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Master's Thesis

Confiscation and Other Ways of Using the Frozen Russian Assets as a Lawful Response to Russian Military Aggression: a Legal Analysis

Konfiskavimas ir kiti įšaldyto Rusijos turto panaudojimo būdai kaip teisėtas atsakas į Rusijos karinę agresiją: teisinė analizė

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ABSTRACT AND KEY WORDS

This work examines the nature of asset freezing as a restrictive measure taken in response to Russian military aggression against Ukraine. In particular, the study aims to determine the legal possibility of confiscating Russian frozen assets and explore other available ways of using them in favour of Ukraine. Moreover, the held analysis provides the main differences between sanction regimes toward state and private assets and determines the existing challenges toward using such funds. As a result, the work outlines the main findings and proposals on how to tackle existing constraints and enforce the efficient mechanism for confiscating or, in other ways, using Russian frozen assets as a lawful response to the brutal war in Ukraine.

Key words: restrictive measures, asset freezing, Russian military aggression, confiscation, countermeasure, collective self-defence, violation of sanction.

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LIST OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EU	European Union
EU MS	European Union Member States
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UN	United Nations
UN SC	United Nations Security Council

INTRODUCTION

Relevance of the topic. On 24th February 2022, Russia launched a full-scale invasion of the territory of Ukraine, committing brutal and hostile military aggression against the Ukrainian population. Aiming to combat the Russian actions and restore international peace and security, the EU and non-EU countries commenced an extensive sanction campaign against Russia and all affiliated natural and legal persons who somehow supported and sponsored the war. Indeed, the EU immensely implemented a wide range of sanctions packages which, among other measures, included freezes on Russian assets, targeting both state and private assets. However, after almost two years of large-scale military aggression in Ukraine and imposing different sanctions, Russia still did not stop its cruel activities. It shows the predominant need in developing more robust and efficient mechanisms for forcing Russia to stop this brutal and unprovoked war in Ukraine while also pay all incurred damages by its actions. Hence, the search for efficient tools and their further enforcement for using frozen Russian assets in favour of Ukraine drives the relevance of the selected topic.

The object of this thesis is to analyze the nature of asset freezing as a restrictive measure and possible legal options for applying confiscation toward Russian frozen assets as a lawful response to Russian military aggression. Accordingly, this thesis aims to analyze legally available concepts third countries may rely on to justify the lawfulness of confiscating frozen Russian assets or apply other available ways of using such frozen funds in favor of Ukraine.

The aims and objectives of this thesis are to substantiate the lawfulness of confiscating frozen Russian assets and further usage of such funds in favor of Ukraine; to illustrate that the temporary nature of asset freezing is not absolute and can be waived; to demonstrate that confiscation of Russian state-owned and private assets is practically possible and that such measures will comply with international law; to examine all other available instruments of using frozen Russian assets and provide a legal justification for them.

The tasks of this thesis are 1) to disclose and examine the nature and application of restrictive measures in the wake of Russian military aggression, mainly focusing on freezes of assets; 2) to determine the legal nature of state immunity and how it applies toward central banks assets; 3) to explore the law of third-party countermeasure and the concept of collective self-defence and its practical application as a legal justification for confiscation; 4) to study existing state practice regarding the enforcing law on confiscation of Russian

frozen assets; 5) to analyze the confiscation mechanism of private assets for violating sanction under the EU regulation; 6) to examine other available ways of using frozen Russian assets and its further evolution.

Methods:

Analysis of scientific literature is applied for exploring doctrinal and legal categories, such as asset freezing, state immunity, third-party countermeasures and the collective self-defence.

Analysis of documents is used for analyzing the volume of EU legal acts and CJEU jurisprudence in terms of asset freezing as a restrictive measure taken against Russia. Also, this method is implied to identify existing drawbacks and inconsistencies in the current regulations in order to develop practical solutions to tackle them efficiently.

Historical analysis method is applied to examine the genesis of asset freezing as a restrictive measure within UN and EU sanction policy. This method is used to analyze the nature and origin of asset freezing and which purposes it pursues within sanction regime. Also, this method is used for exploring the genesis of third-party countermeasures and the doctrine of collective self-defence under international law.

The Linguistic Method is used for interpreting and understanding the essence, content and purposes of international and EU legal framework in terms of applying restrictive measures, such as asset freezing, especially the adopted sanction legislation in response to Russian military aggression against Ukraine.

Originality – The thesis provides a systemic overview of legal avenues for effectively confiscating Russian frozen state and private assets and for using them for the benefit of Ukraine. Notably, it provides an in-depth analysis of permissibility of confiscating Russian frozen state assets through reliance on the law of third-party countermeasures and the doctrine of collective self-defence while also substantiating why state assets are barred from the principle of state immunity. Besides, it presents a comparative analysis of the law of countermeasure and the doctrine of collective self-defence, focusing on the main differences that should be accounted for in confiscating Russian frozen state assets. Aside from confiscation of Russian state assets, this study analyzed the possibility of confiscating private assets through criminal proceedings as a penalty for violating restrictive measures. In addition, this work reviewed and analyzed other available means for using Russian frozen assets in favour of Ukraine, especially before the legal mechanism for confiscation

is established. Besides, the work highlights the main shortcomings while emphasizing what needs to be improved under the EU legal framework in terms of searching for practical solutions for confiscating and using frozen Russian assets.

Main sources: Throughout the research in pursuing specified tasks and objectives of the thesis, different sources were used, such as international and EU legal acts, case law of international courts, academic journals, books, electronic publications, etc. In terms of exploring the legal avenues for confiscating Russian state assets, it is essential to mention scientific works of Anton Moiseienko, such as 'The Freezing and Confiscation of Foreign Central Bank Assets: How Far Can Sanctions Go?', 'Frozen Russian Assets and Reconstruction of Ukraine: Legal Options'. The author explores the legal nature of imposed freezes over Russian property, constraints related to state immunity, available legal options for applying confiscation toward Russian state assets, and what international mechanisms on confiscation are accessible and would comply with international law. The mentioned works provide an in-depth analysis of the selected topic, enabling the investigation of different paths on permissible avenues for confiscation. Considering that substantial part of this thesis goes to the examination of third-party countermeasure as a legal justification for confiscation of Russian frozen property, it is crucial to mention the studies of Tom Ruys and Martin Dawidowicz: Tom Ruys 'Sanctions, retortions and countermeasures: concepts and international legal framework' and Martin Dawidowicz ' Third-Party Countermeasures in International Law'. These studies contributed to substantiating permissibility of third-party countermeasures under international law and its application for the purposes of confiscation. Also, in terms of exploring the concept of collective self-defence, it is vital to note the findings of Russell Buchan in his recent journal publication 'Non-Forcible Measures and the Law of Self-Defence". Russell Buchan's research concludes that acts of collective self-defence may encompass all measures necessary to repel an armed attack, regardless of whether they are forcible or non-forcible in nature. These findings contributed to my argument that third countries can enforce confiscation against Russian frozen state assets as a non-forcible measure by invoking the doctrine of collective self-defence.

1. ASSET FREEZING AS AN EU RESTRICTIVE MEASURE (SANCTION): THE ESSENCE AND THE PROCEDURE OF APPLICATION

1.1. The Notion of Restrictive Measure and its Legality under International and EU Law

The threats to international peace and security have become increasingly frequent phenomena in the modern world. To combat such threats effectively, states steadily seek effective levers of influence in dealing with an aggressor state's threat or use of force. Over the past decades, states have recourse to applying various restrictive measures to fight wrongful acts effectively. As such, states' application of restrictive measures has become a popular mechanism for dealing with international law violations due to their complex and multi-functional nature of such measures. In legal doctrine, restrictive measures are frequently described as sanctions, being an interchangeable term. Hence, considering that these two terms are mostly used interchangeably, they will be used accordingly for the purpose of this work. The legal basis for applying such measures is presented both under the international legal framework and at the regional EU level as well. Articles 39 and 41 of the UN Charter provide that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall decide which measures can be taken to maintain or restore international peace and security. The UN SC may decide which measures, without resorting to using armed force, are to be employed. Also, such a decision may be accompanied by a call upon the Members of the United Nations. (The UN Charter, Article 39, 41). The possibility to apply restrictive measures within EU legal order is also reflected under Article 29 of the TEU and Article 215 of the TFEU.[1] The provisions of these Articles provide that sanctions can be imposed against third countries, natural or legal persons, groups and non-state entities.

Indeed, restrictive measures under EU Law play a paramount role in safeguarding adherence to the EU standards, preserving peace, strengthening international security well as supporting democracy, the rule of law, and human rights whilst also being designed to promote its CFSP objectives. (Wouters, 2021, p. 177) As was indicated in the Basic Principles on the Use of Restrictive Measures (Sanctions), the sanctions are 'an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of our common foreign and security policy' and it is part of the 'efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance' (Basic Principles, 2004, p. 2). Moreover, restrictive measures as legal

[1] The content of these Articles will be described in detail in further sub-sections of the thesis.

instruments within CFSP policy refer to incentives to encourage the required change in policy or activity (Guidelines on implementation and evaluation, 2018, p. 3). That is why sanctions are being considered legitimate tools to apply pressure on states without resorting to military measures. (Godinho, 2010, p. 68).

Applying various sanctions by the UN, its members and EU is not a novel practice under international law. History dictates a number of cases when the UN and EU enforced a range of restrictive measures against third countries, private persons and non-state actors which failed to comply with international law obligations while also committing actions threatening international peace and security. For example, in combatting terrorism, the UN and the EU introduced a range of sanctions against individuals and entities associated with Al-Qaida. Later, a wide range of sanctions was imposed against third countries for providing support to non-state actors in proliferating weapons of mass destruction or sponsoring terrorism (Godinho, 2010, p. 68). Also, the restrictive measures were actively used as a response to acts of aggression, occupation of sovereign territories and other grave violations of international law obligations. For instance, as a reaction to violation of international law, sanctions were taken against Iraq, the ex-Yugoslavia (twice), Libya, Somalia, Haiti, the UNITA movement of Angola, Rwanda, Liberia (twice), Sudan, Sierra Leone, Afghanistan, North Korea, Iran etc (Godinho, 2010, p. 68). Besides, the EU and the United States enforced unilateral sanctions against the Central Bank of Iran and the Central Bank of Syria due to their contribution to financing terrorism (Bogdanova, 2022). The Central Bank of Venezuela (Banco Central de Venezuela) has been targeted by the unilateral US sanctions, as a result of which all its assets and other property on the territory of the United States, as well as under the control of the United States persons, are 'blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in' (Bogdanova, 2022). The main idea of targeting sanctions were to reverse an unlawful invasion and occupation and stop human rights violations (Bogdanova, 2022). More importantly, such frozen funds were further subject to confiscation by the US, even though such measures are still assessed on their legality. Accordingly, this approach illustrates that the need in resorting to sanctions, such as asset freezing, has emerged as a reasonable response to arising international and human rights violations by states.

By its origin, sanction can be treated as a reference to any measure taken against a state to compel it to obey international law or punish it for a breach of international law (Ruys, 2016, p. 1). Due to its complex nature, sanctions, though not exclusively, may pursue two distinct objectives: 1) to coerce or change behavior; 2) to constrain access to resources needed to engage in certain activities. It means that sanctions may perform

preventive functions while also serving as an inducement tool. Legal literature discerns various approaches on interpreting and considering the concept of 'sanction' (Ruys, 2016, p. 1). The first one is so-called a purpose-oriented approach which focuses on the objective of the imposed measure to properly correspond to a breach of legal norm (Ruys, 2016, p. 1). The second approach focuses on the identity of the author of the measures concerned (Ruys, 2016, p. 1). And the third approach defines sanctions by reference to the type of measures imposed. For instance, asset freezing by its type and functions falls within the financial sanctions category (Ruys, 2016, p. 1). In a historical realm, sanctions have been imposed for a variety of reasons, namely, to reverse un unlawful invasion and occupation or to stop human rights violations (Godinho, 2010, p. 68). Later, it became an effective tool in fighting with international terrorism. Hence, the concept of restrictive measures may cover a diverse set of goals, primarily being deemed to restore international peace and security through enforcing a certain behavior of another actor. The list of permissible restrictive measures is not exclusive and may encompass a variety of measures which are chosen depending on the circumstances of each situation. In general, such measures may embody asset freezes, travel bans, import and export restrictions and correspond to a particular situation (The Commission Proposes Rules on Freezing and Confiscating Assets…, 2022). Since the concept of restrictive measures as such is not an object of this study, we will further focus on the concept of asset freezing as one of financial types of sanctions as well as a procedure on their application.

