

CONFISCATION ESTONIAN STYLE: LEGAL AND POLITICAL ASPECTS OF POTENTIAL SEIZURE OF RUSSIAN ASSETS IN EU COUNTRIES

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The possible confiscation of Russian assets by Western countries is one of the serious challenges to modern international law and the system of international relations. Since the greater part of the frozen assets is under the jurisdiction of EU countries, special attention should be paid to studying mechanisms for the use of Russian assets within the EU. The purpose of this article is to identify the key characteristics of the EU's approaches to the use of frozen Russian assets, determine their compliance with international law and investigate possible consequences for the modern system of international relations. To achieve this goal, the author analysed the legal aspect of this problem, examined the compliance of the initiatives to confiscate Russian property with the norms of modern international law and pinpointed the potential consequences of such actions. It is concluded that possible options for seizing sovereign assets contradict the norms of international and national law. Therefore, all these methods are unfeasible within the current legal framework. Yet, the main obstacle to implementing the plans to seize Russian sovereign assets lies not within the legal realm, but in the political sphere since such actions could result in unforeseeable ramifications. The mechanism proposed by the European Commission for seizing private property within the framework of criminal proceedings implies the use of criminal law to solve political problems, which is at variance with the objectives of criminal policy.

Keywords:

European Union, Russia, sovereign assets, private property, confiscation, Estonia, principle of sovereign immunity, international law

Introduction

In June 2023, the Estonian authorities announced that the development of a mechanism for the seizure of Russian assets had been completed. On 12 October 2023, the Estonian government adopted a bill amending the Act on International

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Sanctions¹, which was subsequently submitted to Parliament for approval. According to the information made public, the new bill lays down national rules allowing the utilisation of assets belonging to individuals targeted by restrictive measures to compensate Ukraine for damages.² It can be concluded that this refers to the frozen assets of private individuals targeted by restrictive measures. These assets, according to the Estonian authorities' estimates, amount to approximately 38 million euros.

Thus, according to the Estonian authorities, the country may become the first EU member state to legally establish a national mechanism for the seizure of foreign property. At the same time, the country's authorities hope that their experience will serve as an example for the entire EU.

Estonia, however, is not the pioneer in this matter. In 2022, amendments to the Special Economic Measures Act³ were approved in Canada. According to these amendments, the Prime Minister was granted the right to confiscate property located in Canada and owned by a foreign state in case of a serious violation of international peace and security or of significant and systematic human rights violations in a foreign state [1].

The information disclosed by the Estonian government does not yet clarify how the property confiscation mechanism will work in Estonia and whether it concerns sovereign assets of the Russian Federation. Yet, to date, no state has implemented a mechanism for confiscating foreign private and sovereign property or has a clear understanding of how this can be executed.

It is not coincidental that Estonia was the first EU country to assert its readiness to develop a mechanism for the seizure of Russian property. The Baltic States have always been at the forefront of anti-Russian policies, insisting on the radical option of using Russian assets for not only the needs of Ukraine but also their own.⁴ Nevertheless, these countries play a very modest role in the international financial system, and the volume of frozen assets they hold is insignificant: given the negligible volume of investment in their economies, a lack of international trust will not have catastrophic consequences for these states.

¹ International Sanctions Act, 2022, *Riigi Teataja*, URL: <https://www.riigiteataja.ee/en/eli/508032022003/consolide> (accessed 12.11.2023).

² The government will send a regulation on the use of frozen Russian assets to the Riigikogu, 2023, *Republic of Estonia Government*, URL: <https://valitsus.ee/en/news/government-will-send-regulation-use-frozen-russian-assets-riigikogu> (accessed 10.09.2023).

³ Special Economic Measures Act S.C. 1992, p. 17, as amended on 23 June 2022, 2023, *Government of Canada*, <https://laws-lois.justice.gc.ca/eng/acts/s-14.5/page-1.html#1358046-1367626> (accessed 10.07.2023).

⁴ Strupczewski, J. 2022, Exclusive: Four EU countries call for use of Russian assets to rebuild Ukraine, *Reuters*, URL: <https://www.reuters.com/world/europe/exclusive-four-eu-countries-call-use-russian-assets-rebuild-ukraine-2022-05-23/> (accessed 01.10.2023).

