. At the heart of that debate is thus whether State immunity protects foreign State property from such sanctions, insofar as they qualify as 'measures of constraint'. This article argues that such a customary norm exists, but that its content should be construed differently than in relation to judicial proceedings.

2. Current debate on State immunity

2.1. State immunity at the intersection of territorial sovereignty and sovereign equality

The law on State immunity, as explained by the International Court of Justice (ICJ) in the *Jurisdictional Immunities* case, exists at the intersection of two competing principles: the principle of territorial sovereignty and the principle of sovereign equality.[19] While the former militates for a restrictive understanding of State immunity, the latter provides support for greater protection of the foreign State's interests.

When it comes to the notion of sovereignty, States are free to decide on the organization of their economic system.[20] This entails the right to regulate property rights with regard to assets present in their territory as they see fit.[21] While international law provides for important qualifications thereto—such as in the context of human rights or international investment law—it still stands as a matter of principle. Thus, as noted by the ICJ in the *Asylum* case, any 'derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case'.[22] This likewise applies to State immunity, which constitutes 'a departure from the principle of territorial sovereignty'.[23] Given that there is generally no applicable treaty,[24] the relevant rules stem from customary international law. Thus, both the existence of as well as the scope of any rule must be established by virtue of sufficiently widespcread and uniform State practice, accompanied by *opinio juris*.[25]

[19] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99, para 57.

[20] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14, para 205 ('each State is permitted, by the principle of State sovereignty, to decide freely … [on] the choice of a political, economic, social and cultural system').

[21] Thus, property disputes brought by States against private individuals are resolved on the basis of the applicable domestic law (generally the *lex situs*), rather than based on specific rights to property of the State based in international law, see, e.g. *Iran v Berend* [2007] EWHC 132 (QB) para 30; Higher Regional Court Frankfurt am Main, 16 U 161/11 (4 February 2013) para 35.

[22] See *Asylum (Colombia/Peru)* [1950] ICJ Rep 266, 275.

[23] *Jurisdictional Immunities* (n 19) para 57.

[24] The only treaty in force being the (scarcely ratified) European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) ETS No 74.

[25] *Jurisdictional Immunities* (n 19) para 55 ('the Court must determine … *the existence* of "international custom, as evidence of a general practice accepted as law" conferring immunity on States *and*, if so, what is *the scope and extent of that immunity*' [emphasis added]), see also paras 58–59.

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At the same time, '[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality'.[26] Thus, the sovereignty of a State implies that it should not be subjected to the sovereign authority of another State. This is often expressed by the legal maxim *par in parem non habet imperium* (meaning 'equals have no sovereignty over each other'[27]), which stems from fourteenth-century political thought.[28]

Modern State jurisdiction takes three forms: prescriptive jurisdiction (or the power of a State to legislate, typically within its own territory); adjudicative jurisdiction (the power for a State's courts to hear and decide cases); and enforcement jurisdiction (the State's authority to compel compliance with its own laws).[29] In principle, foreign States are subject to prescriptive jurisdiction, remaining bound by the domestic law of the territorial State.[30] However, the principle of State immunity protects a State from the exercise of adjudicatory jurisdiction by the territorial State (jurisdictional immunity *stricto sensu*), with exceptions to that immunity depending on what type of conduct is being adjudicated. In addition, State immunity protects against enforcement jurisdiction insofar as it is connected to adjudicatory proceedings (immunity from enforcement), regardless of whether the specific enforcement measure is taken by a court itself or an executive body on order of a court. Exceptions to immunity from enforcement depend on the use of property against which 'measures of constraint' are being taken.[31]

However, what remains in dispute is whether and, if so, to what extent State immunity applies to other types of enforcement jurisdiction: thus to 'measures of constraint' adopted in a non-judicial context. This is of particular relevance in the context of sanctions regimes, which often include a range of measures taken by executive and/or legislative authorities against foreign State property. Thus, whether and to what extent these assets are protected by immunity against such measures is crucial to determine the legality of those types of sanctions. While the question has attracted new attention in recent years, it is not itself new. In the initial stages of the International Law Commission's (ILC) work on codifying the rules on jurisdictional immunities, some members considered that State immunity could 'cover other types of power of the State, such as the power of the executive and legislative authorities, not necessarily linked to judicial power', while others 'thought there was little or no evidence' in State practice for that assertion.[32]

[26] ibid, para 57.

[27] AX Fellmeth and M Horowitz, *A Guide to Latin in International Law* (OUP 2009) 214.

[28] See Y Dinstein, 'Par in Parem non Habet Imperium' (1966) 1 IsLR 407, 409 (concerning the 'modern' understanding as applying among different contemporary sovereigns).

[29] C Ryngaert, 'Jurisdiction of States' in C Binder et al (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022) vol 3, 357, para 4.

[30] AJ Colangelo, 'Jurisdiction, Immunity, Legality, and *Jus Cogens*' (2013) 14(1) ChiJIntlL 53, 60–5.

[31] See *Jurisdictional Immunities* (n 19) paras 113, 116.

[32] ILC, 'Yearbook of the International Law Commission 1980, Vol II, Part Two' (1981) UN Doc A/CN.4/SER.A/1980/Add.1 (Part 2) paras 119–121; see Dinstein (n 28) 415 ('Numerous writers restrict the immunities of the foreign State to the jurisdictional powers of the local State, exercised through its courts, thus turning the immunities into exemptions from suit or from judicial process. That is a rather narrow-gauged way of putting it, for there are some aspects of State immunities that undoubtedly apply to the powers of the executive branch of government as distinguished from the judiciary ….').

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2.2. Two theories on State immunity from 'non-judicial measures of constraint'

Two different theories have developed in reaction to this question. The first considers the law of State immunity equally applicable in a non-judicial context. The underlying assumption is that this field of law serves to safeguard sovereign equality,[33] and that its purpose would be frustrated if other (non-judicial) measures of constraint were excluded from its scope. Sompong Sucharitkul—later to become the first ILC special rapporteur on the topic—argued that:

> [t]he same set of principles governing waiver of territorial jurisdiction, or non-exercise of sovereign authorities by the judicial branch of the government appear to be equally applicable with respect to the suspension or non-use of power by national authorities other than a court of law[.][34]

Similarly, Alfred Verdross and Bruno Simma contended that:

> it is undisputed that no state is authorized to subject the activities of another state as a sovereign to its legislature, judiciary and executive, as all states are *of equal status* among themselves under international law[.][35]

More recent scholarship has also applied this understanding in the context of sanctions by executive or legislative organs against foreign central banks. Scholars making this argument generally simultaneously assert that such sanctions could or should be justified as countermeasures under the law of State responsibility.[36]

[33] For an in-depth consideration of the topic, see R O'Keefe, 'State Immunity from Measures of Constraint: The State Interests Protected' (2023) CVI(3) RDInt 607; see also ILC Draft Articles on Jurisdictional Immunities of States and their Property, with Commentaries (1991) 56, art 18, Commentary, para 2 <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf> ('If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property.'); Federal Court of Justice (Germany), *Greece v A* (25 June 2014) VII ZB 24/13, VII ZB 24/13, ILDC 2388 (DE 2014) para 13(a); *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* (Application instituting proceedings of 27 June 2023) ICJ General List No 189, para 21.

[34] S Sucharitkul, 'Immunities of Foreign States before National Authorities' (1976) 149 RdC 87, 94.

[35] A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (Duncker & Humblot 1984) 763 (author translation, emphasis in the original).

[36] J-M Thouvenin and V Grandaubert, 'The Material Scope of State Immunity from Execution' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 247 ('our view is that the principle of "immunity from constraint" … covers … all kinds of public constraint the forum State could exercise over the foreign State's property, including those which are independent of any judicial proceedings, to the extent that it infringes the foreign State's sovereignty'); see also P-E Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (2012) 17(3) JC&SL 301, 314; N Ronzitti, 'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective' in N Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016) 21–2; J-M Thouvenin, 'Gel des fonds des banques centrales et immunité d'exécution' in A Peters et al (eds), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015) 212–19; E Castellarin, 'Le gel des avoirs d'une banque centrale étrangère comme réaction décentralisée à un fait internationalement illicite: rétorsion ou contremesure ?' (2012) 25 HagueYIL 173, 179–80 (arguing that the norms on immunity from execution should be applied '*par analogie*').