1.2 Asset Freezing as an EU Restrictive Measure

Asset freezing holds an essential role in the range of restrictive measures. It falls within the category of financial measures – restrictive measures that take the form of a financial burden on actors, be it seizing bank accounts, prohibiting financial transactions, or denying loans to central banks of targeted countries (Giumelli, 2013, p. 23). As was indicated and specified in EU documents, financial restrictive measures under the EU legal framework, consist of: (1) freezing of funds and economic resources of designated persons and entities, and (2) a prohibition on making funds and economic resources available to such persons and entities (Restrictive measures (Sanctions) – Update…, p.13). In last two decades asset freezing has become one of the most common methods of combatting violations committed by third countries (Final Report, Study on Freezing…,p. 64). Even though there is no unified approach toward defining the asset freezing, there are commonly utilized definitions that clearly describe the main essence of the considered category. Besides, legal literature provides different variations of this term, such as asset freezes, freezing of assets, freezing of funds, or freezing of economic resources which by their

essence describe the same meaning. Generally, asset freezing is interpreted as a prevention of usage, alteration, movement, transfer, or access of assets, or in case of economic assets, selling, renting, mortgaging them. Though, the existing EU regulations and CJEU jurisprudence mostly operate by the terms 'freezing of funds' or 'freezing of economic resources' (Restrictive measures (Sanctions) – Update…, p.13). The 'freezing of funds' is understood as a prevention of '*any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management*' (Regulation (EU) No. 269/2014). As was noted in *Bank Sepah v. Overseas Financial Limited & Oaktree Finance Limited* 'freezing of funds' and 'freezing of resources' should be interpreted broadly because what is at stake is preventing any use of frozen assets that would enable the regulations at issue to be circumvented and the weaknesses in the system to be exploited (Bank Sepah v Overseas Financial Limited, para. 56). Subsequently, the notion 'funds' may cover financial assets and benefits of every kind, such as cash, cheques, deposits with financial institutions, balances on accounts, debts and debt obligations, interests, dividends etc (Regulation (EU) No. 269/2014). It is apparent that the purpose of freezing funds is to limit as much as possible the transactions that may be carried out with frozen funds (Bank Sepah v. Overseas Financial Limited, para. 43). Hence, by its substance, asset freezing implicates the limitations over the access to sanctioned funds aiming to preclude any movement or financial operations with such funds. However, abstain the imposed constraints upon the assets, the sanctioned funds still remain the property of their owners. The target may retain control over its property after being de-listing from the 'blacklist", and the violation ceases to exist.

Historically, the mechanism of asset freezing was developed as a means for sanctioning foreign states for international wrongdoings, while also inducing states to adhere to international obligations and laws. However, with the passage of the time and emerging challenges, the use of asset freezing also extended to individuals and legal entities (van den Broek *et al*., p. 19). In particular, asset freezing played a paramount role in fighting with international terrorism. In 1999 the UN adopted the Resolution 1267 of the UN Security Council concerning Al Qaida and the Taliban and associated individuals and entities, which was further implemented by the EU with the creation of an autonomous 'EU blacklist' in the form of a Third Pillar Common Position, no. 931/2001 (S/RES/1267). This resolution created a legal basis for placing individuals or entities on a special 'blackslist' which further served as a ground to enforce the sanctions, including asset freezing (van den

Broek *et al*., p. 20). As follows from the UN Sanction Committee's position, the main idea and objective of asset freezing was to deny the listed persons and entities access to financial sources to support terrorism until they remain on the blacklist (Assets Freeze: Explanation of Terms, 2015). Accordingly, the asset freezing served as a temporary measure with a preventive aim (van den Broek *et al*., p. 20). In case of state's asset freezes the logic was the same. All imposed freezing measures were supposed to be withdrawn as soon as the targeted state has complied with the obligations dictated by the UN Security Council (van den Broek *et al*., p. 20). Hence, by its essence and legal nature asset freezing can be used as a means both for sanctioning foreign states as such by imposing freezes on states' assets and targeting separate individuals and legal entities as well. It must be stressed that the main idea of freezing of funds within EU foreign security policy was to induce third countries to abstain from committing international law violations, not to punish independently separate individuals. In other words, by inflicting freezes upon private property, the EU is trying to stop the violations of international obligations by third countries while also depriving certain affiliated persons or entities of resources and means for supporting and contributing to such wrongdoings by the state. Besides, asset freezing is deemed to be one of the numbers of so-called smart sanctions since they target only specific individuals or organizations, causing a minimum impact for the society (Winkler, 2007, p. 3).

It must be noted that asset freezing was applied not only as a restrictive measure within security policy but also as a means of countermeasure. Under international law, asset freezes can be treated as restrictive measures (sanctions) or countermeasures. Sometimes, in legal doctrine, the adoption of certain sanctions is classified as countermeasures (Ruys, 2016, p. 11). Based on this approach, the imposition of sanctions by states is an expression of countermeasures. However, it depends on how states classify the nature of measures taken.[2] Similarly to restrictive measures, asset freeze as a countermeasure is supposed to serve as an 'inducement' tool, stimulating the aggressor state to terminate its wrongful behaviour. In other words, perceiving the asset freeze as a countermeasure, this measure is designed to induce the sanctioned state into doing or not doing something (Moiseienko, 2023, p. 4). In the opinion of EU MS, the freezing of assets, including those belonging to Heads of State and central banks, among other unilateral coercive measures adopted as a

[2] Under legal literature it is often addressed that the restrictive measures (including asset freezing) can be explained under the traditional doctrine of 'countermeasures'. For instance, the adoption of economic sanctions against third country can be justified through the concept of countermeasures. In certain circumstances countermeasures and restrictive measures may overlap. Though, they cannot be treated as interchangeable terms since they have different legal nature and regimes of application.

third-party countermeasure, is a standard tool of enforcement that complies with international law (Dawidowicz, 2017, p. 254). Perceiving the asset freezes as a dimension of countermeasure may significantly contribute to the discussions on the permissibility to waive the temporary measure of asset freezes for the purposes of confiscation. Still, the difference between the legal nature of restrictive measures and countermeasures is not clearly drawn within the international legal framework. Given that this thesis primarily focuses on asset freezing as a restrictive measure (sanction), the peculiarities of asset freezing as a countermeasure will not be addressed in further detail.

1.3. The Procedure for Imposing Asset Freezes under EU Law

When imposing sanctions, the EU may take two forms of actions (Godinho, 2010, p. 73). First, the EU may implement sanctions within the Union legal order which had been adopted by the UN Security Council. Such restrictive measures are imposed by the Council in implementation of Resolutions adopted by the UN SC under Chapter VII of the UN Charter (Guidelines on Implementation and Evaluation…,p. 5). Second, the EU is entitled to apply its own 'unilateral sanctions' (Godinho, 2010, p. 73). In general, the EU may decide to adopt more stricter measures compared to the UN ones (Guidelines on Implementation and Evaluation…,p. 5). By the legal nature, the imposed UN sanctions are mandatory for implementation by the EU, while at the same time, the EU also possesses discretion in choosing and applying its own additional restrictive measures or broadening the scope of the UN sanctions. Accordingly, the EU's sanctions, by its nature, can be derivative or autonomous (Chachko, 2018, p. 8). The same rules also apply to the imposition of asset freezes within EU legal order.

The legal basis for implying restrictive measures under EU Law is prescribed under Article 29 of the TEU and Article 215 of the TFEU. Given that the asset freezing is a type of the EU restrictive measures, it is also applied through the general procedure under Article 215 of the TFEU. Overall, the procedure for the adoption of the autonomous sanctions, including asset freezing, comprises two steps[3]: the adoption of a CFSP decision and a subsequent Council regulation which contains the scope of sanction measures (Wouters, 2021, p. 178). The CFSP decision is adopted by the Council based on Article 29 of TEU, following a proposal from a Member State or the High Representative potentially with the support of the European Commission (Wouters, 2021, p. 178). In accordance with Article

[3] Though, for the terrorism-related measures Article 75 of the TFEU provides a simpler procedure - there, no reference to CFSP decision is made since the scope of this Article directed at 'internal' terrorism. Given the internal character of such measures and their application specifically toward terrorism, the adoption of sanctions under Article 75 of the TFEU will not be addressed further in this thesis.

31 of the TEU they are in principle adopted by unanimity (TEU, Article 31). To recall, the enactment of Council Regulations is legally based on Article 29 of TEU and Article 215 of the TFEU and are adopted by qualified majority following a joint proposal of the High Representative and the Commission (Wouters, 2021, p. 178). In particular, sanctions can be taken against third countries and toward legal and natural persons who have a sufficient link to the targeted third country (Pye Phyo Tay Za*,* para. 61*)*. It is important to note that in terms of sanction policy the Council enjoys broad discretion in assessing all relevant matters for imposing sanctions and in determining their scope and concrete type (Rosneft, para. 88; National Iranian Oil Company, para. 128; Almaz-Antey, para. 95; Eyad Makhlouf, para. 80). For instance, whether it is necessary to enforce travel bans, import restrictions or asset freezes. Even though the regulation requires only the qualified majority of the EU Member States, adopting such a decision implicates the presence of mutual consent upon the sanction policy since the measures taken may concern all countries and are mandatory for implication. Besides, the EU duly control the alignment to implemented sanction regime and its enforcement by non-EU countries, especially those who hold the candidate status or in process of accession negotiations. For example, after the launch of Russian full-scale invasion in Ukraine on February 2022, the European Parliament enacted Recommendation on the Russian war of aggression against Ukraine under which it recommended the Council and Vice-President of the Commission '[…] *to reach out to non-EU countries and especially EU candidate countries and encourage more alignment with the EU's restrictive measures*.' (European Parliament Recommendation of 8 June 2022). It additionally confirms that the impact of the EU's sanction regime targets more actors than just exclusively EU MS.

As was previously noted, the adoption of decision regarding sanctions is followed by a Council Regulation, which enacts the substance of the sanctions program. In general, the procedure under the EU system on asset freezes can be described as twofold: 1) the formation of 'blacklist' of targets; 2) the formation and enforcement of the taken measures, including the supervision upon adherence to them. Regarding the criteria and methods for listing and de-listing sanctioned persons or entities, the EU developed a number of rules and necessary safeguards. For instance, when listing relates to the terrorism, it concerns suspects of terrorism regarding whom the investigation procedures were initiated, while also requiring the bunch of solid and credible evidence to confirm existing suspects. Hence, a prominent element of the financial sanctions is the annexes related to regulations, in which targets for which measures will apply, are listed. After inserting persons or entities

to the specially created 'blacklist', it is required to review such a list on a regular basis and at least every once every six months to reassure there are still present grounds for keeping targets on this list (Council Common Position of 27 December 2001). Such measures guarantee the legality of measures imposed and its targets. It is important to elaborate that the list of targets is defined by means of a Council Decision, not by the Commission itself (Godinho, 2010, p. 76). Based on those mentioned above, the application of asset freezes can be considered an administrative procedure which requires the unanimity for adopting CFSP decision and qualified majority for Council regulation on scope of restrictive measures; such sanctions can be taken against third countries and toward legal and natural persons who have a sufficient link to the targeted third country which violated its international law obligations.