Confiscating foreign property has been a recurring event in global practice [2]. However, the confiscation of Russian assets has some peculiarities: firstly, due to Russia's status as a leading global power and a permanent member of the UN Security Council, and secondly, due to the amount of funds that could potentially be seized. These circumstances indicate the significant urgency of the problem, which requires comprehensive analysis from both legal and political perspectives.

According to expert estimates, around 200 billion euros of Russian sovereign assets have been frozen in EU countries, along with approximately 24 billion euros belonging to private individuals.¹ Additionally, around 40 billion US dollars is frozen in the US and approximately 20 billion US dollars in the UK [3]. These numbers stem from reports by the Central Bank of Russia, whilst Western nations lack precise knowledge regarding the whereabouts of the majority of frozen assets. Despite the apparent unity of Western countries regarding sanctions pressure on Russia, approaches to the use of frozen Russian assets in different countries and alliances may differ.

This article will examine the legal and political aspects of the EU's plans for the utilisation of Russian sovereign and private assets.

Seizure of Russian property as an element of the EU's sanctions policy

After the beginning of Russia's special military operation in Ukraine, the EU significantly tightened the regime of unilateral restrictive measures introduced in 2014 [4–6].

Amongst the numerous restrictions, the EU has prohibited any transactions related to the management of reserves and assets of the Central Bank of Russia (Article 5a (4) of Regulation N° 833/2014 as amended by Regulation N° 2022/394).² Until 2022, asset freezing was solely applied to individuals. Since February 2022, such measures have also been extended to sovereign assets

Formally, freezing is not identical to confiscation, implying that the specified assets will eventually be returned to their owners. Almost immediately, widespread appeals were made for the use of the frozen Russian assets for Ukrainian reconstruction and potentially for the needs of EU member states.

¹ EU Blocks More Than €200 Billion in Russian Central Bank Assets, 2023, *Bloomberg*, URL: <https://www.bloomberg.com/news/articles/2023-05-25/eu-has-blocked-200-billion-in-russian-central-bank-assets> (accessed 05.10.2023).

² Council Regulation (EU) 2022/394 of 9 March 2022 amending Regulation (EU) N° 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. OJ L 81, 09.03.2022, p. 1–7, 2022, *EUR-Lex*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R0394> (accessed 01.10.2023).

At the meeting held on 30—31 May 2022, the European Council called for exploring options for using frozen Russian assets for Ukrainian reconstruction (para. 13).¹ In October 2022, the European Council called on the Commission to present options for using frozen Russian assets for Ukrainian reconstruction in accordance with EU legislation and international law (para. 11).²

The issue of seizing Russian assets was once again raised at the European Council meeting on 29 and 30 June 2023, where the Council, the High Representative and the Commission were invited to continue work on frozen Russian assets in accordance with EU law and international law in coordination with partners (para. 6).³ Thus, the issue of EU countries using Russian assets has been on the Union's agenda for over a year, yet no progress has been made in this regard.

The problem of legalising the confiscation of Russian assets should be considered as consisting of two parts: the confiscation of Russian sovereign assets and the confiscation of funds and other assets belonging to private individuals.

Confiscation of private assets belonging to Russian private individuals

The term 'seizure of private Russian assets' refers to the process of confiscating property and funds belonging to Russian individuals and legal entities targeted by EU restrictive measures. In accordance with Council Decision N° 2014/145/CFSP and Council Regulation N° 269/2014, restrictions, including asset freezing, have been imposed on a range of individuals and entities. It is in relation to such property that measures for seizure from the rightful owner are planned to be applied. The Estonian government, however, intends to take a step further in this matter by extending the practice to any Russian individual, whether targeted by restrictions or not.⁴

¹ Special meeting of the European Council (30 and 31 May 2022). Brussels, 31 May 2022, *European Council*, URL: <https://www.consilium.europa.eu/media/56562/2022-05-30-31-euco-conclusions.pdf> (accessed 05.10.2023).

² European Council meeting (20 and 21 October 2022). Conclusions, *European Council*, URL: <https://www.consilium.europa.eu/media/59728/2022-10-2021-euco-conclusions-en.pdf> (accessed 05.10.2023).

³ European Council meeting (29 and 30 June 2023) — Conclusions, *European Council*, URL: <https://www.consilium.europa.eu/media/65398/2930-06-23-euco-conclusions-en.pdf> (accessed 05.10.2023).