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The counter-theory contends that the law on (State) immunity only applies in the judicial context.[37] This would follow from existing State practice and *opinio juris* being limited to immunity before domestic courts, and a purported lack of materials suggesting that immunity would protect against measures taken independently by the executive or legislature.[38] In that vein, Robert Jennings and Arthur Watts noted that:

> there does not seem to be any general requirement in international law that all such [foreign state's] property be granted, just because it is state owned, any special inviolability or other exemption from governmental action by the state in which it is situated. Thus it would seem to be liable to temporary seizure or to expropriation, may be the subject of orders restricting the foreign state's freedom to deal with the property or requiring it to deal with the property in a certain way, and may be subject to taxation.[39]

In the context of unilateral sanctions, Ingrid Brunk contended:

> Freezing assets does not implicate immunity under domestic or international law because it does not involve the assertion of jurisdiction by domestic courts, nor is an asset freeze necessarily related to the enforcement or execution of a court judgment.[40]

This position is also supported by the contention that the principle of sovereign equality enshrined in Article 2(1) of the United Nations (UN) Charter cannot create norms in the absence of State practice.[41] In the current debates surrounding

[37] While not making this point explicitly, see also X Yang, *State Immunity in International Law* (CUP 2012) 343 (discussing 'coercive or enforcement measures *taken by the court*' against foreign State property [emphasis added]).

[38] As suggested by T Ruys, 'Immunity, Inviolability and Countermeasures—A Closer Look at Non-UN Targeted Sanctions' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 670.

[39] R Jennings and A Watts, *Oppenheim*'s *International Law* (9th edn, OUP 1992) vol 1, section 111, 363–4 (while adding that '[i]n these and similar respects the local governmental action must not be arbitrary and must comply with whatever requirements may be laid down by international law in relation to private foreign-owned property generally, for example as to compensation in the case of expropriation').

[40] I Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (2023) 91(6) GWashLRev 1616, 1633.

[41] Ruys (n 38) 684–6; Brunk ibid 1636–8. Ruys finds support for that in the ICJ drawing a distinction between the *principle* of sovereign equality and the *rules* protecting State sovereignty in its Preliminary Objection judgment in *Immunities and Criminal Proceedings*, in order to dismiss arguments by Equatorial Guinea that (alleged) violations of immunity under customary international law could be pleaded as violations of a treaty provision requiring that States 'carry out their [treaty] obligations … in a manner consistent with the principles of sovereign equality'. See *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections, Judgment) [2018] ICJ Rep 292, para 93. While the Court's drawing of a distinction is notable, it remains questionable whether a dictum concerning an issue of treaty interpretation in the context of a compromissory clause elucidates the question to what extent arguments based on principles carry weight in the norm ascertainment of customary international law. In comparison, in the context of whether a right is 'plausible' enough to issue Provisional Measures, the Court considered that 'this claimed right *might be derived* from the principle of the sovereign equality of States'. See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures, Order of 3 March 2014) [2014] ICJ Rep 147, para 27 (emphasis added).

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the legal protection of CBR assets, this argument—even if not explicitly endorsed—has found considerable traction.[42]

The ICJ has addressed a number of immunity issues, particularly immunity from jurisdiction and enforcement in civil proceedings,[43] as well as the immunity of high-ranking officials in criminal proceedings.[44] While not directly concerned with it, one dictum in the *Jurisdictional Immunities* case might be read as addressing the question at hand: '[t]he rules of State immunity are procedural in character and *are confined to determining whether or not the courts of one State may exercise jurisdiction* in respect of another State'.[45] However, it can hardly be interpreted as resolving it, as it addresses jurisdictional immunities (rather than immunity from enforcement), and was concerned with an alleged conflict between *jus cogens* norms 'and the rule of customary law which requires one State to accord immunity to another', rather than the distinction between judicial and non-judicial measures of the territorial State. While the matter was an object of the dispute in the *Seizure and Detention of Certain Documents and Data* case—with Timor-Leste arguing for, and Australia against, the existence of immunity from non-judicial measures of restraint—the case was settled before the Court adjudicated on the merits.[46]

2.3. The thesis of this article

This article contends that the question must be examined on the basis of customary international law, rather than solely relying on the purpose of norms on State immunity. In the context of State immunity, evidence of State practice and *opinio juris* primarily stem from domestic legislation, the case law of domestic courts, pleas of immunity advanced by States (before domestic and international judicial bodies), as well as other forms of diplomatic protests or public assertions on the (non-)existence of norms.[47] However, when it comes to non-judicial measures of constraint, the relevant materials often also stem from administrative, diplomatic and parliamentary practice. Their limited accessibility (in comparison to legislative or judicial practice) creates notable practical difficulties when seeking to evaluate the exact state of the law.

The increasing use of sanctions against foreign State property—typically taken by executive and/or legislative authorities, without involvement of judicial bodies—has

[42] See e.g. A Moiseienko, 'Trading with a Friend's Enemy' (2022) 116 AJIL 720, 726 (considering that 'there is considerable uncertainty as to whether immunities apply' in such circumstances); P Webb, 'Ukraine Symposium—Building Momentum: Next Steps towards Justice for Ukraine' (*Articles of War*, 2 May 2022) <https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/>.

[43] *Jurisdictional Immunities* (n 19). See also the recent applications in *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-owned Property (Germany v Italy)* (Application instituting proceedings of 29 April 2022) ICJ General List No 183; and *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* (n 33).

[44] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177; *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Judgment) [2020] ICJ Rep 300.

[45] *Jurisdictional Immunities* (n 19) para 93 (emphasis added); see also Ruys (n 38) 679.

[46] *Certain Documents and Data* (n 41).

[47] *Jurisdictional Immunities* (n 19) para 55.

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led to additional State practice and *opinio juris* on the matter. The following two sections provide an examination of these materials in the context of immunity from non-judicial measures of constraint, demonstrating that there is sufficient support for such immunity in State practice and *opinio juris*. However, the content of the norm concerning non-judicial measures of constraint differs from immunity in the context of judicial measures of constraint.

3. Immunity from non-judicial measures of constraint: ascertaining the existence of a norm

3.1. State practice in domestic legislation and case law

Scholarship has highlighted that the materials that are typically referenced in the context of State immunity cannot provide a conclusive answer to the question at hand. They are generally limited to regulating immunity from (civil) court proceedings, as well as from enforcement measures taken by or on the order of courts. For instance, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (Jurisdictional Immunities Convention), not yet in force, only addresses 'the immunity of a State and its property from the jurisdiction of the courts of another State'.[48] In the context of immunity from enforcement of foreign State property, the ILC Commentary to the relevant provisions clarifies that it 'concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding'.[49]

Similarly, domestic immunity legislation generally provides that foreign States are 'immune from the jurisdiction of the courts' of the respective States.[50] However, formulations concerning immunity from enforcement of foreign State property vary more widely. Examples in domestic legislation provide that property of a foreign State: 'is not subject to any process for the enforcement of a judgment or an arbitration award',[51] 'shall not be the subject of judicial enforcement',[52] or have immunity 'in respect of measures to secure a claim and immunity in respect of enforcement of a court decision',[53] 'from proceedings for execution of a judgment or other decision of a court',[54] 'from jurisdiction with respect to proceedings of a

[48] UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN Doc A/RES/59/38, art 1. The European Convention on State Immunity (n 24) has a similar scope.

[49] See para 1 of the Commentary to art 18 in 'Yearbook of the International Law Commission 1991, Vol II, Part Two' (1994) UN Doc A/CN.4/SER.A/1991/Add.l (Part 2) 56.