1.4. The Overview of the EU Asset Freezes Imposed in the Wake of the Russian Military Aggression against Ukraine

Since 2014, following hostile Russian foreign policy and occupation of Crimea in Ukraine, the EU adopted a diverse set of sanctions against Russian and all involved persons in such illegal activities (EU Sanctions against Russia: alignment…, p. 5). The legal basis for imposed sanctions is provided in Council Decision 2014/512/CFSP and Council Regulation No. 833/2014 (Sanctions adopted following Russia's military aggression, 2023). As Russian continued the occupation and its other illegal activities, threatening the sovereign and territorial integrity of Ukraine, the sanctions were multiple times supplemented and expanded. From 2014 till 2022, the EU has continuously enlarged the list of sanctioned persons, enacting new types of sanctions. The taken sanctions mainly targeted the economic, energy, defense and financial sectors of the Russian economy (EU Sanctions against Russia: alignment…, p. 6). Though, before the full-scale invasion, the impugned measures did not imply any freezes upon state or private assets. However, after the launch of Russian unprovoked military aggression against Ukraine on 24 February 2022, the EU immediately resorted to more comprehensive restrictive measures to tackle military aggression and cut all Russian possibilities for financing the war. Up until now, the number of sanctions packages constitute 11 packages. Also, the EU has already agreed a proposal for adopting the 12th package of sanctions which will include new sanctioned individuals and entities, export bans and measures designed for tightening the oil price cap to decrease the revenue Russia is capable of getting (European Pravda, 2023). New restrictions will reduce Russia's ability to circumvent sanctions and weaken its military industry.

Subsequently, the EU adopted measures included targeted sanctions against Russian elites, defence and military sectors, state-owned media; bans on the exports and other services operations; prohibition on various sectors of trading operations; bans on aviation industry, including bans on flights etc (EU Sanctions against Russia: alignment…, p. 6). Among others, the EU enacted a considerable amount of economic and financial sanctions to cut all financial resources, which generally refers to the freeze of assets. Specifically, the EU imposed sanctions oriented at cutting Russian banks off from the SWIFT system. More importantly, the EU prohibited all transactions with the National Central Bank of Russia related to the management of the Russian Central Bank reserves and assets (EU sanctions against Russia explained, 2023). Mainly, the economic regime embedded the measures regarding the prohibition on the financing of the Russian government and Central Bank as well as banning all those transactions related to the management of the Central Bank's reserves and assets; decoupling of 10 Russian banks from the SWIFT messaging system; prohibitions on a range of financial interactions; ban on supply of euro-denominated banknotes to Russia etc (Sanctions adopted following Russia's military aggression). Consequently, the central bank could no longer access the assets it has restored in central banks and institutions in the EU. All targeted sovereign Russian assets became immobilized (Sanctions adopted following Russia's military aggression).

Besides, the EU inflicted a subsequent volume of freezes upon the private assets of persons with a sufficient link to the Russian government and all sorts of activities related to military aggression. Asset freezes were taken against more than 1,500 individuals, including political leaders, Russian State Duma members, National Security Council members, military staff and high-ranking officials, business people, propagandists and oligarchs (EU sanctions against Russia over Ukraine (factsheet). The implemented sanction regime against individuals is accompanied by Council Decision 2014/145/CFSP and Council Regulation (EU) No 269/2014 which is regularly amended by new regulations and is subject to reviews. Under the available public information, it was reported that asset freezes of individuals cover around 30 billion euros belonged to 'Russian and Belarusian individuals and companies', including 800 million euros in France (Freeze and Seize Task Force, 2022). Still, this number is continuously growing.

As was already mentioned above, Article 215 of TFEU and CJEU jurisprudence prescribe that sanctions can be taken against third countries and toward legal and natural persons who have a sufficient link to the targeted third country. The freezing of private assets is actively used by the EU as a lawful response to Russian military aggression due

to the existing sufficient links between targeted legal and natural persons who in different ways support and sponsor the war. The notion 'sufficient link' means that targeted persons possess an affiliation with sanctioned third country. Still, Article 215 does not prescribe neither the notion of third countries nor precise criteria toward legal and natural persons who have a sufficient link to the targeted third country. The evaluation whether there is a sufficient link between individual and targeted state is a matter of fact, not a law (Pye Phyo Tay Za, para..41). As such, this provision can be interpreted broadly, with the consideration of specific circumstances. In *Kadi and AI Barakaat International Foundation v Council and Commission*, the Court reaffirmed that sanctions against third countries 'may include the rulers of such country and also individuals and entities associated with or controlled, directly or indirectly, by them.' (Kadi case, para. 166). Therefore, the formed approach illustrates that even any indirect connection and ties with sanctioned third country can serve as a legal ground for sanctioning legal or natural persons.

Another example of showing ties between an individual and a sanctioned third country may serve recent findings in *the Mazepin v Council* case. This case concerns a leading Russian businessperson who was added to the sanction's list due to his close ties to the government and who is the owner and CEO of Uralchem – a Russian manufacturer of wide range of chemical products (Mazepin v Council). The reason of being added to sanction list and having 'sufficient ties' with Russian government was the fact that Mr. Mazepin in February 2022, following the initial stages of Russia's aggression against Ukraine, was invited and attended a meeting with President Putin and other members of the Russian government (Insight EU Monitoring). Based on this, the Council of the EU concluded that Mr Mazepin's invitation to this meeting shows that he belongs to President Putin's closest circle. The Russian national tried to contest such a decision before the General Court, but it was reasonably rejected, considering that restrictive measures were justified, necessary and proportionate (Mazepin v Council, paras. 116, 120). Among others, the CJEU emphasized that the Applicant, as a leading businessman in the fertiliser sector, provided a substantial source of revenue to the Government of the Russian Federation (Mazepin v Council, para. 74). Hence, it shows that even certain events that indicate the presence of any ties with the government of the third country are sufficiently enough to establish a "sufficient link" between such a person and the targeted state, thus reaching the threshold for Article 215 TFEU. Accordingly, due to the existing ties with Russian government and financial inputs to ongoing war in Ukraine, many Russian individuals were reasonably subject to asset freezes across EU MS.

Hence, the analysis illustrated that the EU imposed freezes covering Russian state-owned and private assets. Indeed, the EU developed a complex mechanism of diverse restrictive measures targeting different Russian spheres. On the one hand, asset freezing has been playing an essential role in preventing Russia from sponsoring the war and destabilizing its economy. On the other hand, asset freezes and sanctions, in general, have not stopped Russia's course of action in Ukraine, and the brutal war in Ukraine is still ongoing. Such findings confirm that there is a crucial need to consider further steps to increase the costs to Russia of its actions in Ukraine and force Russia to stop the war. In particular, to analyze how we can move from a 'temporary nature' of asset freezing to factual confiscation or other effective ways of using such funds in favour of Ukraine. Such legal options will be examined in detail in further chapters of this thesis.

2. CONFISCATION AS A LAWFUL RESPONSE TO RUSSIAN MILITARY AGGRESSION

2.1. Confiscation of Russian State Assets

Confiscation could be considered a one of the most effective tools of using state-owned Russian property in favor of Ukraine and inducing Russia to return to international law-compliant behavior. After the launch of large-scale invasion, seven states holding Russian central bank assets (Austria, Canada, France, Germany, Japan, the United Kingdom and the United States) immediately imposed a ban over any transactions with Russia's central bank by their citizens and on their territories (Kamminga, 2023, p. 2). The overall amount of immobilized Russian state assets approximately estimates US $350 billion (Moiseienko, 2022, p. 1). Thus, these assets became intangible and immobilized for Russia's Central Bank access and usage. Still, the question over legality to enforce confiscation of Russian state assets remains the topic of heated debate. Mostly, shared concerns among international scholars and legal practitioners arise in the context of (1) doctrine of state immunity and allegedly impossibility to confiscate immobilized state-owned assets due to the mentioned doctrine, (2) irreversible nature of confiscation which contradicts the temporary nature of freezing. Legal practitioners believe that the confiscation of Russian state funds will violate the inviolability of state immunity that protects state-owned property from unauthorized impact. Moreover, there is no specially designed legal basis under EU law which may authorize the confiscation of frozen assets by EU MS. However, as will be demonstrated hereafter in this chapter, it does not preclude Member State from developing and implementing their own domestic legislation to regulate this matter. Moreover, in the following sub-sections, it will be demonstrated that (1) the state immunity cannot be applied to frozen Russian state assets; (2) confiscation of state assets could be justified as a lawful third-party countermeasure and (3) confiscation can be applied as an act of collective self-defence.

2.1.1. The Doctrine of State Immunity and State Assets

As mentioned, one of the main constraints on confiscation is the doctrine of state immunity, which protects state-owned property from arbitrary state foreign intrusion. State immunity derives from customary international law and law of treaties. Indeed, international law strives to protect states from being sued or their property from being enforced without their consent (Moiseienko, 2022, p. 15). In a general vision, state immunity is a principle of customary international law that implies that sovereign states should be immune from the courts of another state by virtue of international law (Yang, 2012, p. 36). Logically, the immunity also extends to central banks under customary

international law. However, state immunity is not absolute and cannot be applied in an abusive manner by states merely to avoid state responsibility for international wrongdoings. Hence, even though state immunity is a principle of international law, its denial can be reasoned when states rely on it solely to evade the responsibility. It is important to note that central banks should be also exempted from the immunity protection under treaty law. Indeed, the UN Convention on Jurisdictional Immunities of States and their Property provides that state assets are protected from the foreign intrusion and arbitral interference over state-owned property (Kamminga, 2023, p. 5). In particular, the Convention refers to central banks as 'other monetary authority of the state' (The UN Convention on Jurisdictional Immunities). It is further elaborated that central bank assets enjoy sovereign immunity and that taking measures against such assets will be in violation of the Convention and its main principles. However, these provisions explicitly relate to the state property protection from foreign judicial power intrusion (judicial power intrusion by third countries). This position is also confirmed by the preamble of the discussed Convention while also deriving from the principle of *travaux préparatoires.* Article 1 of the Convention defines that *'the present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another states'* (The UN Convention on Jurisdictional Immunities). It clearly appears that the doctrine of sovereign immunity bars the national court of one state from adjudicating in proceedings involving another state (Ziskina, 2023). In this regard, Tom Ruys also asserted that financial sanctions against central banks are not incompatible with the Convention and the doctrine of state immunity (Ruys, 2019, p, 3-4). The same approach is followed by Prof. Natalino Ronzitti. The scientist takes the position that ‘the principle of immunity of jurisdiction and freezing of assets are located on different stages’, since ‘restrictive measures are the product of State legislation or executive orders’ (Ronzitti, 2016, p, 15). Therefore, the doctrine of state immunity could not extend to the imposed sanctions and possible confiscation of state assets as it falls beyond the scope of judicial power.

Evidently, the Russian assets were frozen through the direct executive action and not through 'measures of constraint in connection with proceedings before a court' (Kamminga, 2023, p. 5). In fact, asset freezes on the basis of executive action are sufficiently distinct from the juridical process which makes sovereign immunities irrelevant to sanctions (Brunk, 2022). The marking of this difference is crucial as it completely refutes the argument that Russian state assets, particularly central banks ones, somehow protected under the doctrine of state immunity. Confusing the essence of state immunity may lead to its abusive application and allow states to escape the responsibility for committed wrongful

acts. Additionally, the scope of frozen Russian assets covers not only central banks assets but also other Russian state property. Beyond the Russian central bank assets, there are two main categories of what might be described as Russian state property abroad. First, it concerns those assets which are directly controlled and owned by Russian state bodies and agencies (Moiseienko, 2022, p. 9). Second, there are assets which are owned and controlled by state enterprises and their subsidiaries, such as Gazprom's subsidiaries in the UK and the EU (Moiseienko, 2022, p. 9). For instance, Rosneft as a major energy company and being founded by the Russian government, was added to EU's sanctions 'blacklist'. In *Rosneft and Others v. Council* the CJEU stated that '*…Rosneft, a major player in the Russian oil sector, whose share capital, on the date of adoption of Decision 2014/512, was predominantly owned by the Russian State*' (Rosneft, para. 82). Indeed, such kind of assets bars from the state immunity and cannot enjoy inviolability over confiscation under specific circumstances by other actors. However, it may become much more challenging to establish the connection between such property and Russia as a state (whether Russia acts as an owner) than in the case of the Russian central bank assets. On that view, it is needed to point that neither EU regulations nor other international legal acts provide a definition for 'state asset' and what are criteria for classifying such assets as state-owned. The presence of such inconsistencies and legal loopholes within the international legal framework may lead to wrongfully perceiving the concept of state immunity and its application over state-owned property, which was frozen within sanction policy.