⁴ *Estoniya khochet prodats' portovyve terminaly rossiyskikh kompaniy*. [Estonia to sell Russian companies' terminals], 2023, *Sputnik Lithuania*, URL: <https://lt.sputniknews.ru/20230628/estoniya-khochet-prodat-portovyve-terminaly-rossiyskikh-kompaniy-29305239.html> (accessed 01.09.2023).

At the EU level, the confiscation of Russian assets is primarily considered concerning individuals on the so-called sanctions list. Within the sixth package of restrictive measures, the Commission and the High Representative proposed to strengthen accountability for sanctions regime violations through criminal law measures, including property confiscation.¹ Effectively, this means the introduction of criminal law sanctions for violating Union-wide restrictive measures. On 25 May 2022, the Commission prepared a Union-wide mechanism for the seizure of property and funds from private individuals targeted by sanctions.² The main idea of this mechanism is to establish criminal liability at the Union level for sanctions violations and to introduce confiscation of property as one of the penalties. The Commission has prepared a package consisting of three draft laws to implement the proposed mechanism.

The first bill within this package was Council Decision N° 2022/2332,³ which included sanctions violations amongst the most serious transnational crimes, often referred to in Western legal terminology as Eurocrimes [7, p. 507; 8].

According to this decision, violation of Union restrictive measures constitutes a crime in compliance with the second subparagraph of Article 83(1) of the Treaty on the Functioning of the European Union (TFEU), i. e. this violation falls into the category of particularly serious transnational crimes. Remarkably, this is the first case of expanding the number of Eurocrimes provided for in Article 83 (1) of the TFEU after the implementation of the Lisbon Treaty.

Moreover, the Commission has prepared a new draft directive on confiscation⁴ intended to replace Directive N° 2014/42/EU,⁵ which is currently in effect.

¹ Council Regulation (EU) 2022/880 of 3 June 2022 amending Regulation (EU) N°269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (article 15 (1)). OJ L 153, 03.06.2022, p. 75–76, *EUR-Lex*, URL: <https://eur-lex.europa.eu/eli/reg/2022/880/oj> (accessed 25.05.2023).

² Communication from the Commission to the European Parliament and the Council towards a Directive on criminal penalties for the violation of Union restrictive measures. Brussels, 25.05.2022. COM (2022) 249 final, 2022, *EUR-Lex*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0249> (accessed 25.05.2023).

³ Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union. OJ L 308, 29.11.2022, p. 18–21, 2022, *EUR-Lex*, URL: <https://eur-lex.europa.eu/eli/dec/2022/2332/oj> (accessed 25.05.2023).

⁴ Proposal for a Directive of the Parliament and of the Council on asset recovery and confiscation Brussels, 25.05.2022. COM(2022) 245 final, 2022, *EUR-Lex*, URL: https://ec.europa.eu/home-affairs/proposal-directive-asset-recovery-and-confiscation_en (accessed 25.05.2023).

⁵ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. OJ L 127, 29.04.2014, p. 39–50, 2022, *EUR-Lex*, URL: <http://data.europa.eu/eli/dir/2014/42/oj> (accessed 05.07.2023).

Unlike the latter document, the new confiscation directive will establish a legal basis for the effective implementation of Union restrictive measures. It will also provide a mechanism for asset seizure, should it be deemed necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.

Finally, in December 2022, the Commission presented a draft directive on criminal liability for violation of Union restrictive measures.¹ The directive provides framework rules for criminalising acts related to the violation of Union restrictive measures and formulates liability for their commission. According to the draft directive, such acts include the provision of funds and property to a person in violation of the sanctions regime, failure to act in regard to asset freezing, provision of services in violation of the sanctions regime and permission of entry into the country in violation of an established ban, etc.

According to Article 10 of the draft directive, member states shall take necessary measures to ensure that funds or economic resources falling under Union restrictive measures, in relation to which a person, organisation or entity commits a crime, are considered ‘proceeds’ of crime for the purpose of the directive. In other words, regardless of the *actus reus* of the violation related to sanctions breach, frozen assets must be qualified as proceeds from criminal activity and subject to confiscation.

Thus, a legal framework for the lawful confiscation of assets and funds from private entities has been established. Based on the scheme proposed by the Commission, the conditions for the confiscation of private assets owned by Russian individuals are, firstly, the fact of imposition of restrictive measures against the owner of the said property and, secondly, the commitment by said or other individuals of actions related to the violation of the sanctions regime.