[50] See e.g. 28 U.S. Code § 1604 Foreign Sovereign Immunities Act (US); State Immunity Act 1979, section 3(1) (Singapore); State Immunity Ordinance 1981, section 3 (Pakistan); Foreign State Immunities Act 1981, section 2(1) (South Africa); Foreign States Immunity Law 5769-2008, section 2 (Israel); Act on the Civil Jurisdiction of Japan with respect to Foreign States, art 4 (Act No 24 of 2009) (Japan).

[51] State Immunity Act 1979, ibid, section 15(2)(b); see, similarly, State Immunity Act 1978, section 13(2)(b) (UK); State Immunity Ordinance 1981, ibid, section 14(2)(b); Foreign State Immunities Act 1981, ibid, section 14(1)(b); Immunities and Privileges Act 1984, section 15(1)(b) (Malawi); Foreign States Immunities Act 1985, section 30 (Australia).

[52] Act XXVIII of 2017 on Private International Law (Hungary) section 85(3).

[53] Federal Law No 297-FZ on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation of 2015, art 16(1) (Russian Federation).

[54] Foreign States Immunity Law (n 50) section 15(a).

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civil execution',[55] 'from attachment, arrest and execution'[56] or 'in the case of an action *in rem*, from arrest, detention, seizure and forfeiture'.[57] Such differences notwithstanding, this legislation addresses the issue in the context of court proceedings, where immunity from enforcement is generally adopted as the basic premise and an exhaustive list of exceptions is provided.[58]

There are only two instances where domestic legislation might be read as addressing non-judicial measures of constraint. While not explicitly concerning State immunity, French law generally provides for the protection of (foreign) central bank assets from seizure.[59] In comparison, Spanish Organic Law No 16/2015 includes provisions on the various types of immunities, including the immunity of foreign States. Its introductory provisions define 'immunity from execution' broadly as 'a prerogative whereby a State, organization or person and *its property may not be subject to coercive measures* or to the enforcement of decisions rendered by the courts of another State'.[60] Despite the formulation suggesting that immunity from execution may also apply to 'coercive measures' ('*medidas coercitivas*') taken in a non-judicial context, the Part of the legislation on State immunity only applies 'before Spanish courts' ('*ante los órganos jurisdiccionales españoles*').[61] Moreover, although the law explicitly exempts the property of international organizations from any 'coercive measure of an executive, administrative, judicial or legislative measure' ('*medida coercitiva de carácter ejecutivo, administrativo, judicial o legislativo*'), it contains no such provision on the inviolability of the property of foreign States.[62]

Leaving aside the above two examples, care should be taken when evaluating the relevance of this domestic practice: although not providing support for the existence of a norm on immunity from non-judicial measures of constraint, it does not prove its *non*-existence. The Jurisdictional Immunities Convention was deliberately limited to disputes stemming from 'relations between a State and foreign natural or juridical

[55] Act on the Civil Jurisdiction of Japan with respect to Foreign States (n 50) art 18(1).

[56] 28 U.S. Code § 1609 Foreign Sovereign Immunities Act (US); see also State Immunity Act, section 12(1) (Canada).

[57] State Immunity Act ibid, section 12(1); see also State Immunity Act 1978 (n 51) section 13(2)(b); State Immunity Act 1979 (n 50) section 15(2)(b); State Immunity Ordinance 1981 (n 50) section 14(2)(b); Foreign State Immunities Act 1981 (n 50) section 14(1)(b); Immunities and Privileges Act 1984 (n 51) section 15(1)(b).

[58] See, in particular, Code des procédures civiles d'exécution, art L. 111-1-2 (France). The notable exception is the legislation of the Russian Federation, which appears to provide for immunity from execution only with regard to certain types of assets. In addition, the Argentinean legislation does not address immunity from enforcement.

[59] Code monétaire et financier, art L 153-1 (France). While China also provides for absolute immunity of central bank assets, this is limited to measures of the judiciary, see Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures, Order of the President No 41 (2005).

[60] See Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España, art 2(b) (translation by the author, emphasis added).

[61] Organic Law No 16/2015, arts 4, 17(1).

[62] ibid, art 34(2).

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persons'[63] and does not address how State immunity applies in public law settings which essentially involve the application of domestic law in inter-State relations.[64] However, its Preamble suggests that customary law provides for immunities outside of the context of court proceedings.[65]

There are certain areas of public (administrative) law in which domestic practice awards immunity to foreign States, such as competition law[66] and, most importantly, tax law.[67] While the latter primarily concerns the exercise of prescriptive jurisdiction, it shows that immunity plays a role in a non-judicial setting. For instance, the UK has traditionally accorded a wide degree of immunity to States from domestic tax law. In the context of a recent consultation on whether to adjust that approach, the Secretary of the Treasury defined sovereign immunity broadly as 'the principle that one sovereign State should not seek to apply its law to another sovereign State'.[68] Similarly, the Canadian Supreme Court considers that the sovereign immunity of States and their property 'extends to all processes of Courts, all invasions of or interferences with their persons or property, and all applications of coercive public law brought to bear affirmatively, including taxation'.[69]

The most pertinent case to the present discussion is *Controller and Auditor-General v Sir Ronald Davison* before the New Zealand Court of Appeal.[70] It concerned the powers of a Commissioner of Inquiry, appointed by an order of the executive and charged with examining allegations of tax fraud and evasion in which the Cook Islands were implicated. More specifically, the petitioners sought a declaration that sovereign immunity meant that the Commissioner had no power to require the production of documents belonging to the Cook Islands and held by them. The issue thus did not concern immunities applicable in court proceedings as such, but rather the violation of immunities applicable to the exercise of

[63] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries (n 33) 36, art 10, Commentary, para 12.

[64] ibid.

[65] See preamble to the UN Convention on Jurisdictional Immunities of States and Their Property (n 48) ('rules of customary international law continue to govern matters not regulated by the provisions of the present Convention'); Council of Europe, 'Explanatory Report to the European Convention on State Immunity (16 May 1972) ETS No 74, paras 8, 12 (clarifying that the Convention does not apply to 'proceedings before administrative authorities').

[66] See also Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.870—Aluminium imports from eastern Europe) (85/206/EEC) [1985] OJ L92/1, para 9.2. (dismissing a plea of sovereign immunity concerning foreign trade organizations of socialist states in competition proceedings, as '[s]uch claims are properly confined to acts which are those of government and not of trade').

[67] See D Graukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors' (2010) OECD Working Papers on International Investment 2010/02, 30–7 (discussing also competition and criminal law).

[68] HM Treasury and HM Revenue & Customs, 'Sovereign Immunity from Direct Taxation: Consultation on Policy Design' (2022) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1087699/SI_reform_consultation.pdf>.

[69] Supreme Court (Canada), *The Municipality of the City and County of Saint-John et al v Fraser-Brace Overseas Corporation et al* [1958] SCR 263, 268.

[70] M Byers, 'New Zealand Court of Appeal: Judgment in *Controller and Auditor-General v Sir Ronald Dawson*' (1997) 36(3) ILM 721.