More importantly, the practice on withdrawal of state immunity toward frozen state assets was already applied by states.[4] Notably, the approach for withdrawing the guarantees provided by state immunity was already applied in terms of freezing Afgan central bank assets. The freezing did not implicate foreign sovereign immunity since it did not relate to measure associated with the exercise of judicial power (Brunk, 2023, p.27). Consequently, it irrefutably concludes that state-owned assets which were frozen through the executive procedure, not a judicial one, cannot enjoy the protection under the doctrine of state immunity. Still, the implication of state immunity will inevitably arise over the confiscation and its permissibility under international law. Similarly to asset freezing, it should be argued that under customary and treaty law, the principle of state immunity could not be perceived as absolute. As an option, states holding Russian frozen state property within their jurisdiction can reasonably justify the denial of state immunity for confiscating frozen

[4] The freezing of central bank assets is not unprecedented. There plenty of examples when state immunity over central bank assets was reasonably denied in terms of freezing such funds. For instance, the imposition of freezes against Afghan, Iran and Venezuelan Central Bank Assets. Also, the US moved from mere freezing to confiscation of Iranian central bank assets to compensate victims of terrorism.

Russian assets through the concepts of countermeasure or collective self-defence. These two concepts will be discussed further in detail.

2.1.2. Confiscation as a Lawful Third-Party Countermeasure

As a reasonable justification for applying confiscation, many scholars and practitioners refer to the concept of third-party countermeasures. Third-party countermeasure implies that states other than the injured by the internationally wrongful act may recourse to the imposition of specific measures against the aggressor state, inducing that state to comply with the obligations concerned (Ruys, 2016, p. 22). In other words, the law of countermeasure permits a state to suspend its obligations to another state to induce the latter to end committing violations and resume the adherence to international law-compliant behaviour. Besides, third-party countermeasures have been considered a 'significant factor' in making obligations *erga omnes* 'more effective.' (Dawidowicz, 2017, p. 11). However, the concept of third-party countermeasures remains of the most challenging issue in terms of law enforcement of international responsibility in respect of breaches of obligations owed to the international community. The controversy over the permissibility to apply third-party countermeasures generally comes down to the absence of consistent state practice and the reluctance of states to invoke specific measures which, by its nature, could be perceived as unlawful. Also, due to variety of legal and political reasons the states do not publicly acknowledge that the actions were taken as countermeasure to certain events or violations committed by another state. As was correctly advocated by Michael Wood '*there is always considerable difficulty in ascertaining state practice. Governments do not indicate publicly, clearly, or at all, the legal basis for each and every thing that they do or refrain from doing*' (Dawidowicz, 2017, p. 251).

Still, even if states have not explicitly declared that their measures were applied with reliance on the doctrine of countermeasures, the existing practice nevertheless demonstrates that they have relied on it in substance (Dawidowicz, 2017, p. 252). Moreover, international law shall be interpreted as a living instrument and in a dictum of emerging challenges. The formation of well-established practices on applying third-party countermeasures would contribute to strengthening the international rule of law and increasing the cost for states for non-compliance with international law obligations while reinforcing the principle 'aggressor pays' (Ruys, 2019, p. 32). The brutal Russian war in Ukraine is unprecedented for the whole international community, which reversely requires a resolute reaction and the adoption of decisive steps to tackle this military aggression. Within this part of the study, it will be examined which are the main constraints for applying confiscation as third-party countermeasure, why these constraints are sometimes

mistakenly perceived and how to mitigate them efficiently. As a result, it will be demonstrated that confiscation is legally available option for third countries and can be applied as a lawful third-party countermeasure in response to Russian military aggression.

Legally, countermeasures were designed to ensure the fulfillment of the obligations of responsible state (ARSIWA Commentaries, p. 31). International law permits a state to suspend its legal obligations to another state to induce the latter to end its violation of the suspending state's rights. At the same time, such measures are taken in the general interest of the international community (ARSIWA). Literally, in recourse to the Russian war of aggression, all other states may reasonably suspend their obligations not to interfere with Russian sovereign property. Article 48 of the ARSIWA stipulates that *'any state other than injured state is entitled to invoke the responsibility of another state…if obligation breached is owed to the international community as a whole*' (ARSIWA, Article 48). In other words, these provisions address the ground for invoking countermeasures when another state violates *erga omnes* obligations by its actions. Further this Article reflects that any state other than the injured one may claim from the responsible state cessation of the internationally wrongful act and non-repetition in the future (ARSIWA). Also, as clearly derives from state practice, third-party countermeasures are normally taken in response to 'widely acknowledged' grave breaches of obligations *erga omnes*. Hence, if *erga omnes* obligations are owed to all states, it means that all states are entitled to impose the international responsibility of a state in breach, which may include the infliction of countermeasures (Moiseienko, 2023, p. 44). As such, the argument of third-party countermeasures' application in response to military aggression against another sovereign state should be perceived as simple and compelling since there is no doubt that a war of aggression constitutes a violation of *erga omnes* obligation (Moiseienko, 2023, p. 44). However, international law dictates specific requirements to consider an applied countermeasure a permissible measure. Based on past state practice and case law, the ILC has clarified procedural and substantive requirements on the recourse to countermeasures in ARSIWA (Ruys, 2016, p. 13). Narrowly, there are three requirements for considering a countermeasure as a permissible and justified measure – 'temporariness', 'inducement', and 'reversibility' (Moiseienko, 2023, p. 44). Accordingly, for the purposes of this study, we will provide a legal assessment of such requirements, existing challenges over them in terms of implying confiscation of Russian sovereign assets and practical ways to tackle them.

Firstly, many scholars are concerned by the irreversible character of confiscating Russian state assets, which is incompatible with countermeasures' reversible and temporary

nature. This position derives from the fact that in case of confiscation, such funds cannot be returned to the initial owner. Though, this approach regarding confiscation of Russian frozen assets and irreversibility sometimes is mistakenly perceived. As was correctly noted by Anton Moiseienko that the current debate is premised on an oddly absolutist conception of the 'permanence' and irreversible character of confiscation, especially in the context of central bank assets (Moiseienko, 2023, p, 44). Accordingly, all mentioned concerns over confiscating state-owned assets can be substantially mitigated and rebutted. Indeed, the laid idea and objective of countermeasures as legal instruments is to induce another state to stop its unlawful activities and violations of international law. Admittedly, the approach regarding the impossibility to confiscate Russian state assets since countermeasure must be reversible is sometimes mistakenly perceived (International Centre for Ukrainian Victory, 2023, p. 6). Firstly, as was already ascertained, by its origin and nature the countermeasures were designed as a legal tool within public international law to induce a certain state to restore the adherence to international law obligations. It means that all measures taken against such state should be waived only after the violation cease to exist. However, Russia's international obligations include not only ceasing its aggressive war, but also compensating Ukraine for the damages Russia has inflicted (International Centre for Ukrainian Victory, 2023, p. 6). It means that even if Russia will withdraw its troops from Ukrainian territories and stop the aggression, it does not mean that the measure applied (in our case - confiscated assets) should be fully reversed and returned. As was correctly pointed by Ukrainian expert group on confiscation '*the extensive destruction committed by Russia will not be undone by simply withdrawing Russian forces from Ukraine; full compensation is required for Russia to comply with its international obligations*' (International Centre for Ukrainian Victory, 2023, p. 6). This position is also aligned with the UN General Assembly Resolution adopted on 14th November 2022 regarding Russian military aggression in Ukraine. Among other, it was stipulated that Russia should make reparations for all the damages, losses and injuries inflicted (A/RES/ES-11/5). As a result, to cope with the reversible requirement of countermeasures in the post-war phase, the confiscated Russian funds can be easily counted toward the total amount of reparations to Ukraine. Moreover, this approach regarding confiscation will serve as an additional guarantee that reparations will be actually paid, at least in the amount of frozen assets.

Besides, the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine through an Enlarged Partial Agreement was already established (Resolution CM/Res (2023)3). It means that the number of incurred damages and evidence upon it will be documented, enabling experts to determine which part of such

damages can be compensated from confiscated Russian assets. Consequently, the confiscation of Russian frozen assets will not violate the requirement on reversibility of countermeasures since Russia must not only unconditionally withdraw its troops from Ukrainian territories but also pay total compensation for inflicted damages in Ukraine. If the total amount of confiscated assets exceeds the reparations sums, the exceeding sums can be easily reversed to Russia. However, it is quite obvious that the amount of already inflicted damages to Ukraine by Russian significantly exceed the total amount of frozen state and individual assets. It means that an act of property confiscation does not automatically mean that such measures go beyond the requirement of reversibility. Therefore, it concludes that confiscation of Russian assets will not contradict the requirements for countermeasures to be applied.

Alternatively, in exceptional circumstances, the law on state responsibility should permit states to invoke countermeasures that produce irreversible effects if other options are not reasonably available (Buchan, 2023, p. 24). It means that non-reversible countermeasures can be taken as a last resort measure, corresponding to the gravity of breach and proportionality as such (Buchan, 2023, p. 24). Again, given the assessment to the scale of Russia's ongoing breaches of international law, freezing of its state-owned property and its further confiscation reasonably fall within the meaning of proportionate response to unprovoked and brutal military aggression against Ukraine. Yet, to recall, international law in constantly evolving, and even if at the moment, there is no well-formed practice regarding the application of non-reversible countermeasures, the Russian war of aggression can well clarify this matter and help develop international norms in this regard. Unprecedented situations require unprecedented decisions.

Another important aspect that should be considered is the subject nature of countermeasures under international law. Indeed, Article 54 of ARSIWA highlights that states other than injured an injured state may take lawful measures against another state to ensure cessation of the breach and reparation in the interest of the injured state (ARSIWA, Article 54). Hence, from this formulation it follows that the question of applying countermeasures belong to states as an independent actor. It means that the matter of confiscation of state assets may fall within the internal discretion of each EU MS even when EU regulations does not provide such a legal option for funds confiscation.[5] Under international law doctrine it is not clear whether the EU could adopt collective decisions

[5] However, EU regulations should also regulate how EU MS can confiscate frozen assets to comply with international law and EU legal framework. For instance, what safeguards and procedural guarantees the domestic legislation should contain. Still, the mere absence of EU regulation in this matter cannot preclude EU MS from adopting domestic legislation on confiscation and implying certain measures.

regarding confiscation since some scholars believe that the EU as a separate entity could not regarded as being individually affected by the breach of international obligations by another state (Ronzitti, 2016, p. 75). In other words, under this approach the EU is not entitled to adopt a collective decision on confiscating Russian state assets since it falls out of the scope of either sanctions regime within CFSP policy or countermeasure regime under international law. Therefore, the lawfulness of taken countermeasures should be examined exclusively on the basis of the notion that, for instance, certain EU MS imposed a confiscation over Russian state funds as a lawful countermeasure in the presence of violations of *erga omnes* obligations by Russia.

At the same time, there is an opposing practice when the EU has already acted collectively on behalf of all EU MS in terms of applying countermeasures.[6] Moreover, the European Parliament addressed in its legal documents that confiscation Russian state assets is justified under customary international law '*as a collective countermeasure in response to Russia's violation of the fundamental rule prohibiting wars of aggression*' (Draft European Parliament Legislative Resolution, 2023). Also, in the Resolution of 15 February 2023 on one year of Russia's invasion and war of aggression against Ukraine, the European Parliament called the Commission and co-legislators to complete the legal regime allowing for the confiscation of Russian assets frozen by the EU and for their use to address the various consequences of Russia's aggression against Ukraine, including the reconstruction of the country and compensation for the victims of Russia's aggression (European Parliament resolution 2023/2558 (RSP)). Accordingly, even though EU regulations did not legalize the mechanism for confiscating frozen Russian assets, EU member states as acting independently are entitled to adopt the decision on confiscating frozen funds within its domestic legal framework. At the same time, EU regulations need more clarity over the sanctions regime related to frozen state funds since it should provide rules on how EU MS can confiscate frozen funds and regulate the procedure for confiscation under its own policy and domestic framework. The absence of specialized legislation leads to many uncertainties and confusion, as well as the reluctance of EU MS to adopt tangible measures on confiscation.