When analysing the package of draft legal acts presented by the Commission, several aspects merit particular attention. According to established international practice, confiscation as a criminal penalty is applied to property or money that has served as an instrument of a crime or has been obtained as a result of criminal activities. At the time of asset freezing, individuals subject to corresponding restrictive measures have not committed any violations.

Provisions of Article 10 of the Directive on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures, which require member states to ensure the qualification of ‘frozen assets’ as proceeds of crime, seem disputable as they may substantially infringe upon the rights of natural persons under sanctions. This imperative demand from the Union for member states to act in line with the directive undermines the very foundations

¹ Proposal for a Directive of the Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures. COM/2022/684 final, 2022, *EUR-Lex*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0684> (accessed 05.07.2023).

of the institute of confiscation, turning this criminal penalty measure into political leverage. Overall, the proposed scheme for seizing private property raises a range of questions as to the protection of property and procedural rights [10].

Analysis of the entire package of draft legal acts leads to the conclusion that the confiscation of property in criminal proceedings is to be used to address political tasks related to the seizure of property and funds from Russian individuals and their redirection towards financing the military campaign in Ukraine. Yet, criminal law should never be used to achieve political goals under any circumstances [9, p. 499].

Moreover, under Article 83(1) of the TFEU, the Union is granted the right to harmonise national criminal law rules only with regard to particularly serious transnational crimes. Criminalising certain acts can be justified only when all other options for achieving the goals of legal regulation have been exhausted [11], i.e., criminalisation must follow the *ultima ratio* principle [12]. In this particular instance, the proposal to criminalise acts related to the violation of restrictive measures is unlikely to meet the said principle. In a different political situation, violation of the sanction regime could hardly be classified as a serious transnational crime comparable to terrorism, drug trafficking, human trafficking, etc. Currently, the violation of sanctions regimes is not generally regarded as a criminal offence by most countries. The Council's swift decision to include violations of sanctions in the category of the most severe transnational crimes reflects the extreme politicisation of the proposed mechanism.

Thus, one can conclude that the preparation of the aforementioned package of draft legal acts seeks primarily not to improve EU criminal law [13; 14], but to legitimise the mechanism for the forced seizure of Russian private property located within the jurisdiction of EU countries.

When analysing the Commission's proposed mechanism for the seizure of Russian private property, attention should also be paid to yet another factor. Traditionally, restrictive measures have primarily served as instruments of the EU's common foreign and security policy. Now, however, instruments for legal cooperation in criminal matters are being used to ensure the implementation of the sanction policy at the Union level [15]. Thus, the EU's sanction policy is gradually extending beyond the scope of common foreign and security policy, permeating other areas of EU policy.

Utilisation of Russia's sovereign assets

In the study context, sovereign assets refer to funds that are part of the international reserves of the Russian Federation and are held in foreign states. Primarily, this concerns funds that have been invested by the Central Bank of Russia in foreign financial assets.

As noted earlier, in March 2022, the EU Council adopted a regulation prohibiting any operations related to the management of reserves and assets of the Central Bank of Russia. In other words, the assets of the Central Bank of Russia, located within the jurisdiction of EU countries, were frozen. These frozen assets are considered by the EU authorities and member states as subject to potential confiscation.

Despite extensive discussions on this issue, there is currently no common approach at either the political or expert level regarding the confiscation or other use of frozen Russian assets. Some researchers advocate for legal avenues for seizing Russian property [16], whilst others argue that such a measure would contradict international law [17, p. 15] or face significant legal obstacles to implementation [18].

Within the Union, there is consensus that Russia should bear financial responsibility for the damage caused by military actions in Ukraine. However, member states and EU institutions tend to differ on whether Russian sovereign assets can be used for these purposes, and if so, how to implement it.

Analysis of the current discussion on this issue reveals two main approaches: radical and compromise-seeking.

The radical approach suggests the immediate seizure of all known Russian sovereign assets for subsequent transfer to Ukraine — formally, for the country's reconstruction. Supporters of this approach traditionally include EU members comprising the so-called 'anti-Russian bloc': Poland, the Baltic States, including Estonia, and some other countries. They, however, have not yet found a universal method for seizing Russian sovereign property.