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sovereign authority by an organ of the executive. While the judges relied on different arguments to find that immunity was not applicable in the specific circumstances (partly relying on the exception for 'commercial transactions'), none of them suggested that it was of no relevance whatsoever.[71]

Another practical problem stems from the fact that immunity from non-judicial measures of constraint constitutes a prohibitive norm. Thus, the relevant State practice to be evaluated consists of the *absence* of any measures of constraint taken against foreign State property.[72] While some scholars contend a relevant absence of practice,[73] customary law additionally requires a 'parallel existence of explicit *opinio juris*' that suggests that States feel legally obliged to abstain from taking a given measure.[74]

A rare example of a particular inaction being explained based on State immunity may be found in the diplomatic practice of Austria. The Office of the Legal Advisor of the Austrian Foreign Ministry had to consider the immunity of a diplomatic building in Vienna in administrative proceedings given the proposed construction of an underground line passing below the premises. More specifically, it had to address whether the Vienna Transport Agency could initiate expropriation proceedings against the foreign State before an administrative authority, in order to be granted an easement. The Office of the Legal Advisor considered that the provisions of the Vienna Convention on Diplomatic Relations were in principle not applicable, as the 'premises' as such were not affected.[75] However, it then assessed the matter on the basis of State immunity, as reflected in the Jurisdictional Immunities Convention, and found that while expropriation proceedings could be initiated under Article 13(a), the outcome could not be enforced against the foreign State.[76] The administrative authority thus had to refrain from taking action and having the easement entered in the land register, without coming to a negotiated settlement.[77]

As the next section will highlight, existing *opinio juris* largely stems from States protesting *against* non-judicial measures of constraint, in particular in the context of sanctions taken against foreign State property. In contrast, there is little to no

[71] See the reprinted opinions in Byers ibid.

[72] See Thouvenin (n 36) 212–13. See also ILC Conclusions on Customary International Law, with Commentaries (2018) UN Doc A/73/10, 120, Conclusion 6(1) (stipulating that practice 'may, under certain circumstances, include inaction').

[73] See e.g. A Moiseienko, 'Sovereign Immunities, Sanctions, and Confiscation: The Case of Central Bank Assets' (2023) 19–20 (on file with the author) ('there is no state practice whatsoever to support the notion that state property, let alone central bank assets specifically, may be confiscated by another state's executive branch').

[74] Ruys (n 38) 685; see also *Jurisdictional Immunities* (n 19) para 77 (noting '[t]he almost complete absence of contrary jurisprudence' and 'the absence of any statements by States … asserting that customary international law does not require immunity'); *S.S. "Lotus" (France v Turkey)* [1927] Permanent Court of International Justice Series A No 10 (7 September 1927) 28.

[75] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95, art 22.

[76] The Office of the Legal Advisor considered that the exception of art 19(c) of the UN Convention on Jurisdictional Immunities of States and Their Property (n 48) was not applicable.

[77] See H Tichy, K Bühler and P Niederdorfer, 'Recent Austrian Practice in the Field of International Law: Report for 2019' (2020) 75(1) ZÖR 227, 262–4.

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opinio juris for the inapplicability of immunity. States that have taken such sanctions or are politically supportive of them have—even when asserting their lawfulness—abstained from claiming that immunity would not apply in the context of non-judicial measures of constraint.[78]

3.2. Opinio juris *in public statements, (diplomatic) protests and submissions in judicial proceedings*

When examining the reactions to the freezing of central bank assets, scholars have contended that sanctions have been met 'with no diplomatic protests or state practice suggesting that doing so violates international law of immunity'[79] or noted a 'lack of any prominence that sovereign immunities occupy in those [affected] states' public pronouncements'.[80] The absence of protest in such circumstances could, in itself, amount to *opinio juris*, if the affected State was 'in a position to react' to the measures.[81] However, many States voice their objections to such measures, often advancing a much more fundamental critique, by generally opposing unilateral or autonomous sanctions or so-called 'unilateral coercive measures'. For example, in response to US measures following the Taliban's takeover of Afghanistan, a spokesperson of the Chinese Foreign Ministry condemned 'the unreasonable and preposterous freezing of the assets of other countries' central banks, an illegal act akin to banditry'.[82]

However, criticism of non-judicial measures of constraint against State property as violating State immunity appears to be relatively consistent. The most explicit example is the reaction to the issuance of US Executive Order 13599, which blocked (i.e. froze) all property of Iran and Iranian financial institutions (including the central bank) within the US or held by a US person.[83] The Order was taken independently by the executive, even though—due to its interaction with statutory legislation—it also enabled courts to execute judgments against all blocked

[78] See ILC Conclusions on Customary International Law (n 72) 41, Conclusion 10, Commentary, para 4 ('an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication' of *opinio juris*, further noting that 'such statements could be made … in protests characterizing the conduct of other States as unlawful').

[79] Brunk (n 40) 1634.

[80] Moiseienko (n 73) 18.

[81] ILC Conclusions on Customary International Law (n 72) 120, Conclusion 10(3) ('Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.'); see also *Regina (Freedom and Justice Party and Others) v Secretary of State for Foreign and Commonwealth Affairs and Another* (England, Court of Appeal [Civil Division]) [2018] EWCA Civ 1719, 18 ILR 658, paras 100ff.

[82] While this statement clearly indicates opposition to the measures (and thus some form of *opinio juris*), it is less clear what norm the spokesperson considers to have been violated, given that 'banditry' does not fit in any recognized category of international wrongful acts. Embassy of the People's Republic of China in the Republic of Rwanda, 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on February 24, 2023' (24 February 2023) <http://rw.china-embassy.gov.cn/eng/fyrth/202302/t20230224_11031269.htm>.

[83] Executive Order 13599, Blocking Property of the Government of Iran and Iranian Financial Institution, 5 February 2012, Federal Register Vol 77, No 26, 6659.

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property, eventually leading to the *Certain Iranian Assets* case being brought by Iran before the ICJ.[84]

A few months later the Iranian delegate to the Asian-African Legal Consultative Organization (AALCO) objected to the Executive Order in a statement:

> Iran came under a most unprecedented economic coercive measure by the United States by blocking of the property of Central Bank of Iran and imposing other restriction [sic] on it. This unilateral act … contravenes all norms and principles of international law concerning the immunity of State and its properties as manifested also in the 2004 UN Convention on Jurisdictional Immunities and their Property. It is underlined therein, under article 21 and the preamble of this Convention that the jurisdictional immunities of States and their properties including property of central bank [sic] or other monetary authority of the State are generally accepted as a principle of customary international law.[85]

At the same annual meeting, the 48-Member-State AALCO adopted a resolution '[c]ondemning the imposition of restrictions against AALCO Members States, Syrian Arab Republic and Islamic Republic of Iran by the Government of the United States of America' as well as 'the adoption of restrictive measures against states, especially in cases where the functional organs of a sovereign State, like Central Banks, are subjected to sanctions which violate immunity of State and its properties'.[86] Both the AALCO and Iranian positions thus explicitly frame the blocking of assets by the executive as a violation of State immunity. In the following two annual meetings of the AALCO, the Iranian delegate made similar comments[87] and resolutions including the same paragraphs were adopted.[88]

Subsequently, the US Supreme Court allowed the execution against Iranian assets in *Bank Markazi v Peterson*.[89] This triggered a more formal protest by Iran (prior to taking the case to the ICJ), which addressed both (alleged) violations of jurisdictional immunities, as well as the blocking of property by the executive branch, which contended that:

[84] See P Janig and SM Fallah, '*Certain Iranian Assets*: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment' (2016) 59 GYIL 355, 357–8.

[85] AALCO, 'Verbatim Record of Discussions: Fifty-First Annual Session' (2012) Doc No AALCO/51/ABUJA/2012/VR, 104.

[86] AALCO, 'Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties' (22 June 2012) Doc No AALCO/RES/51/S 6.

[87] See, verbatim, AALCO, 'Verbatim Record of Discussions: Fifty-Second Annual Session' (2013) Doc No AALCO/52/NEW DELHI (HQ)/2013/VR, 236; see also AALCO, 'Verbatim Record of Discussions: Fifty-Third Annual Session' (2014) 221 <https://www.aalco.int/Final%20Verbatim%20Record%20of%20the%20Fifty-Third%20Annual%20Session%202014.pdf> (focusing on the immunity from jurisdiction, while generally stating that 'the financial sanctions against Iranian financial institutions are unjustifiable and violate sovereign immunity regime and need to be condemned').

[88] AALCO, 'Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties' (12 September 2013) Doc No AALCO/RES/52/SP 2; AALCO, 'Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties' (18 September 2014) Doc No AALCO/RES/53/S 6.

[89] US Supreme Court, *Bank Markazi v Peterson*, No 14–770, 578 U.S. 212 (2016).