Moreover, the possibility to imply countermeasures by third countries, other than injured, also derives from customary international law. Customary international law comprises two essential components – state practice and *opinion juris*. Regarding the first

[6] The examples will be mentioned in the next paragraph.

element of state practice, the application of countermeasures by third countries is not novel for international law and community as such. In a historical realm, some countries have already applied freezing of state funds as unilateral countermeasures (being justified through the law of countermeasure) in response to serious violations of community interests to induce the responsible state to comply with its international law obligations. For instance, on 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. EU and the United States adopted trade embargoes and decided to freeze Iraqi assets (ARSIWA Commentaries, p. 138). Another serving example is the collective measures against the Federal Republic of Yugoslavia in 1998 (ARSIWA Commentaries, p. 138). Acting in response to committed violations and humanitarian crisis in Kosovo, the EU Member States adopted a special legislation on freezing of Yugoslavia funds (ARSIWA Commentaries, p. 138).

Conversely, with regard to the second element – *opinion juris* – the practice is not so straightforward. Being a Special Rapporteur, Crawford observed that it was 'unclear' whether the practice on third-party countermeasures was accepted as law – that is, whether any *opinio juris* was associated with it. The same was also ascertained by the ILC, which asserts that it appears to be no 'clearly recognized entitlement' to take third-party countermeasures. As was indicated by the ICJ in Asylum case, the practice on third-party countermeasure was apparently 'so much influenced by considerations of political expediency' that it was not possible to discern any *opinion juris* (Asylum case). Though, after a careful analysis on countermeasures and whether it can be considered 'accepted as law', the statements expressing *opinion juris* in this field do actually exist (Dawidowicz, 2017, p. 252). For instance, in 2004 the Council of the European Union released a special statement on sanction policy and adoption of special measures. In particular, it provided that in case of necessity, the Council may resort to the adoption and imposition of autonomous sanctions (i.e. acts of retorsion and/or third-party countermeasures), in support of efforts to uphold human rights, democracy, rule of law and good governance (Dawidowicz, 2017, p. 253). This statement follows that the EU interprets the adoption of restrictive measures as acts of retorsion or third-party countermeasures for justifying them legally. Hence, while not so unequivocally, the analysis of states' actions and the adherence to common policy in this matter illustrate the presence of *opinion juris*. Overall, the analysis concludes that third-party countermeasures are a legally available option and sound for justifying Russian frozen state assets confiscation. Accordingly, freezes of assets may legitimately lose their 'temporary effect', and such measures will be justified and in

compliance with international law. Even though certain controversies still remain, third-party countermeasure is legally sound for justifying confiscation since the following conditions are met: 1) confiscated assets will be linked to compensation of officially established and documented damages; 2) confiscated assets that would exceed that damages (that is unlikely) are to be returned to Russia; 3) alternatively, the irreversible character of confiscation is justified as proportionate measures to the gravity of Russia's violations. Moreover, as was already illustrated, the existing practice under international law and community dictates the presence of state practice regarding the application of countermeasures by third countries, which shall waive existing controversy over the permissibility of third-party countermeasures.

2.1.3. Confiscation as a Collective Self-Defence

The right to collective self-defence remains one of the tools for guaranteeing collective security, which correlates with the primary objectives established under the preamble of the UN Charter – to preserve peace and security as common interests of the international community. While searching for legal ways to enforce the confiscation of Russian sovereign property, it is also essential to consider the confiscation as an act of collective self-defence as it directly corresponds to the notion of this legal concept. This approach is based on the legally-founded position that the right to self-defence may encompass forcible and non-forcible measures by states. As such, the invocation of confiscation toward frozen funds can reasonably fall within the notion of 'non-forcible measures' as an expression of collective self-defence. The legal theory on non-forcible measures and the law of self-defence has been thoroughly analyzed by Russell Buchan (Buchan, 2023), Federica Paddeu (Paddeu, 2015), Artem Ripenko (Ripenko, 2023) and others. Also, in terms of the confiscation of sovereign Russian assets, this concept was partially covered in the conducted research by Anton Moiseienko (Moiseienko, 2023).

Legally, the right to collective self-defence is codified under Article 51 of the UN Charter. It states that nothing in the Charter *'shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…'* (UN Charter, Article 51). Hence, right to self-defence can be exercised either unilaterally or collectively when an armed attack occurs. In general terms, as was noted by Tom Ruys, the collective self-defence means that a state-victim of armed attack may request help from any state, and every state willing to help can provide such assistance for the attacked state, regardless if the armed attack itself endangered it (Ruys, 2010, p. 86).

From the practical realm, the notion of collective self-defense was thoroughly examined in *Nicaragua* case by the ICJ (Nicaragua case). In particular, it was underlined that the normal purpose of an invocation of self-defence is to justify the conduct which would otherwise be wrongful (Nicaragua case, para. 74). In other words, the invocation of self-defence will exclude the wrongfulness of the taken measure and state responsibility as such (Paddeu, 2015, p. 10). In terms of confiscating Russian frozen state assets, it is indisputable that Ukraine is a victim of Russian brutal war. Moreover, it is also an undeniable fact that Ukraine multiple times called for international assistance and help to repel Russia's armed aggression, including calls for confiscating frozen funds. Therefore, it is possible to refer to confiscation despite existing legal and political concerns over the permissibility of such measures under international law since the concept of self-defence in any case would exclude the wrongfulness of the taken measure and state responsibility as such.

Based on Article 51 of the UN Charter, Yoram Dinstein distinguished four categories of self-defence: individual self-defence individually exercised; individual self-defence collectively exercised; collective self-defence individually exercised; collective self-defence collectively exercised (Dinstein, 2005, p. 252). The collective self-defence which is collectively exercised occurs when two or more states act together supporting the attacked state (Dinstein, 2005, p. 252). In its collective dimension, self-defence can be operationalized in different manner and forms, through the special agreements and pre-settled cooperation between state, or through the reactive character when states did not agree on adopting collective measures in advance (Akermark, 2017, p. 252). Hence, in terms of actions of states aimed at tackling Russian military aggression, it is possible to discern two applicable forms of collective self-defence: 1) collective self-defence individually exercised (when other than the injured state decides to provide any help to the attacked state) and 2) collective self-defence collectively exercised (when states act mutually and adopt measures collectively to provide support to the attacked state). In the first case, every state is empowered to act independently and adopt particular measures within its domestic legislation (for instance – the Canadian legislation on confiscating public and private Russian assets). In the second case, several states may cooperate to repel Russian military aggression and pursue a collective objective (for instance, all EU MS may impose an embargo on the aggressor state).

Notably, Article 51 of the Charter dictates two requirements in pursuit of self-defence application: firstly, the states are obliged to notify the UN Security Council about their intentions to inflict specific measures; secondly, states may withdraw their right to

self-defence as soon as the UN Security Council adopts measures necessary to restore international peace and security (UN Charter, Article 51). Meanwhile, as a necessary requirement, measures taken in self-defence may not exceed what is proportionate to achieve the pursued purposes (Goldmann, 2022). Though, in terms of UN SC notification, the existing state practice demonstrates that no pattern of law explicitly defines the form or manner in which such notification should be made. In most cases, states resort to self-defence mechanisms without publicly acknowledging and announcing the legal justification of such actions, mainly due to policy and political concerns. This angle confirms that even when states fail to notify the UN Security Council officially, the taken measure would not lose its legal value.

For a long time, the notion of self-defence was interpreted solely in terms of applying use of force by states as a response to armed attack. The prevailing number of international scholars and lawyers assert that this right is subject to specific restrictions and can be applied exclusively by states when they resist an armed attack through force (Buchan, 2023, p. 2-3). However, this approach was significantly reshaped by the evolutionary interpretation of international law and emerging state practice over new challenges. Moreover, the scope of Article 51 of the UN Charter does not pre-establish any limitations upon the types of measures which states may imply when an armed attack occurs. Even though, it is still being determined whether collective self-defence can be reflected in other types of actions except the use of force when armed attack occurs. Perceiving that self-defence may be expressed either in forcible or non-forcible measures would perfectly correspond to the primary objective self-defence seeks to achieve – to enable states to protect themselves from armed attacks (Buchan, 2023, p. 3). In this regard, Russel Buchan in his studies elaborates that self-defence should be considered a general right within customary and international law and can be invoked to justify all measures necessary to combat armed attack regardless whether such measures are forcible or non-forcible in nature (Buchan, 2023, p. 3). It means that the possibility to exercise the right to self-defence or collective self-defence should not be exclusively limited to use of force against the aggressor-state. For example, in the course of Falklands War certain states resorted to imposition of non-forcible economic sanctions against Argentina, justifying them as acts of collective self-defence and being designed to confront Argentina's armed attack against the UK (Buchan, 2023, p. 2). Another example of application of non-forcible measures is the construction of security wall by Israil in 2002 within occupied Palestinian territory, which was further justified as an act of self-defence (Buchan, 2023, p. 3).

Therefore, state practice confirms that self-defence can imply both forcible and non-forcible measures.

In the case of Russian military aggression against Ukraine, the concept of collective self-defence can also serve as a reasonable legal justification for confiscating Russian frozen assets. The idea falls within the concept that the right to collective self-defence may also extend to non-forcible measures, such as confiscation. Also, the application of self-defence measures is possible during the phase of ongoing military aggression to confront it immensely and efficiently. It is evident that Ukraine is currently fighting with the aggressor, which possesses a larger number of resources and mobilization potential. That is why confiscating and transferring frozen assets to Ukraine may serve as additional help and support to overcome the existing imbalances and resist aggression, thus constituting a justified act of collective self-defence (International Centre for Ukrainian Victory, 2023, p. 7). Furthermore, the supply of military and humanitarian support by the EU MS and other non-EU countries can also be treated as actions of collective self-defence since all such measures by their essence are oriented at helping Ukraine to tackle Russian military aggression. Even though not all states officially and expressly declared that their support is provided as actions of collective self-defence, but their unequivocal actions and statements demonstrate it in substance. For instance, during the UN Security Council meeting on 10 April 2023, the representative of Poland stated that 'Poland is proud of the world's collective self-defence against the trespasser trampling on the most fundamental principles of the United Nations Charter' (Kleczkowska, 2023, p. 7). Accordingly, confiscating the Russian frozen sovereign assets as a collective self-defence to provide additional military and humanitarian support in confronting large-scale Russian military aggression should be considered a plausible option.

2.1.4. Comparison of Countermeasures and Self-Defence for the Purposes of Confiscation of Russian State Assets

Within this part of research, it is essential to elaborate on the difference between the law of countermeasure and the doctrine of self-defence. Indeed, as was previously substantiated, these two options can be applied as legal justification for inflicting confiscation of Russian state assets. Still, certain peculiarities must be addressed to avoid misperception of these two legal instrumentalities under international law. Moreover, the doctrine of self-defence and countermeasure could overlap since they both may apply to the similar or sometimes even the same circumstances. Still, the law of countermeasures and self-defence have different objectives, regimes and procedure on application.

Distinguishing these differences will significantly contribute to the discussions on permissibility to apply confiscation of Russian state assets through different legal avenues.

Firstly, the law of countermeasure requires to notify the targeted state about its intention to apply countermeasures against it. In a practical realm it means that states which hold Russian state property within their jurisdiction would be obliged to inform Russia about their plans to confiscate the frozen assets. In case of collective self-defence, states may act at any reasonable time and should inform only the UN SC about their intentions to invoke such measures. Still, as was illustrated above, even if states omit to proceed with this requirement, the absence of notification will not preclude them from adopting such actions. Moreover, as a safeguard against arbitrariness of such measures, the actions of collective self-defence must be withdrawn as soon as the UN SC undertakes its own actions directed at tackling ongoing armed conflict. Considering that the UN SC still did not adopt any tangible measures in response to Russian military aggression, it additionally confirms the practical need for states to enforce such measures independently. Secondly, the law of countermeasure must not be necessarily applied in the war-paradigm and being a law-enforcement mechanism. It may concern any international law violations by a third country and injured or other states may respond to them through applying different range of measures to induce the state-perpetrator to stop its unlawful behavior. Still, as we already addressed above, such measures must be temporary and reversible in nature. Comparatively, self-defence is not a law-enforcement mechanism. It is a defensive reaction designed to restore a certain military balance vis-à-vis an attacking state. Moreover, the doctrine of self-defence does not require that taken measures should not be necessarily reversible. Hence, in terms of existing doubts and concerns over the irreversible character of confiscation, such risks are not referred to the scope of right to self-defence.