A compromise-seeking option for utilising Russian sovereign property was proposed by the European Commission's officials. In accordance with the mandate of the European Council, the European Commission presented on 30 November 2022 its plan for using Russia's frozen sovereign assets. According to the Commission, there are no legal avenues for confiscating Russian sovereign assets, so member states will have to return all funds belonging to Russia. The Commission proposes to split the decision on the use of Russian assets into two stages.

In the first stage, the Commission proposes to invest the assets of the Central Bank of Russia to generate interest income, which can be directed towards Ukrainian reconstruction. In the future, after a peaceful resolution of the conflict in Ukraine and the lifting of restrictive measures, Russian assets will be returned to Russia. However, the EU believes that a peaceful resolution of the conflict should include an obligation for Russia to compensate for the damage caused. In other words, according to the EU, Russia's access to frozen assets should be granted on the condition of compensating Ukraine for the damage caused by military actions.

Thus, both approaches imply that Russia will effectively be unable to use its assets located within the jurisdiction of EU countries. The difference between them lies in that the radical scenario suggests that Western countries would take possession of Russia's assets, transferring them to Ukraine (or retaining them for their own use to aid Ukraine). In the second scenario, EU countries would take possession of the income generated from the use of Russian assets, and in the long term, unlock Russia's access to its assets for their subsequent redirection in favour of Ukraine.

A legal basis for the possible seizure of Russia's sovereign assets

The very possibility of one state confiscating property and financial assets belonging to another state raises serious doubts regarding compliance with norms of international law [19].

First and foremost, asset confiscation entails a procedure for the forced transfer of ownership of certain property. This procedure requires a corresponding legal foundation. According to proponents of seizing Russian sovereign assets, confiscation is aimed at compensating for the damage caused by Russia's actions in the armed conflict in Ukraine. In this case, this means reparations [20, p. 64]. Yet, to execute reparations, the state's consent is necessary. It may be expressed in a document, such as an international treaty, or executed through a decision made by a body whose jurisdiction is accepted by the parties involved in the reparations. Although the UN Security Council serves as such a body, there is neither a treaty providing for compensation nor a relevant decision by the UN Security Council.

At present, international calls for compensating Ukraine for the harm inflicted by Russia as a result of the armed conflict are outlined in the United Nations General Assembly resolution dated November 14, 2022, N° ES-11/5.¹ Yet, formally, resolutions of the UN General Assembly are not legally binding. Moreover, the demand for full compensation for damages from Russia was raised by Ukraine in the lawsuit against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide.² The case mentioned is currently under consideration.

¹ United Nations General Assembly Resolution ES-11/5. Furtherance of remedy and reparation for aggression against Ukraine, 2020, *United Nations Digital Library System*, URL: <https://digitallibrary.un.org/record/3994481?ln=ru> (accessed 11.11.2023).

² Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), 2023, *International Court of Justice*, URL: <https://www.icj-cij.org/case/182> (accessed 05.10.2023).

The unilateral seizure of assets by one country from another typically occurs during wartime. However, neither EU member states nor other Western countries are currently at war with Russia [17, p. 31].

Supporters of the confiscation of Russian sovereign assets often refer to the provisions of the Articles on State Responsibility for Internationally Wrongful Acts of 2001, prepared by the UN International Law Commission (below, Articles on State Responsibility) [21], paying particular attention to paragraphs covering the use of countermeasures by the injured state against the responsible state (Article 48).¹ At the same time, central to the idea of countermeasures are incentives for the targeted state to comply with its international legal obligations [22, p. 395—396]. In other words, countermeasures are measures to compel the responsible state to fulfil its obligations [23, p. 104]. Amongst the principal characteristics of countermeasures are their reversibility and temporary nature, i.e. they shall be lifted as soon as the violated rights of the injured party are restored. By its legal nature, asset confiscation is a measure of responsibility rather than coercion as it does not possess the attribute of reversibility. Consequently, the potential confiscation of Russian sovereign assets cannot be classified as countermeasures under the Articles on State Responsibility.

When analysing the legal aspect of the possible seizure of Russian sovereign property by EU countries, another factor should be taken into account. Through its political institutions, the EU is actively engaged in discussion on these issues. But, as an integration union, it does not have sufficient competence in this area: Russian international reserves are held not within the EU but in specific member states.