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> [i]t is a matter of grave concern that the United States Congress, along with other branches of the United States Government, seem to believe that they can easily defy and breach the fundamental principle of State immunity by unilaterally waiving the immunity of States and even central banks in total contravention of the international obligations of the United States and under a groundless legal doctrine that the international community does not recognize.[90]

The Coordinating Bureau of the Non-Aligned Movement (representing 120 States) addressed similar points in an almost simultaneous statement, condemning the 'illegal practice' of allowing lawsuits to be lodged against sovereign States, that the legislation 'pav[ed] the way for illegally confiscating foreign assets', and 'the actions by the United States Government to unlawfully hold' assets of foreign States.[91] Thus these objections apparently all concern the non-judicial measures by the executive branch.[92]

Similarly, the Foreign Minister of Venezuela contended that as a result of unilateral sanctions—which also included the freezing of assets of the central bank[93]—Venezuela 'suffered the brunt of a multidimensional financial, economic and property attack … against all legal principles of sovereign immunity'.[94] However, in comparison to Iran, Venezuela has not consistently framed its opposition against such unilateral sanctions as an issue of State immunity.

As noted in the Introduction, these arguments have resurfaced in relation to the measures taken against assets of the CBR. The most 'formal' fora for such arguments were debates on a UN General Assembly (UNGA) resolution recognizing that the Russian Federation was under an obligation to make reparation for the invasion of Ukraine, as well as the need for 'an international mechanism for reparation' and recommending the creation 'of an international register of damage' by the Member States.[95] While most of the States voting against the resolution framed it as an opposition to 'double standards', two abstaining States referred to sovereign immunity. The United Arab Emirates expressed 'concern over the resolution's implications for sovereign equality and sovereign immunity' and Sri Lanka argued that the UNGA cannot 'usurp the

[90] 'Letter dated 28 April 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (29 April 2016) UN Doc A/70/853–S/2016/400, 3.

[91] Communiqué annexed to 'Letter dated 5 May 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (6 May 2016) UN Doc A/70/861–S/2016/420. See also Human Rights Council, 'Visit to the Islamic Republic of Iran: Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Alena Douhan' (4 October 2022) UN Doc A/HRC/51/33/Add.1, para 93(d).

[92] For a different interpretation, see Brunk (n 40) 1635 (contending that '[t]he measures against Iran were not sanctions imposed by the executive branch, … and so they are legally distinct from other sanctions regimes that merely freeze assets through executive actions').

[93] There is a notable difference between Iran and Venezuela, however, in that the measures affecting the latter's central bank were taken against the background of disputes on who was the legitimate government. On this issue, see Supreme Court (United Kingdom), *"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57.

[94] C Torres, 'Foreign Minister Félix Plasencia: "Unilateral Coercive Measures Constitute Crimes against Humanity"' (15 September 2021) <https://archive.ph/7Eibm#selection-449.0-449.99>.

[95] UNGA Res ES-11/L.6 (7 November 2012) UN Doc A/ES-11/L.6.

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sovereign immunity of State property under international law'.[96] The Russian Federation also argued that 'the funds for damage compensation will be drawn from frozen, or rather stolen, Russian assets', that the UNGA could not 'annul sovereignty immunity, which States assets have under international law' and that the resolution would lead to the 'illegal expropriation of sovereignty assets'.[97]

The Russian Federation has reacted to the ongoing debate on the seizure of its assets by issuing bilateral statements or declarations together with China,[98] Iran[99] and Nicaragua,[100] all of which refer to the impermissibility under international law of seizing foreign State property in light of its immunity.[101] In other public statements Russian officials have decried the blocking of assets as a violation of 'all norms and rules both of … domestic legislation and international law'.[102]

However, States have also referred to State immunity in other very different circumstances when their property was affected by executive action. For example, an incident in which 'bags containing official correspondence and communications' were opened by Spanish officials on the border to Gibraltar, was

[96] For these statements, see UN, 'General Assembly Adopts Text Recommending Creation of Register to Document Damages Caused by Russian Federation Aggression against Ukraine, Resuming Emergency Special Session' (14 November 2022) GA/12470 <https://press.un.org/en/2022/ga12470.doc.htm>. The representative of the Democratic People's Republic of Korea similarly expressed 'concern over the possibility of abusing this draft resolution as a basis to illegally seize property and assets of a sovereign State'.

[97] See ibid. See also a prior statement of the Spokeswoman of the Russian Foreign Ministry in The Ministry of Foreign Affairs of the Russian Federation, 'Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, November 9, 2022' (9 November 2022) <https://mid.ru/en/foreign_policy/news/1837618/>.

[98] President of Russia, 'Joint Statement of the Russian Federation and the People's Republic of China on Deepening Comprehensive Partnership and Strategic Interaction Relations Entering a New Era in the Context of the 75th Anniversary of the Establishment of Diplomatic Relations between the Two Countries' (16 May 2024) <http://kremlin.ru/supplement/6132>.

[99] Ministry of Foreign Affairs of the Russian Federation, 'Declaration of the Russian Federation and the Islamic Republic of Iran on Ways and Means of Countering, Mitigating and Compensating for the Negative Consequences of Unilateral Coercive Measures' (5 December 2023) <https://mid.ru/ru/foreign_policy/news/1919257/>.

[100] Ministry of Foreign Affairs of the Russian Federation, 'Declaration of the Russian Federation and the Republic of Nicaragua on Ways and Means of Countering, Mitigating and Compensating for the Negative Effects of Unilateral Coercive Measures' (23 April 2024) <https://mid.ru/ru/detail-material-page/1945916/>.

[101] The Russian Federation also lodged a diplomatic protest in reaction to a legislative motion in the Swiss parliament relating to the confiscation of State assets, as this would violate 'the fundamental principles and norms of international law regarding state immunity', see Ministry of Foreign Affairs of the Russian Federation, 'Press Release on a Demarche to the Ambassador of Switzerland to Russia' (12 March 2024) <https://mid.ru/en/foreign_policy/news/1937963/>. During the legislative procedure, the Committee on Legal Affairs of the Swiss Council of States also considered that these assets would in principle be protected by State immunity, see Kommission für Rechtsfragen des Ständerates, 'Bericht der Kommission für Rechtsfragen vom 8. Januar 2024' (8 January 2024) <www.parlament.ch/centers/kb/Documents/2023/Kommissionsbericht_RK-S_23.3264_2024-01-08.pdf>.

[102] The Kremlin press secretary concerning the failure to unfreeze sovereign assets, see 'Countries Meddling with Russia's Assets Should Unfreeze Them Without Any Terms—Kremlin' (*TASS*, 26 May 2023) <https://tass.com/economy/1623599>. Likewise, the Russian Deputy Foreign Minister, see 'Diplomat Pledges Fight against Russian Assets Freeze in West' (*TASS*, 20 August 2022) <https://tass.com/politics/1496227>.

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called a 'breach of the principles underlying the Vienna convention on diplomatic relations, and the principle of state immunity' by the British Minister for Europe.[103]

What remains surprising though is that neither the affected States nor the central banks themselves have thus far challenged in court the legality of asset freezes on immunity grounds. In relation to proceedings before the ICJ, this may be explained by a potential lack of a jurisdictional basis. Notably, Iran was unable to plead violations of State immunity in *Certain Iranian Assets*, as such violations were not covered by the compromissory clause of the Treaty of Amity.[104]

However, jurisdictional issues cannot explain the lack of legal challenges before the Court of Justice of the EU (CJEU). Article 263(4) of the Treaty on the Functioning of the European Union allows any legal person—including States[105] and their central banks—to bring an action for annulment against restrictive measures that are directly addressed to them. These measures may be annulled due to an 'infringement of the Treaties or of any rule of law relating to their application'—which also includes norms of customary international law. While not in the context of a challenge against restrictive measures, the CJEU has held that:

> [t]he principles of customary international law … may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act … and, second, the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard.[106]

The case law of the CJEU thus suggests that a violation of State immunity under customary international law could lead to the annulment of the legal act imposing restrictive measures.[107] However, although the Central Bank of Iran has challenged restrictive measures—including the freezing of funds—before the CJEU, it notably has not raised any arguments concerning State immunity.[108] A challenge on the basis of State immunity may yet be brought before the CJEU, however, as the

[103] Hansard, HC Deb, 27 November 2013, vol 571, col 261 (noting that the British government has 'now received an explanation from the Spanish Government and been assured that we will not see a repeat of those actions. As the Spanish authorities know, overriding international principles provide for both State immunity and the freedom of official communication between a state and its representatives.'). The UK Prime Minister also made that argument during the same debate, see Hansard, HC Deb, 27 November 2013, vol 571, col 256.