Though, the main difference between these two doctrines can be marked by the distinguishing objectives it seeks to pursue. Deciding on which ground to justify confiscating Russian sovereign assets would depend on the final objective it seeks to attain. Confiscation as a third-party countermeasure can be explained as an inducement for Russia to stop the war and secure reparation payments; also, based on this doctrine, the confiscated funds can be used for compensating financial and other material losses the EU and other international supporters incurred for providing financial and humanitarian support for Ukraine, including the support to millions of Ukrainian refugees. This concept will perfectly correlate with and enforce the principle that Russia, as an aggressor state, should pay. As an option, the confiscated funds can be transferred to the specially established fund

and be kept there till Russia withdraw its troops from Ukrainian territories. Afterwards, such confiscated funds can be transformed into the total amount of reparations. While applying confiscation as an act of collective self-defence (whether it will be exercised jointly by states who hold Russian assets within its jurisdiction or independently), such frozen funds can be confiscated at any time and be allocated for military and humanitarian assistance in Ukraine to restore existing military imbalances between Ukraine and Russian military potentials. Overall, both third-party countermeasure and collective self-defence concepts can be perceived as legally sound options for applying confiscation of Russian state assets. However, the analysis illustrates that enforcing confiscation through the doctrine of collective self-defence can be a more legally feasible option than the law of third-party countermeasures due to the existing controversies and debate over the reversibility requirement.

2.1.5. State Practice regarding the Development of National Mechanisms for Confiscation

Even though most of the countries who majorly keep Russian bank assets within their jurisdiction are still reluctant to introduce the practical tool for confiscation, some of the countries have already taken proactive measures to carry out the procedure on confiscation. For example, in the United Kingdom the legislators have registered a special legislative project № 245 called 'Seizure of Russian State Assets and Support for Ukraine Bill'. It provides a legal basis for enabling state assets confiscation which belongs to Russian central bank. Additionally, the mentioned draft law proposes a model for confiscating the assets of the National Welfare Fund, the Ministry of Finance and any other persons or entity who owns Russian assets or are controlled by these Russian institutions (The UK Bill 245 2022-23). The confiscated funds shall be transferred to the trustee for Russian state assets. Accordingly, this developed mechanism will allow to direct the collected and received funds for Ukraine help. Even though this draft was not approved yet, it illustrates positive tendencies toward building an efficient legal mechanism for confiscating the Russian state assets.

The similar concept on state funds confiscation was developed in the United Stated and was reflected in the Draft Law 'Rebuilding Economic Prosperity and Opportunity for Ukrainians Act – REPO Act (Ziskina, 2023). This act provides the legal mechanism for seizing any Russian state funds which are located within the US state jurisdiction. Indeed, REPO Act is currently the most ambitious piece of legislation aimed at the confiscation of central bank assets and other sovereign property (Moiseienko, 2023, p. 15). Under its provisions, the confiscated funds should also be allocated into a specially created fund – the Ukraine Support Fund. It is defined that these funds shall be used for rebuilding of

Ukraine, humanitarian aid purposes and other aims which the US State Secretary will define as those which could directly and efficiently facilitate the Ukrainian reconstruction and welfare of the Ukrainian population. The analysis of the experience of both the US and the UK clearly illustrates that foreign states possess a capacity and competence to adopt regulatory tools for confiscating Russian state assets. The developed mechanism mainly stems from the doctrine of state sovereignty and aimed to *'promote international peace and security, compliance with international obligations, to promote the resolution of armed conflict in Ukraine and the protection of civilians in Ukraine, and to encourage the russian federation to cease actions threatening the territorial integrity, sovereignty or independence of Ukraine etc'*. (The UK Bill 245 2022-23). Therefore, the predefined objectives of the proposed acts on confiscation illustrate that the primary function of the confiscation mechanism is to induce the Russia to stop its cruel and unprovoked war in Ukraine, indirectly relying on the doctrine of third-party countermeasure. A mere freezing cannot achieve this objective without endorsing more robust measures such as confiscation. In other words, the confiscation of Russian state funds may deter other countries from illegitimate invasion into territories of other sovereign countries and occupation of their territories (Moiseienko, 2023, p. 5). Otherwise, it will create a negative precedent of tolerating armed aggression by international community.

In the context of perspectives for confiscation, it is important to mention about Estonian and Canadian developed approaches. Estonia as EU Member State has recently developed an independent mechanism on confiscation as an amendment under to its special legal act on sanctions 'International Sanction Act'. This act regulates '*the national implementation of international sanctions, the specifications for the implementation and application of financial sanctions, the procedure for monitoring the application of financial sanctions, the imposition of the sanctions of the Government of the Republic and the liability for a failure to notify of the application of financial sanctions and submission of false information*' (International Sanction Act, Article 1). The amendments draft establishes the possibility to use the frozen assets of persons sanctioned in Estonia to compensate for damage from the war in Ukraine (European Pravda, Estonian government approves…, 2023). Within its incentive, the Prime Minister of Estonia signified that Estonia's experience should be an example and an encouragement for other European countries (European Pravda, Estonian government approves…, 2023). Except the direct confiscation mechanism, the draft additionally provides the legal basis for continued freezing of Russian funds. According to the calculation, the current value of frozen Russian assets in Estonia worth about 38 million euros (European Pravda, Estonian government approves…, 2023).

However, this regulation is silent about the perspectives to confiscate Russian state-owned property. Hence, the draft law comprises only twofold options: 1) the confiscation of assets and 2) upholding freezes until war damages are compensated.

Moving to the Canadian experience, Canada has become the first country which adopted a special legislation on confiscation of Russian assets. Canada wrapped its sanction laws in a manner of enabling confiscation public and private assets alike, which are laid down under the Special Economic Measures Act (SEMA) (Moiseienko, 2022). By its scope and essence, SEMA enshrines legal mechanisms to impose sanctions in situations, in particular, when a grave breach of international peace and security has occurred and has resulted in, or is likely to result in a serious international crisis (Canada Gazette, 2022). The taken amendments to SEMA allows to confiscate property located in Canada and held by a foreign state. From the practical perception, Canadian regulation is a first efficient step toward the confiscation of Russian frozen assets for recovery of damages incurred by Russia in Ukraine. It provides the well-established and balanced procedure on confiscation. Factually, the law provides that the precondition for inflicting confiscation is a grave breach of international peace and security and gross and systematic human rights violations which were committed in a foreign state (European Pravda, Revolutionary Precedent…,2022). In fact, such provisions on possible confiscation appear to reflect *opinion juris* that in exceptional circumstances the confiscation of foreign sovereign state assets for a purpose for providing reparations for injured state may indeed be a permissible measure (Kamminga, 2023, p. 10). After the confiscation of such funds, they can be used for the reconstruction of the foreign state adversely affected by a grave breach of international peace and security; the restoration of international peace and security; to compensate victims when that security is breached and their rights are violated (Kamminga, 2023, p. 10). As a legal justification for applying confiscation also for public funds, the Canadian government has not yet indicated which of international law justifications to rely on for confiscating Russian state assets (Moiseienko, 2022). However, Professor Robert Currie has pointed to third-party countermeasures as a visible option (Moiseienko, 2022).

Still, the question regarding the confiscation of state sovereign assets, such as central bank assets, remains unsettled under the state practice. Hence, even when considering the law of countermeasure or doctrine of collective self-defence as plausible options for confiscating Russian sovereign assets, the reluctance of EU and non-EU countries to adopt special legislation on these matters and, as a result, the absence of relevant state practice raises the obstacles to enforcing such idea into the practical realm. It is mainly explained by the absence of previously formed state practice in this matter and

the existence of policy and political concerns. From this angle, to tackle this problem, it requires the adoption of special recommendations and guidelines on confiscation with a thorough substantiation of why the reliance on the doctrine of countermeasure and self-defence is a plausible solution and reasonable justification for confiscating sovereign Russian assets. It will additionally ascertain that the confiscation of Russian state assets is legally available and is completely justified as a proportionate response to unprecedented Russian military aggression against Ukraine.

2.2. Confiscation of Private Assets

2.2.1 Confiscation of Private Assets for Violating Sanctions

Private and sovereign assets require different asset-recovery mechanisms, each of which faces a specific legal challenge: the fundamental right to property and the principle of state immunity respectively (Shagina, 2023, p. 28). While the imposition of freezes upon state-owned assets relates to administrative measures, the implication of confiscation over private assets mainly concerns criminal proceedings. As such, in terms of using private' frozen assets the most visible option that has been debated by international community is the confiscation as a criminal sanction for violating Union restrictive measures. From 2014 the range of sanctions against Russia and its individuals reached a record high. Still, the level of sanction violation has steadily increased which undermines the effectiveness of the taken measures. For example, in Estonia, from the beginning of large-scale invasion, 1,500 of sanction evasion cases were detected while the Swiss authorities are already investigating 300 cases of sanction circumvention (Institute of Legislative Ideas, 2023, p. 6). This drastic statistic underlines the importance on adopting special regulations on punishing sanction circumvention and maintaining the adherence to existing sanctions. A consistent enforcement and prosecution of restrictive measures violations between all EU MS is a key tool for maintaining their effectiveness. It will guarantee cooperation between EU MS and ensure the coordination between EU's enforcement and judicial authorities. Moreover, the enforcing confiscation of private assets as a penalty for violating EU restrictive measures is an option for collecting frozen private assets in favor of Ukraine. Prosecuting and confiscating frozen funds may serve as an additional source for collecting money and transferring the managed funds into a special compensation fund for recovering damages incurred by Russian military aggression. That is why it is essential to develop a mechanism on collecting such individual funds and then possibility to transfer such money in favor of Ukraine. Therefore, the criminalization the violation of Union restrictive measures will pursue two objectives – 1) stimulate sanctioned and other persons to adhere

to the EU sanction regulations and resist from violating such rules; 2) provide an additional monetary contribution for Ukraine to cover its military and humanitarian needs.

In May 2022, the European Commission issued a Proposal for a Directive on the violation of Union restrictive measures. The European Commission addressed that existing differences between national systems, particularly in offences and penalties for breaches of EU sanctions, are thought to weaken their efficacy and the EU's credibility (Proposal for a Directive on the violation…,2022). The violation of EU sanctions is not considered a criminal offence in all Member States, and the penalty systems vary widely from one Member State to another (Proposal for a Directive on the violation…,2022). Accordingly, cross-border character, the location of the sanctioned property and their owners within different jurisdictions and the absence of criminalization of sanction violation and circumvention in certain EU MS may entitle perpetrators to search for loopholes for sanction (Ballegooij, 2022, p. 145). Following the European Commission proposal on criminalizing the sanction circumvention, the Council issued a decision on identifying the violation of Union restrictive measure as an area of crime that meets the criteria specified in Article 83(1) of the TFEU (Council Decision (EU) No. 2022/2332). To recall, Article 83 of the TFEU allows for a special procedure whereby the Council may identify new areas of crime. Afterwards, the European Commission issued a Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures. The European Commission underlined that establishing minimum rules concerning the definition of criminal offences and penalties in terms of violating EU restrictive measures is necessary to ensure the effectiveness of their application and the integrity of the international market (Proposal for a Directive on the definition of criminal offences…, 2022). Though, the mentioned proposal must be further considered and approved by the European Parliament and the Council to enter such regulations into force within the EU legal order. In general terms, the Proposal for a Directive on the on the definition of criminal offences provides the definition of criminal offence with regard to violation of Union restrictive measures; establishes the range of penalties the scale of penalties which may apply toward the perpetrators of EU's sanction policy, procedure on cross-border investigation and prosecution while also ensuring cooperation between all EU MS. The Proposal strives to ensure consistency with EU with their policies in sanction matters and improve the operational effectiveness of national enforcement chains (Proposal for a Directive on the definition of criminal offences…, 2022).