The Union is based on the principle of conferral. Member states did not and could not delegate to the Union the authority to forcibly seize a third state's sovereign property. Therefore, these issues fall within the competence of member states.

According to the Central Bank of Russia, as of the end of 2021, more than a quarter of all its assets in foreign currency and gold were held in three EU countries: Germany, France and Austria. Thus, approximately half of all the frozen sovereign assets are located in these three states, and the size of Russian assets held in other countries of the Union is insignificant. Therefore, the legal decision on the possible confiscation of Russian assets will be made by these countries

¹ Report on the work of the fifty-third session of the International Law Commission (April 23 — 1 June and 2 July — 10 August 2001), 2001, *United Nations*, URL: https://www.un.org/ru/documents/decl_conv/conventions/pdf/responsibility.pdf (accessed 05.10.2023).

rather than EU institutions. The European Commission's involvement in discussions on the seizure of Russian property likely aims to showcase its active involvement and coordinate decisions made at the national level.

Confiscation and the sovereign immunity principle

A formidable obstacle in international law to the seizure of foreign sovereign property is the principle of sovereign immunity. According to the principle of equality, no state can exercise its sovereign authority over another state, its authorities or property [24, p. 49]. In the case of foreign asset seizure, one sovereign state takes ownership of assets belonging to another sovereign state. This involves intergovernmental confiscation, which fundamentally differs from confiscation within criminal proceedings. In criminal procedural matters, the decision to confiscate property from a citizen is made on behalf of the state, with the citizen, regardless of their status, initially undertaking to comply with the laws and decisions of the state. In other words, in the sphere of criminal policy, the participants in confiscation are legally unequal entities, as the state possesses sovereign authority over the citizen. In international relations, no state has sovereign authority over another, so intergovernmental confiscation is excluded by its nature.

Rooted in the principle of sovereign equality, the principle of sovereign immunity [25] has developed to protect states from negative impacts from other countries within international law [26, p. 407]. According to the commonly held perspective, the principle of sovereign immunity pertains to rules of customary international law [27].

Overall, sovereign immunity refers to a state's right to avoid being subjected to the jurisdiction of another state in all its forms — legislative, executive and judicial [28, p. 114]. The principle of sovereign immunity is enshrined in the UN Convention on Jurisdictional Immunities of States and Their Property,¹ which has not yet come into effect. The document provides for both judicial immunity and immunity from any coercive measures in connection with court proceedings, i. e. immunity from execution [29].

The principle of sovereign immunity is a rather complex category of international law. Despite its universal nature, this principle is applied differently in various countries. Several forms of sovereign immunity exist, along with diverse approaches to its application across different states. As for the immunity of cen-

¹ United Nations Convention on Jurisdictional Immunities of States and Their Property. Adopted by resolution 59/38 of the General Assembly on December 2, 2004, *United Nations*, URL: https://www.un.org/ru/documents/decl_conv/conventions/state_immunities.shtml (accessed 05.06.2023).

tral bank assets, many countries, such as France and Germany — where most of the frozen assets of the Central Bank of Russia in the EU are located — follow the concept of nearly absolute immunity or are progressing towards it [30, p. 24].

For the purposes of this article, it is important to note that the principle of sovereign immunity is the key legal obstacle to the implementation of the plan to seize Russia's state assets. The issue of sovereign immunity arises regardless of whether the radical or compromise-seeking approach has been adopted to utilise Russian assets.

As mentioned above, the European Commission proposes to allocate to aid Ukraine not the assets of the Russian Federation, but only the interest earned from their investment. The income from the use of property, however, belongs to the owner of that property. Thus, in this situation, there is a double violation of property rights: firstly, through the unauthorised use of assets for investment purposes without the owner's consent, and secondly, through the deprivation of property rights to income from the use of the property. Moreover, in the event of unsuccessful investment of Russian assets, EU member states (Germany, France and Austria) will bear the risk of loss or reduction of the asset.

Some experts believe that in the study situation, there are grounds not to apply the principle of sovereign immunity to the assets of the Bank of Russia since the UN Convention on Jurisdictional Immunities of States and Their Property has not entered into force. Additionally, this principle protects against national courts but not against international ones, let alone unilateral administrative acts [31].