[104] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Preliminary Objections, Judgment) [2019] ICJ Rep 7, paras 48–80.

[105] See C-872/19 P *Venezuela v Council (Affectation d'un État tiers)* EU:C:2021:507, paras 42–53.

[106] C-366/10 *Air Transport Association of America and Others* EU:C:2011:864, para 107; see also C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, paras 47–48.

[107] Judicial review of sanctions against individuals by the CJEU has notably generally 'been limited to procedural aspects' and recognized the broad discretion enjoyed by the Council in this context, see E Chachko, 'Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence' (2019) 44(1) YaleJIntlL 1, 14.

[108] Case T-262/12 *Central Bank of Iran v Council of the European Union* EU:T:2014:777, paras 8, 63; Case T-563/12 *Central Bank of Iran v Council of the European Union* EU:T:2015:187, paras 8, 45.

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Chairwoman of the CBR has repeatedly affirmed that they are working on legal challenges, calling it 'a rather complex legal process'.[109]

At any rate, there seems to be no *opinio juris* clearly suggesting that State immunity is generally irrelevant in the context of non-judicial measures of constraint. This becomes apparent when examining statements of the actors that have taken such sanctions or are politically supportive of them. While the EU asserts that '[a]ll restrictive measures adopted by the EU are fully compliant with obligations under international law',[110] it provides no explicit legal reasoning on the (non-)applicability of norms of State immunity, the existence of exceptions or the character of restrictive measures as countermeasures.

A Committee of PACE has espoused the notion that State immunity would not protect foreign States' assets from executive measures based on domestic legislation.[111] However, the PACE resolution passed on the basis of this Committee report only suggests that such measures would qualify as countermeasures, which would be 'unassailable within the framework of sovereign immunity'.[112] Beyond this statement in the Council of Europe, States supportive of asset freezes on the political level have raised State immunity concerns themselves. Thus, in a public statement the Ukrainian Minister of Justice, when calling for the seizure of frozen Russian State assets, noted that they 'are protected by sovereign immunity, but our understanding is that assets of a state (that) started a war, committed aggression, shall not be protected by sovereign immunity'.[113] In addition, a leaked non-paper of the EU's Ad Hoc Working Party on Frozen Assets argues that State immunity:

> does not prohibit proportionate administrative restrictive measures which are temporary, reversible and not confiscatory in nature and which pursue the legitimate objectives of the Union's external action (hence the legality of the current restrictive measures adopted in respect of assets held, owned or controlled by the Russian state and its entities).[114]

In both instances, the statements read as if State immunity is in principle applicable, but is not violated due to certain exceptions.[115] The non-paper cannot be considered

[109] See e.g. 'Bank of Russia to Continue Work on Frozen Assets Release—Central Bank Chief' (*TASS*, 10 February 2023) <https://tass.com/economy/1574981>.

[110] Council of the EU, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (7 June 2004) para 3 <https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf>; Council of the EU, 'Sanctions Guidelines—Update' (4 May 2018) paras 9, 11 <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

[111] Council of Europe (PACE), Report of the Committee on Political Affairs and Democracy 'Support for the Reconstruction of Ukraine' (22 February 2024) Doc 15932, para 76.

[112] Council of Europe (PACE), Resolution 2539 (2024) 'Support for the Reconstruction of Ukraine' (16 April 2024) para 6.

[113] A Brzozowski, 'EU Freezes Russian Assets Worth €13.8 billion, but Struggles to Move towards Seizure' (*Euractiv*, 12 July 2022) <www.euractiv.com/section/global-europe/news/eu-freezes-russian-assets-worth-e13-8-billion-but-struggles-to-move-towards-seizure/>.

[114] See Tamma (n 13) link 2: document obtained by POLITICO (EU Non-paper on the generation of resources to support Ukraine from immobilised Russian assets) 4.

[115] See 'Why the EU Will Not Seize Russian State Assets to Rebuild Ukraine' (*The Economist*, 20 July 2023) <www.economist.com/europe/2023/07/20/why-the-eu-will-not-seize-russian-state-assets-to-rebuild-ukraine>.

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to express the *opinio juris* of the EU (or its Member States) given its lack of publicity. However, it suggests that statements of the EU arguing that State immunity from non-judicial measures of constraint does not exist are unlikely to be forthcoming.

3.3. Conclusion on the existence of State immunity from non-judicial measures of constraint

The analysis above arguably shows that customary international law provides for a norm of State immunity from non-judicial measures of constraint. While somewhat scattered, State practice shows State immunity readily being applied in non-judicial settings, without this being considered as a peculiarity. Although not apparent in every instance, expressions of *opinio juris* appear to be predominantly in favour of State immunity from non-judicial measures of constraint, rather than against it. In particular, and in contrast to some scholars arguing for the existence of such a norm,[116] one does not have to rely on the principle of sovereign equality as its sole basis.

However, in many ways the force of the argument for a customary norm of State immunity from non-judicial measures of constraint depends on what the default rule is considered to be: the exemption from the application of domestic law, requiring the emergence of a new exception in non-judicial settings, or the precedence of sovereignty of the territorial State, requiring that such immunity is affirmatively shown.[117] From a historical perspective, this also relates to uncertainty whether the Latin maxim *par in parem non habet imperium*, as its wording suggests,[118] should be read as meaning that foreign States are generally free from the exercise of sovereign authority or whether that is limited to the exercise of adjudicative jurisdiction. As already alluded to above, scholarly opinion on the content of that 'default rule' is similarly divided to that on the (non-)existence of State immunity from non-judicial measures of constraint.[119] Likewise, judicial practice may be found for both a wider and more narrow understanding of the maxim of *par in parem non habet imperium*.[120]

That being said, outside the field of State immunity, State property located abroad is unlikely to enjoy any other protection under international law: in particular, States have no substantive right to property under general international law or under treaties within international economic law.[121] Even when they hold property through separate

[116] See Thouvenin (n 36) 213.

[117] See WS Dodge and CI Keitner, 'A Roadmap for Foreign Official Immunity Cases in U.S. Courts' (2021) 90 FordhamLR 677, 702ff (calling this the 'baseline question' and arguing for non-immunity to be the default rule).

[118] See text accompanying n 28 above.

[119] Section 2.2.

[120] For a broad understanding of the maxim, see e.g. Hague District Court (the Netherlands), C/09/554385 / HA ZA 18/647 (29 January 2020) ECLI:NL:RBDHA:2020:667, para 4.7: 'State immunity ensues from the customary international-law principle of equality of states (*par in parem non habet imperium*, equals have no sovereignty over each other).' For a narrow understanding, see e.g. Supreme Federal Court (Brazil), *Consulate-General of Japan v Ribeiro de Lima* (30 April 2002) ILDC 447 (BR 2002) para 33.

[121] In particular, economic treaties that enshrine property protections, namely investment treaties and Treaties of Friendship, Commerce and Navigation, do not protect State property as such. See also P

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legal entities, these have to meet additional requirements to qualify as 'companies' or 'foreign nationals' which might enjoy protection under certain treaties—a test which Iran's Central Bank notably did not meet in the context of the Iran–US Treaty of Amity.[122] Whilst the lack of alternative protection for State property has no legal bearing on the present question, such policy considerations will nevertheless shape the position of States in relation to immunity. Even assuming that a norm of State immunity from non-judicial measures of constraint exists does not imply that property of a foreign State benefits from absolute protection from the exercise of sovereign authority by the territorial State. The following section further analyses the norm and provides some indications as to its scope and content.