The essence and scope of defining violation of Union sanctions encompasses different types of prohibited conduct, such as: 1) making funds or economic resources available which are under the prohibition of EU restrictive measures; 2) entering into or continuing transaction with a third state, its entities and bodies which are under the EU sanctions; 3) trading operation with goods in violation of EU restrictive measures; 4) providing financial services or performing financial activities which are prohibited or restricted by Union restrictive measures; 5) circumventing sanctions by transferring funds or economic resources owned held, controlled by a designed person, entity or body which are to be frozen in accordance with a Union restrictive measure to a third party to conceal those funds or economic resources, etc (Proposal for a Directive on the definition of criminal offences…, 2022). Assessing the defined dimensions of prohibited conduct enables us to discern that accountability for violating EU restrictive measures implies either already sanctioned persons or other individuals who were not yet placed under the EU restrictive measures but whose actions are inconsistent with the EU regulations on restrictive measures. Besides, the Proposal provides a range of possible penalties based on the gravity of the violation of EU restrictive measures committed. What is essential is that the available scale of penalties also enshrines confiscation as a possible measure for punishing a perpetrator. It stipulates that Member States should take necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offence (Proposal for a Directive on the definition of criminal offences…, 2022). It establishes basic rules regarding sanctioned individuals whose property can be lawfully confiscated as a penalty for violating the sanction regime. Except for the provisions on criminal conduct definition and scale of possible penalties for committed infringements, the draft proposal elaborates on the primary safeguards for targeted persons to cope with human rights protection and guarantees. Notably, it advocates that the penalty measures should correspond to the requirements on proportionality of central human rights safeguards. Still, the inflicted penalties for the offences should be effective and dissuasive (Proposal for a Directive on the definition of criminal offences…, 2022). Moreover, the imposition of such measures should be subject to an appeal procedure, enabling the person to challenge such a decision. Therefore, the Proposal defines the main criteria and standards that should guide EU MS when applying a penalty for violating sanctions.

However, despite criminalizing the violation of Union restrictive measures and the providing a legal possibility to inflict confiscation over perpetrators' private assets, there are certain uncertainties that may trigger the effectiveness of such regulation. Firstly, the

proposed draft does not precisely define for which types of criminal conduct related to sanction circumvention Member States are entitled to enforce confiscation. It means that the decision on applying or not applying confiscation is left to the discretion of each EU MS, which may lead to divergent EU MS practices. As a result, the absence of clarity and alternatives in choosing the penalty may undermine the effectiveness of such provisions. Secondly, the proposed list of penalties for legal entities (different companies, corporations), either already sanctioned or not, does not include an option to inflict confiscation over the entities' property. However, violating Union restrictive measures by legal entities may lead to even more drastic consequences than those produced by natural persons. Thirdly, to ensure the effectiveness of combating sanction violation, the EU law should enforce and enhance not only cooperation between EU MS but also enshrine provisions for establishing cooperation with non-EU countries, especially in terms of holding investigations and prosecutions. Also, the question remains unsettled regarding whether it is legally possible to entail the confiscation of individual property when the person does not directly commit action, which could be classified as "violation of EU restrictive measure". For instance, when the sanctioned individual is not trying to avoid sanctions (to re-sell or re-locate its property) but continues to finance and support the ongoing war in Ukraine. The freezes of assets do not provide a tangible result itself; they merely prevent the person from temporarily accessing its funds. It means that eventually, the person will regain control over their property without facing any negative consequences for supporting the war. From this angle, the criminalization and definition of criminal conduct should cover not only the sanction circumvention, which implies the active actions from the person's side but also those actions aimed at continuing to finance or support the war by all other means.

The next unresolved issue remains how the EU Member States will proceed with the confiscation for violating Union restrictive measures toward persons whose property, was already subject to asset freezing for sponsoring or supporting the war in Ukraine but beyond criminal proceedings. Indeed, in criminal matters freezing and confiscation are closely linked since freezing in most cases serve as a prerequisite for confiscation (Directive 2014/42/EU). The freezing and confiscation as measures for committed criminal offences are covered by Article 83(1) of the TFEU, whereas the freezing of assets as restrictive measures is covered by Article 29 of the TEU and Article 215 of the TFEU. The different legal nature of such measures requires the clear regulation in this matter. Though, considering the number of frozen private assets and documented cases with sanction

circumvention, the EU law should foresee the possibility to confiscate in criminal cases related to violation of Union restrictive measures assets that had been previously frozen under EU law. Otherwise, it significantly reduces the possibility of confiscating such frozen assets while also making such sanctioned persons and their property invulnerable to potential confiscation.

Moreover, the international practice produces examples when frozen assets of private individuals can be confiscated by national courts (Moiseienko, 2022, p. 36). For instance, the US, being the first country in taking such kind of actions, confiscated yacht owned by Viktor Vekselberg (that was previously frozen due to the imposed sanctions), the close ally of Vladimir putin (Shagina, 2023, p. 29). Besides, more recently the US has also seized an aircraft owned by the Russian oil company Rosneft. Such measures were taken as a response to sanction evasion. The department is planning to proceed apace with more seizures of private Russian assets (Tokar *et al*., 2023). Also, the contributive approach was formed under Canadian legislation. The developed legislation empowers national authorities to confiscate frozen individual assets for sanction violation without any further preconditions (Moiseienko, 2022, p. 38). Other approaches on confiscation of Russian-linked property were also developed within the Georgian and Italian legal framework. According to Anton Moiseienko analysis of these confiscation regimes, he has summarized the available options as follows. Firstly, the regime should apply to all those who somehow is affiliated with Russian government. Secondly, property can be confiscated if (1) the owner does not prove its legitimate origins; (2) the owner is determined, based on balance of probabilities to be responsible for or complicit in certain types of serious crime; (3) the property is found, likewise on the balance of probabilities, to have a 'connection' to a crime; (4) no further preconditions except the property having been frozen and the person who owns or holds it having been sanctioned (Moiseienko, 2022, p. 39). Still, all these approaches are subject to human rights concerns as they may violate a person's property rights. However, as previously addressed, if considering the EU's policy on confiscation, the specially designated regulations will also insert required safeguards and precise criteria for defining the scope of criminal offence and the scale of penalties corresponding to proportionality and necessity criteria. It will address all existing concerns and justify the lawfulness of the measures taken.

3. OTHER WAYS TO USE AND SEIZE RUSSIAN ASSETS

The debate over legally sound options to confiscate Russian frozen assets is no longer remain the only viable solution how to use the frozen funds in the interest of Ukraine and its population. In July 2023 the group of Ukrainian experts within the Institute of Legislative Ideas have developed main ways how to use Russian funds and how it can serve for the Ukrainian sake (The Institute of Legislative Ideas, 2023). These ways are the following: (1) confiscation and direct transfer of confiscated funds to Ukraine; (2) the transfer of income and taxes on income from frozen Russian assets; (3) the continued freezing of Russian funds as a pledge of the fulfilment of Russia's obligations to compensate caused damage (The Institute of Legislative Ideas, 2023). Except these proposals, there are also many formulated options for seizing funds through litigation procedure (Moiseienko, 2022). Since the first mechanism on confiscation was thoroughly examined in the above sections, we will focus only on the remaining options.

3.1. The Transfer of Income and Taxes on Income from Frozen Russian Assets

The first idea is to transfer revenues on frozen assets in the European Union. It is well-known that state Russian assets are frozen for more than a year and could not be used practically. Still, as was indicated in the special Report by Euroclear, only for the first quarter of 2023 year, 734 million as income was produced from the frozen Russian state assets (Euroclear, 2023). Accordingly, the mentioned method implies that the frozen assets will remain intact while the generated income on those funds can be allocated to Ukraine. More recently, during the European Council summit, EU leaders endorsed unprecedented plans to use profits generated by frozen Russian state assets (specifically Russian central bank assets) for Ukraine reconstruction (Tamma P. and Barigazzi J., 2023). In particular, it was stressed that '*decisive progress is needed, in coordination with partners, on how any extraordinary revenues held by private entities stemming directly from Russia's immobilized assets could be directed to support Ukraine and its recovery and reconstruction, consistent with applicable contractual obligations, and in accordance with EU and international law*' (European Council meeting (26 and 27 October 2023)). In particular, the European Commission recommends that financial institutions put all profits stemming from the Russian Central Bank's assets on separate accounts once the decision is adopted (Pugnet, 2023). For now, the frozen Russian assets which are located at Euroclear have already generated approximately €3 billion in profits from the time they were frozen through the third quarter of this year (European Council meeting (26 and 27 October 2023)). Accordingly, the EU strives to provide Ukraine with EUR 15 billion from Russia's frozen assets over the period from 2023 to 2027 (European Pravda, 2023).

However, such a decision requires a support from all EU MS and implementation of special EU regulation in this matter.

The next viable option is to transfer taxes collected from the profits from frozen Russian assets. This method implies the possibility to transfer collected taxes to Ukraine which were accrued on income from the reinvestment of Russian assets. This tool was already successfully used by Belgium. Explicitly, in May 2023 the Belgium Government announced a decision on transferring 92 million euro to Ukraine which were gained from taxes on the interest earned by frozen Russian assets (Barron's, 2023). It means that Ukraine in a near future can start receiving collected funds from frozen assets which also does not require a mutual consent on such a decision from other EU MS. However, this mechanism still lacks a well-established procedure on money-transferring to Ukrainian budget while also being a time-consuming that undermines its efficiency. Though, the European Union is moving ahead with a proposal to tax profits from more than €200 billion ($218 billion) of frozen Russian central bank assets to aid Ukraine's reconstruction despite concerns from several EU MS (Bodoni *et al*., 2023). In a recent future the European Commission is planning to announce its legislative proposal regarding the imposition of windfall tax on profits generated by frozen assets (Bodoni *et al*., 2023). More importantly, the proposed initiative strives to counter existing concerns among certain EU MS that such measures could interfere with their national tax systems. On the one side, these costs can significantly contribute to Ukraine's reconstruction. On the other hand, transferring such taxes may offset the main principle that Russia, as an aggressor, should pay for all its violations and damages.

Though, compared to method of transferring revenues on frozen assets, this method does not provide such a tangible result and, as such, cannot replace the monetary value which may be gained through active use and generation of profits from Russian frozen assets. However, both these methods should serve as an additional source for using frozen assets rather than as an alternative tool to confiscation. The EU MS should not carry a financial burden instead of the Russian Federation for the consequences of this cruel war in Ukraine. In other words, if all EU Member States switch to such a monetary mechanism for using frozen assets instead of considering option for confiscations, it will exempt the Russian Federation from any financial liability for committed crimes which completely undermines the principle of 'aggressor pays'. Moreover, this approach will contradict the main principles of international state responsibility for committed wrongdoings. Still, moving the revenues on frozen assets and collected taxes on incomes from frozen assets by

can be a beneficial and temporary measure until the EU MS develop a mechanism for confiscating frozen Russian assets.

3.2. The Continued Freezing of Russian Funds

As a plausible alternative to confiscation during the ongoing military aggression in Ukraine, third countries can also opt for continued freezing of Russian assets as a lawful third-party countermeasure. It is essential to emphasize that there is no preclusion that states cannot apply countermeasures as an inducement instrument in the form of a security tool for fulfilling international obligations by sanctioned states. In other words, all countries will keep all Russian assets frozen until Russia compensates for all caused damages. This mechanism of continued freezing will exclude any possible usage of frozen assets not till the end of military aggression but until Russia provide full reparation to Ukraine (Moiseienko, 2022, p. 9). This option could be more acceptable for many EU MS (than confiscation) and be one of the most accessible courses for states that have frozen Russian assets within their territories. Moreover, the continued freezing of Russian assets will completely fall within the concept of third-party countermeasures. The appealing feature of this option is that it requires a minimum input from foreign states since it is less controversial than, for instance, confiscation. At the same time, EU should also adopt a special legislation that would oblige all EU MS to keep the freezes of Russian assets until Russia compensates for damages it inflicted. Hence, the continued freezing serves a form of security in order to guarantee the payments of reparations for Ukraine by Russia.