Firstly, as mentioned above, the concept of sovereign immunity is part of customary international law [32; 33] and applies regardless of the entry into force of the 2004 Convention. Secondly, according to judicial practice, this concept has a broader application and extends beyond national courts.¹ As for unilateral administrative actions, reference should be made to the official commentary of the International Law Commission (ILC) regarding the Draft articles on Jurisdictional Immunities of States and Their Property. The ILC notes that the concept of 'judicial function' covers functions regardless of whether they are carried out by courts or administrative bodies.² Therefore, concerning the application of immunity from the jurisdiction of courts of another state, some decisions of admin-

¹ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I. C. J. Reports 2012, (par. 113) p. 99, 2012, *International Court of Justice*, URL: <https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> (accessed 07.06.2023).

² Yearbook of the International Law Commission. 1991. Volume II. Part Two Report of the Commission to the General Assembly on the work of its forty-third session, p. 14, 2012, United Nations. Office of Legal Affairs, URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1991_v2_p2.pdf (accessed 19.11.2023).

istrative bodies may be considered judicial, particularly if they involve property deprivation [17, p. 24]. Additionally, a state is not obliged to comply with acts of international organisations of which it is not a member and whose jurisdiction it does not recognise. If a special international tribunal is established by the EU, the US or other countries, its decisions will not be binding on the Russian Federation and most countries worldwide. Even if a considerable number of states participate in the activities of a potential tribunal, this will not confer 'international' status on the tribunal [3], nor will its decisions be binding unless the state consents to its jurisdiction. In other words, sovereign immunity implies the right of a state not to comply with any acts of a foreign state, including judicial, administrative or legislative acts, as well as acts of intergovernmental organisations of which it is not a member.

It is difficult to concur that immunities are granted by international law solely in the contexts of inter-state relations and proceedings in national courts. Immunity is provided to prevent unauthorised interference by foreign states in the affairs of other states and to preclude the exercise of judicial jurisdiction over a state without its consent. It does not matter whether foreign states exercise this jurisdiction unilaterally or through a collective body, to which the concerned state has not consented [26, p. 417].

Possible consequences of forced seizure of Russian assets

The principle of sovereign immunity and other complexities of international law are not the sole obstacles to the use of Russian assets. It is quite evident that interested states may attempt to justify the necessity of seizing Russian sovereign assets by the exceptional nature of the conflict in Ukraine, acting within the framework of collective self-defence, etc. Recently, there has been a notable expansion in the variety and scope of unilateral economic measures employed within international relations [34, p. 407]. Experts propose various ways to overcome the existing limitations of international law [35, p. 53–56].

Thus, the restrictions arising from existing international law are not the key impediment to implementing the plan for confiscating Russian assets. It seems that the primary concern behind the EU's hesitancy regarding the forcible seizure of Russian assets is the apprehension of potential repercussions stemming from an unprecedented confiscation of substantial sovereign assets, particularly from a powerful country like Russia.

Despite attempts by individual countries to advance the issue of seizing Russian property, such a decision is unlikely to be made at the national level. In the current situation, extraordinary measures for confiscating Russian property can only be taken collectively under the leadership of the US. However, the US

is particularly cautious in this matter because the legal protection of foreign assets, including central bank assets, serves as the foundation for the role the US has in the global economy. Devaluation of such protection could undermine the US economy and significantly reduce its economic role and resources in the world [36].

As noted earlier, most of Russia's frozen assets are held in France, Germany and Austria. The economies of these countries, along with the US, the UK, Canada, and Japan, which have also opted to freeze Russian assets, partly depend on attracting foreign assets. Moreover, investors — both private and public individuals — may originate from countries that may potentially face economic measures similar to those applied to Russia. As a result, investments in the Western economy will no longer be deemed safe for these countries and their private business representatives. Increasing sanctions pressure on Russia has already launched a process of asset outflow from Western jurisdictions.¹ All this raises concerns amongst Western countries about whether they will be able to attract assets from foreign central banks in the future [37, p. 15].

Even if the confiscation of sovereign assets is justified as a countermeasure or method of collective self-defence, it can lead to political consequences such as retaliatory measures, loss of confidence in transnational property rights protection and further weaponisation of the global financial system amid confrontation with various countries [3].