4. Sketching the contours of the norm

As with the existence of a customary norm, its content is to be assessed on the basis of State practice and *opinio juris*.[123] However the scarcity of (publicly available) practice in this context renders this task somewhat more difficult. Despite this, there is evidence to suggest that immunity against measures of constraint in a non-judicial context differs from that applicable in a judicial setting. If, taking the ICJ approach in *Jurisdictional Immunities*, immunity is conceptualized as balancing two competing principles, it is easy to understand that the balance is different in the judicial context than in the non-judicial context. In both instances, measures of constraint taken against State property that is in use for 'governmental non-commercial purposes'[124] may be considered an encroachment on the foreign State's sovereignty.[125] Which branch the responsible organ of the territorial State belongs to appears immaterial to the existence of that encroachment as such. However, the sovereign interests of the territorial State may be implicated to a greater degree in a non-judicial context, where what is at stake may be more fundamental than merely an interest in ensuring the proper functioning of civil proceedings. The subject matters falling within the purview of administrative bodies (rather than civil courts) generally touch upon public policy objectives of the State,[126] such as health and safety regulations or export and import restrictions. It thus appears inappropriate to adopt the same legal standards developed in the context of judicial proceedings.[127]

Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine' (European Parliament Research Service, February 2024) PE 759.602, 20–2; P Tzeng, 'The State's Right to Property under International Law' (2016) 125 YaleLJ 1805.

[122] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep 51, paras 40–54. For the relevant legal standard, see *Certain Iranian Assets* (Preliminary Objections) (n 104) para 91 ('an entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a "company"').

[123] *Jurisdictional Immunities* (n 19) para 55.

[124] ibid, paras 118–119.

[125] O'Keefe (n 33).

[126] That balancing operation is of course again different in the context of criminal proceedings.

[127] See, however, the legal opinion of the Austrian Office of the Legal Advisor, which drew a distinction between a *decision-making process* of an executive body and *the actual enforcement* of a decision (potentially involving the full extent of enforcement jurisdiction). In doing so, it applied the exceptions from jurisdictional immunities and immunity from enforcement, as reflected in the 2004 UN

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The following discussion seeks to elucidate the content of State immunity from non-judicial measures of constraint. In particular, this article argues that the norm is subject to a public policy exception, meaning the territorial State may take extraordinary measures against foreign State property to safeguard certain vital interests. Such interests would include preventing the commission of crimes, ensuring the investigation of crimes directed against the State[128] and preventing other threats to public safety. Rather than relying on the traditional exception of 'commercial' use of property, the analysis considers the specific purpose of the measure of the territorial State, rather than the purpose of the property of the foreign State.[129]

Moreover, as this public policy exception is contingent on the existence of a crime or a threat, certain determinations would be required, which could take account of the broader conduct of the foreign State. First, there must be a sufficient connection between the specific foreign State property and the particular crime or abstract threat. Second, measures might only be permissible on a temporary basis for the duration that the specific foreign State property poses a threat to public safety or is likely to be used in the commission of a crime. Acknowledging the existence of a public policy exception in the context of non-judicial measures of constraint also means that the territorial State may take certain measures against foreign State property through executive or legislative acts, which would be unlawful in the judicial context.[130] From a policy perspective, this is justified by the fact that the sovereign interests of the territorial State tend to be affected to a much greater degree in matters in which it acts through its executive or legislature. Thus, formulating and ascertaining what specific 'public policy' concern is sufficiently important to allow for measures of constraint to be taken is crucial to prevent eroding State immunity protections.

Given the scarcity of practice on State immunity, the argument also draws on case law on inviolability, with some caveats.[131] Most importantly, and despite some arguments to the contrary,[132] inviolability has no general relevance for State property, but rather is limited to those fields (such as diplomatic or consular law) in which it is provided for by treaty law.[133] While immunity is repeatedly invoked in the context of non-judicial measures, references to inviolability in State practice

Convention on Jurisdictional Immunities of States and Their Property (n 48). See Tichy, Bühler and Niederdorfer (n 77) 262–4.

[128] In this context, one might draw an analogy to the crimes encompassed by the 'protective principle' in the law of jurisdiction, see KS Gallant, *International Criminal Jurisdiction: Whose Law Must We Obey?* (OUP 2022) 409ff.

[129] cf UN Convention on Jurisdictional Immunities of States and Their Property (n 48) art 19(c).

[130] It appears undisputed there is no 'public policy exception' to immunity from execution in the judicial context, see H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 484ff.

[131] For similar reasoning, see Quiason J in Supreme Court (Philippines), *The Holy See v The Hon Eriberto u Rosaria, Jr et al* (1 December 1994) G.R. No 101949 ('If this immunity is provided for a diplomatic envoy, with all the more reason should immunity be recognized as regards the sovereign itself, which in this case is the Holy See.').

[132] See the arguments of M Wood on behalf of Timor-Leste in *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* Verbatim Records (20 January 2014) CR 2014/1, paras 19, 22.

[133] See *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Counter-Memorial of Australia) (28 April 2014) 107, para 5.65.

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and *opinio juris* are limited to the aforementioned fields of law. However, the case law on inviolability might still assist with determining the *content* of State immunity from non-judicial measures of constraint for two reasons. First, their scope of application overlaps insofar as both are concerned with the exercise of enforcement jurisdiction against foreign State property. Notably, judicial bodies, including the ICJ, often refer to both inviolability and immunity when concerned with judicial measures of constraint. Second, the (quasi-)absolute nature of inviolability[134] suggests that its level of substantive protection will never fall below that provided by State immunity. Therefore, it is reasonable to assume that any measure in conformity with inviolability would likewise not provoke a claim of State immunity from non-judicial measures of constraint, rendering the case law on the former useful for ascertaining the content of the latter.

With regard to the content of State immunity from non-judicial measures of constraint, the first question concerns the definition of 'measures of constraint'. This allows determining the minimum level of interference required in order for measures taken by the territorial State in relation to foreign State property to *prima facie* qualify as a breach of State immunity. In the judicial context, the term 'measure of constraint' is used as a:

> generic term intended to embrace all measures capable of being taken against or in relation to property in connection with, and subsequent to the handing down of judgment in, court proceedings, with a view to executing that judgment.[135]

A comparable matter was also addressed by the ICJ in the *Arrest Warrant* case, where it found that a Minister for Foreign Affairs:

> enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.[136]

In a subsequent case, the Court clarified that 'the determining factor' was whether the person enjoying immunity was subjected 'to a constraining act of authority'.[137] The same considerations should apply to non-judicial measures taken against foreign State property. Therefore, a measure is not contrary to State immunity if the person, entity or property enjoying immunity is not subjected to (or threatened with) the coercive powers of the State, but rather retains freedom of action.[138] Thus conducting investigations may not fall foul of the principle of immunity, even when

[134] See ibid 107, para 5.63.

[135] C Brown and R O'Keefe, 'Article 19' in R O'Keefe and CJ Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 316.

[136] *Arrest Warrant* (n 44) para 54.

[137] *Certain Questions of Mutual Assistance in Criminal Matters* (n 44) para 170; see also Lord Dyson in Court of Appeal (Civil Division) (UK), *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708, para 64 ('the universal definition of "inviolability" [of a diplomatic mission] is freedom from any act of interference on the part of the receiving state').

[138] See e.g. *Certain Questions of Mutual Assistance in Criminal Matters* (n 44) para 171 (finding that a 'summons addressed to the President of the Republic of Djibouti by the French investigating judge … was in fact merely an invitation to testify which the Head of State could freely accept or decline').