There is yet another aspect to consider. Some foreign researchers advocate for exemptions from international law concerning the seizure of Russian assets, citing the exceptional international situation. Unfortunately, there is nothing extraordinary about the conflict in Ukraine. In recent decades, the world has seen and continues to witness numerous international armed conflicts initiated by Western countries with significantly more serious consequences and a much higher number of victims. Creating an international mechanism for compensation in favour of one side of the conflict will prompt several countries to seek compensation from the US, UK, France, Belgium and other nations for incurred damages. Finally, this will further inspire Poland in its intention to seek compensation from Germany for the damage caused during World War II.

So, the obstacles to confiscating Russian sovereign assets are primarily political rather than legal. Moreover, in recent instances of international legal practice, there have been cases of successful challenges to unilateral actions concerning property rights restrictions. In particular, this refers to the decision of the

¹ Jones, M. 2023, Countries repatriating gold in wake of sanctions against Russia, study find, *Reuters*, URL: <https://www.reuters.com/business/finance/countries-repatriating-gold-wake-sanctions-against-russia-study-2023-07-10/> (accessed 05.06.2023).

International Court of Justice of 30 March 2023,¹ which recognised that the US violated its obligations under international law by freezing the assets of some Iranian companies (para. 157, 159) and confiscating such assets without due compensation (para. 187, 192). Moreover, the court ordered the United States to pay compensation.² This decision did not concern sovereign assets, as the court concluded that it has no jurisdiction. In general, this ruling confirms the notion that unilateral infringements on the property rights of foreign entities are illegal.

There is another practical complication concerning the possibility of confiscating Russian assets. The successful implementation of such actions requires precise information about the location of the assets of the Central Bank of Russia is necessary. Yet, as mentioned earlier, EU countries still do not have accurate information on the matter [37, p. 15]. For this reason, representatives of the EU and G7 countries are leaning towards a strategy whereby Russian assets, instead of being confiscated, will be withheld until Russia agrees to compensate Ukraine. In other words, alongside radical and compromise-seeking options for the use of Russian assets, a so-called 'cautious' approach emerges.

Conclusion

The confiscation of Russian assets represents a complex political and legal. The EU, along with the US, Canada, the UK and other countries, is one of the key proponents of this idea. Within the EU, discussions about confiscating Russian assets occur at multiple levels, involving both the Union as a whole and individual member states.

Currently, the confiscation of Russian assets remains merely an idea, which has evoked a mixed reaction from the expert community for over a 2 years, as there are several legal and political obstacles to achieving the stated goal.

The problem of seizing Russian assets has two dimensions: the seizure of private property belonging to Russian individuals and legal entities, and the seizure of sovereign property. Regarding private property, a mechanism has been proposed involving the confiscation of assets as a measure of criminal liability. However, its application requires evidence of a criminal offence related to a violation of the sanctions regime. Actions taken to circumvent the sanctions regime do not

¹ Certain Iranian assets (Islamic Republic of Iran v. United States of America). Judgment of International Court of Justice of 30 March 2023, 2023, *International Court of Justice*, URL: <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf> (accessed 05.10.2023).

² Pimenova S. 2023, Porazheniye SShA v Mezhdunarodnom sude OON: delo ob iranski-kh aktivakh. [US defeat in the International Court of Justice: case regarding Iranian assets.], *Zakon.ru*, URL: https://zakon.ru/blog/2023/4/7/porazhenie_ssha_v_mezhdunarodnom_sude_oon_delo_ob_iranski_kh_aktivah (accessed 20.11.2023).

always concern frozen assets. Therefore, proponents of an approach targeting all sanctioned Russian assets within EU jurisdictions view the mechanism proposed by the Commission as incomplete.

As for sovereign assets, the situation has proven to be significantly more complex. Firstly, in this matter, the EU will have to align with the broader ‘Western’ policy, coordinated by the US [19, p. 2]. Secondly, the EU currently lacks an understanding of how to overcome existing legal obstacles. Thirdly, the confiscation of Russian sovereign assets could have uncontrollable consequences leading to significant political and economic costs for the leading EU countries and the Western world. For this reason, neither the EU nor its closest allies have reached a decision on the use of Russian sovereign assets. Meanwhile, Western countries plan to continue withholding Russian assets to deprive Russia of access to resources needed to continue the military operation and to use frozen assets as crucial leverage in future peaceful conflict resolution efforts.

Smaller countries like Estonia may attempt to take some independent measures to confiscate Russian assets without significant consequences for the global financial system. However, such measures are likely to be seen as tentative attempts to gauge possible reactions and consequences.

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