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such coercive powers are used *vis-à-vis* third parties in this context.[139] States therefore remain free to gather information about any foreign sovereign assets present in their territory, including through requiring the actual asset holders—insofar as they are distinct from the foreign State—to report them.

If the executive or legislative conduct of a territorial State in relation to foreign State property qualifies as a measure of constraint, this article argues that it may still be lawful based on a public policy exception. This finds explicit support in the New Zealand Court of Appeal case *Controller and Auditor-General v Sir Ronald Davison*. The Court was concerned with whether in the light of sovereign immunity, a Commissioner of Inquiry had the power to require the production of documents belonging to another State for the purpose of investigating violations of domestic tax law. The judges employed various arguments to deny the plea of sovereign immunity but they all noted that in principle, considerations of 'iniquity and public policy' may provide for a separate exception.[140] For instance, Judge Richardson stated that:

> [w]here the conduct of the foreign state is in question, refusal of a claim to sovereign immunity could be justified only where the impugned activity, if established, breaches a fundamental principle of justice or some deep-rooted tradition of the forum state.[141]

Such a public policy exception is not generally accepted in the context of jurisdictional immunities and court orders requiring the production of sovereign property as evidence would not be enforceable under the current law of State immunity.[142]

However, there is support for the proposition that interferences for the purpose of gathering evidence can be permissible in the case law on inviolability: the Slovenian Supreme Court found that drawing blood from a diplomat (with their consent) after a traffic accident did not violate their inviolability.[143]

Moreover, the prevention of crime may constitute a public policy concern that allows executive authorities to take extraordinary and temporary measures. In *Tehran Hostages*, the ICJ held that:

> the observance of this principle [of inviolability] does not mean … that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.[144]

[139] *Arrest Warrant* (n 44) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) para 59 ('commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles [of inviolability and immunity]. The function served by the international law of immunities does not require that States fail to keep themselves informed.').

[140] Byers (n 70) 724–5.

[141] Richardson J in Court of Appeal (New Zealand), *Controller and Auditory-General v Sir Ronald Davison* (CA 226/95), *KMPG Peat Marwick and Others v Sir Ronald Davison* (CA 223/95) and *Brannigan and Others v Sir Ronald Davison* (CA 231/95) [1996] 2 NZLR 278, 305.

[142] See Fox and Webb (n 130) 504.

[143] *AA v Supreme Court of Slovenia*, Request for protection of legality, Judgment I Ips 54983/2010-269, ILDC 3192 (SI 2014), 9 January 2014, Supreme Court of Slovenia, paras 22–23.

[144] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, para 86.

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There is also an indication in practice that territorial States may temporarily seize property of a foreign State if necessary to prevent crimes in domestic law or ensure their prosecution. The property in question is passports, which are typically property of the issuing State, but might be seized by local authorities *inter alia* to prevent a suspect from leaving the country.[145]

The existing case law thus shows that certain public policy objectives of the territorial State may allow it to take measures of constraint in relation to foreign State property that would otherwise violate State immunity. These public policy objectives arguably include the prevention of crimes, ensuring the investigation of crimes directed against the State, and preventing other threats to public safety. The following conclusion will further address how this norm of State immunity from non-judicial measures of constraint relates to the specific example of measures taken or proposed to be taken against Russian sovereign assets.

5. Conclusion

The above analysis demonstrates that the law of State immunity applies to measures of constraint, regardless of whether they are adopted in a judicial or a non-judicial setting. In addition to reflecting existing State practice and *opinio juris*, this outcome is also preferable for reasons of practical expediency—largely removing the need to discern from which organ a particular measure originated—as well as conceptual coherence. However, practice also indicates that the normative content of State immunity differs in a non-judicial context, given the differences between (civil) court proceedings and matters before executive organs.

The renewed interest in the concept of State immunity in relation to non-judicial measures of constraint has been prompted by the sanctions taken against the Russian Federation in response to its invasion of Ukraine. A comprehensive assessment of this particular situation requires consideration of certain other legal issues. As a preliminary matter, immunity protections are contingent on the existence of (property) rights of a State in the respective assets. Their existence is in principle determined by the *lex situs*, and may also require consideration of contractual arrangements. As noted in investment tribunals (and no less pertinent in the present circumstances): '[p]ublic international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.'[146]

[145] In *Seizure and Detention of Certain Documents and Data* (Counter-Memorial of Australia) (n 133) 114–16, paras 5.80–5.83, Australia contended that State property as a general matter enjoyed no special immunity or inviolability, as 'State practice demonstrates a willingness to allow the relevant authorities of a forum State to confiscate or seize (at least temporarily) the foreign passport of an individual', even though those passports are property of a foreign State. However, this may also be explained by an exception to immunity, to prevent violations of domestic law or investigate them. See also DC Turack, 'Selected Aspects of International and Municipal Law Concerning Passports' (1971) 12(4) Wm&MaryLRev 805, 807 ('Most states no longer take custody of a foreign passport without prompt notification and return of the passport to the representatives of the issuing authority.').

[146] *Emmis International Holding, B.V. et al v The Republic of Hungary*, ICSID Case No ARB/12/2, Award (16 April 2014) para 162.

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Thus, insofar as the applicable domestic law does not result in (property) rights of a State to certain assets, these assets are *prima facie* not protected by immunity. This matter is at the heart of the debate surrounding the legality of taxing the windfall profits of CSDs stemming from income generated by CBR assets. While determination of the existence of rights ultimately depends on (confidential) contractual relationships, publicly available information suggests that the CBR does not have a proprietary claim to these profits and thus they are not protected by State immunity.[147]

In addition, the Russian Federation will not be protected from the executive and legislative conduct of sanctioning States that falls below the threshold of 'measures of constraint'. In particular, there is no reason to believe that the creation of an international register of damage relating to the invasion of Ukraine—even if outside the framework of the UN—would raise any issues under immunity law.[148]

In contrast, sanctions involving the freezing or immobilization of assets in principle fall within the scope of application of State immunity. This is where the public policy exception suggested above would become relevant, as sanctioning States may seek to show that that these measures serve a sufficient sovereign interest. The case law discussed above has accepted that measures of constraint may be taken to prevent (certain) violations of domestic law, and this may also extend to the prevention of violations of international law. Thus, sanctioning States would have to show that the specific foreign State property would likely be used in furtherance of violations (such as financing the aggression against Ukraine). However, as the public policy exception largely allows for preventative measures, they must be temporally limited to the duration of the existence of a threat of violations.[149]

However, State immunity will arguably still prohibit measures going beyond that. Thus, domestic legislation of the territorial States prescribing a particular use of CBR assets (as suggested by the 'temporary active management' option) or actually confiscating them is unlikely to be lawful under State immunity. With regard to these measures, the relevant legal question does not lie in the law on State immunity, but rather under the law of State responsibility. The question of whether they may be justified as countermeasures has also been the subject of much scholarly debate.[150]

In conclusion, State immunity from non-judicial measures of constraint should be conceptualized as a norm with distinct content. This contributes to assessing the lawfulness of sanctions, as well as a wide range of other situations in which the

[147] This is also suggested by recital 16–19 of Council Decision (CFSP) 2024/577 (n 16); see also Webb (n 121) 41; A Ripenko, 'Funding Ukraine's Aid: New Challenges' (*EJIL:Talk!*, 7 December 2023) <www.ejiltalk.org/funding-ukraines-aid-new-challenges/>.

[148] As suggested by the United Arab Emirates, the Russian Federation and Sri Lanka, see UN (n 96).

[149] When arguing that restrictive measures against the CBR conform with State immunity, the EU Non-paper notably also refers to their temporary and reversible nature and the public policy reasons to take them ('legitimate objectives of the Union's external action'), see Tamma (n 13) link 2: document obtained by POLITICO (EU Non-paper on the generation of resources to support Ukraine from immobilised Russian assets) 4.

[150] See in particular Webb (n 121) 24–9.

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executive and legislative authorities of a territorial State may take measures affecting foreign State property.

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