By its essence, keeping Russian assets frozen can also produce and 'inducement' effect for Russia to stop their unlawful military aggression against Ukraine. Again, the assets will be frozen until Russia terminates its illegal activities and grave violations of international law. Besides, the long-term freezing of assets does not contradict the nature of this restrictive measure. As was indicated in *Kadi v Commission and Council* case, an asset freeze that had been in place for almost a decade to be temporary and preventative but acknowledged it might at some point lose this temporary quality (Kadi v Commission and Council, paras 149-150). Hence, a continued freezing will not undermine the lawfulness of the taken measure. Moreover, there are no legal impediments to continuous freezing since sanctioned assets remains temporary frozen – until Russia provides compensation to Ukraine for the damage inflicted by its invasion in compliance with international law obligations. Even though, from monetary perspective, this way is less effective but mitigates all arising third countries' concerns over the legality of implied tools for using Russian state funds under international public law. Moreover, the existing state practice already illustrates states' commitment in proceeding with this approach. For instance, the

UK announced the decision to tighten its sanction policy and introduce the relevant legislation on keeping Russian assets frozen until Moscow has agreed to pay compensation to Ukraine (Maclellan *et al*., 2023). Moreover, the nature of this mechanism will enable to combine several options on frozen assets usage altogether, such as implication of special taxes on incomes from frozen assets and generated incomes from them.

3.3 Seizing Frozen Funds through Litigation Proceedings

Apart from confiscation and the already-mentioned ways of using frozen Russian assets, another available option is to seize Russian assets through litigation proceedings. Private complaints in the respective state's courts and further enforcement of the rendered judgments in the jurisdiction where the Russian property is located can be a plausible option to seize the frozen funds. Such private complaints can be lodged against natural persons (for instance, against so-called Russian oligarchs as supporters of terrorism), legal entities (for example, companies who continue supplying dual-use products or in other ways contribute to supporting the war) or Russia as a state itself. Correctly defining the circle of defendants in this category of disputes will be crucial in its further judgment enforcement. Despite obtaining the court judgment from Ukrainian domestic courts, the choice of the proper jurisdiction for enforcing such judgment is also vital aspect to consider. Firstly, the decision rendered by Ukrainian court can be enforced by a foreign court based on international agreements between Ukraine and foreign state, or through the principle of reciprocity when such international agreements are absent. Secondly, the possibility of enforcing such a decision will be strictly connected to the foreign country's legislation where the claimant seeks to enforce such a decision against Russian state-owned property. Hence, the first stage for compensating damages is to bring a complaint before the domestic courts in Ukraine, the second stage is to initiate the procedure on enforcing such a decision abroad. To conclude, collecting compensation through private complaints and enforcing procedures abroad (in jurisdictions where the Russian state-owned property is located) can be a feasible option while it requires a careful examination of peculiarities of legislation in foreign state and existing practical and legal risks in this matter.

In additional to the ordinary private complaints within domestic litigation proceedings and further enforcement abroad, it is also possible to bring investors' disputes against Russian property as a mechanism for collecting Russian funds. Following this idea, the arbitration mechanism will enable to submit a substantial part of incurred war damages to arbitration obtaining them through enforcement of arbitral award (Nagy, 2023). In particular, investment arbitration authorizes compensatory claims by individuals for

breaches of public international law. It does not suppress such claims by sovereign immunity since vest claims emerge from public law violations possesses a commercial law character (Nagy, 2023). In other words, the quasi-commercial nature of such individual complaints against Russian property will allow to waive the application state immunity toward such disputes. Though, it must be noted that the investment arbitration mechanism is only applicable for investors whose property located within the territorial scope of BIT's (Nagy, 2023). To recall, BITs apply to investments by citizens of one Contracting Party situated on the territory of another. It means that investors may lodge claims for war damages caused by Russia only if such property is located on the currently occupied Ukrainian territories and being under 'effective control' by Russia (Nagy, 2023). As an option, natural or legal persons (companies, corporations) who suffered due to Russian armed aggression can bring individual investor claims and claim compensation for lost property. For instance, as an investor, Ukrainian billionaire and businessman Rinat Akhmetov has already commenced arbitration proceedings against Russia for all damages inflicted on his property due to Russian military aggression (Ukrainska Pravda, 2023).

It is essential to note that the practice on Ukrainian-Russia BITs' application to illegally occupied Ukrainian territories by Russia has already produced some fruitful outcomes. An illustrative example is the Naftogas case, whose assets were illegally seized by Russia in Crimea after the Russian illegal occupation of this region in 2014. In October 2016, Naftogaz and six other companies of Naftogaz Group initiated arbitration proceedings (PCA case No. 2017-16) against Russia seeking for compensation for losses caused by the seizure of Naftogaz Group's assets in the Autonomous Republic of Crimea in 2014 (Naftogas Group, 2023). On 12 April 2023, the Arbitral Tribunal of the Permanent Court of Arbitration at the Hague ordered russia to pay USD 5 billion in compensation for losses caused by the seizure of Naftogaz Group's assets in the Autonomous Republic of Crimea in 2014. On 5 December 2023, the High Court of Justice of England & Wales recognized its USD 5 billion final award on damages (including interest) against Russia (Naftogas Group, 2023). It means that Naftogaz Group's is currently entitled to initiate the procedure for enforcement of such award through jurisdictions holding Russian assets to recover the incurred losses. Still, it must be clearly addressed that the court decision does not automatically grant Naftogaz the amount recognized by the court due to the existing legal constraints and the absence of a legally approved mechanism for seizing frozen Russian assets. It also needs to be determined whether frozen or other Russian funds can be used to enforce the award. However, the recognition of arbitral awards against Russian

property through investor's claims brings a lot of perspectives in developing a robust compensation mechanism for war damages caused by Russia in Ukraine, especially from the frozen Russian assets. To conclude, even though the investment arbitration mechanism against Russian frozen property is uncharted and has legal barriers, it brings a lot of prospects on the path of developing a straightforward and practical compensation mechanism.

Moreover, as an available option, individuals and companies may proceed with complaints before international tribunals for inflicted damages, seeking compensation. In particular, a certain number of Ukrainian companies, who suffered as a result of Russian military aggression, have brought complaints before the ECHR, arguing a violation by Russia of Article 1 of Protocol 1 to the European Convention of Human Rights, which guarantees the right to peaceful possession of the property. As an example, Amic Ukraine filed a lawsuit against Russia before the ECtHR, arguing the violation of the right to peaceful possession of the property with the preliminary amount of the claimed damages of UAH 300 million (EUR 8.5 million) (Amic Energy, 2023). The total amount of the incurred damage will be claimed during the appropriate stage of the ECHR proceedings since the losses caused by Russia's actions as a terrorist country are increasing daily (Amic Energy, 2023). The complaint regarding the caused damages was also brought by a significant Ukrainian group of companies – Metinvest. Metinvest group, beneficially owned by Rinat Akhmetov and Vadym Novynskyi, filed a complaint before the ECtHR against Russia, claiming the violation of Article 1 of Protocol 1 of the ECHR by causing significant damage and destruction to its assets as a result of Russian full-scale invasion (Metinvest, 2022). Still, it is essential to elaborate that such claims can only be lodged for the period until Russia was a member the Council of Europe since all obligations under ECHR also ceased to exist. Otherwise, such complaints will not lead to any tangible results.

CONCLUSIONS ANS PROPOSALS

1. The thesis reveals that the primary purpose of asset freezing was to induce the aggressor state to withdraw its unlawful activities and to restore international peace and security. The imposition of asset freezes as a response to unlawful Russian military aggression aimed to force Russia to cease its brutal war of aggression against Ukraine and to resort to international law-complaint behaviour. However, the ongoing war in Ukraine shows that the mere limitation to accessing the funds through freezes cannot lead to tangible results in itself and to stop Russia's course of action in Ukraine. Accordingly, the existing EU legal framework needs to be reinforced to enable confiscation of Russian frozen assets, especially when it concerns the third country's grave violations of public international law.

2. Even if freezing of funds was designed to be a temporary measure, it does not preclude such funds from being confiscated through permissible countermeasures by third countries. The present analysis demonstrated that confiscating Russian frozen state funds can be justified entirely as a third-party countermeasure. First, it pursues an inducement role for Russia to cease its military aggression. Second, the confiscation of state funds will not contradict the reversible character of countermeasures since Russia's obligations imply not only withdrawal of its troops from the territory of Ukraine but also compensation for all the damages incurred. At the same time, the analysis in this part showed that even when states undertake measures on the basis of the doctrine of third-party countermeasures, they do not refer to the law of countermeasures publicly and explicitly. It undermines the formation of a consistent and stable state practice while also precluding other states from adopting specific measures as justified countermeasures, thus rendering this legal doctrine somewhat controversial.

3. Besides, the conducted analysis demonstrated that confiscating Russian state-owned funds can be considered as an act of collective self-defence since it implies both forcible and non-forcible measures. Invocation of confiscation may fall within the notion of non-forcible measures as it does not imply the use of force. Moreover, international law does not contain an exhaustive list of permissible acts within the scope of collective self-defence. The application of a collective self-defence mechanism by third countries for justifying the confiscation of frozen Russian state assets may reduce and mitigate the concerns in terms of lawfulness and permissibility of such measures under international law since the purpose of an invocation of self-defence is to justify the conduct which would otherwise be wrongful. However, the present analysis also demonstrated that states are reluctant to enforce collective self-defence measures due to the political concerns.

4. While both third-party countermeasures and collective self-defence may serve as a practical avenue for justifying the confiscation of frozen Russian state funds, the comparative analysis showed that reliance on collective self-defence doctrine could be more acceptable options for the state. In particular, self-defence is less controversial than the law of countermeasures since it does not require the taken measures to be reversible. Moreover, considering collective self-defence is usually taken in the war context, allied third countries may immediately confiscate Russian frozen state funds to repel Russian military aggression and confront existing military imbalances between the Ukrainian and Russian militaries. However, for third-party countermeasures and collective self-defence, EU law would require adopting a special EU legislation that will outline how EU MS may proceed with confiscation through collective self-defence or third-party countermeasures.

5. The study showed that confiscating Russian private assets through criminal proceedings for violating the sanctions regime is the most viable option regarding the frozen private assets. However, the analysis of the EU draft legislation in this matter depicted certain shortcomings that may undermine the efficiency of this mechanism:

- The proposed Directive does not foresee the possibility of confiscating private assets that belong to legal entities. However, the gravity of sanction violation by legal entities may also lead to severe consequences. Hence, the EU draft legislation should be amended in this part.
- The European Commission's Proposal for a Directive does not foresee the possibility of punishing sanctioned persons whose actions are not directed at sanction violation. Still, they continue supporting and sponsoring the war. Therefore, the scope of a criminal offence related to sanction violation should be broadened and encompass the prohibited behaviour of already sanctioned persons (whose property was frozen under EU law), such as continuous support of the war.
- The EU draft legislation does not precisely define upon which prohibited conduct as a criminal offence EU MS could inflict the confiscation, leaving it to the discretion of EU MS. Accordingly, it needs more clarity on what criminalized behavior EU MS should apply confiscation as a penalty. Otherwise, it would lead to divergent EU MS practices, undermining the efficiency of such regulation.
- The EU draft legislation should also foresee a possibility of confiscating assets that had been previously frozen under EU sanction policy. Otherwise, it would be legally impossible to confiscate private frozen assets.

6. Apart from confiscation, the thesis illustrated that there are other legally viable options for using frozen Russian assets before developing and adopting a specific mechanism for confiscation. In particular, EU MS may successfully transfer revenues on frozen assets and taxes collected from the profits from frozen Russian assets. It will provide additional monetary value and the possibility of granting financial help to Ukraine before establishing the confiscation mechanism. However, these mechanisms should not serve as an alternative for confiscation since such an approach would undermine the principle that Russia, as an aggressor, should pay for all damages inflicted on Ukraine and its people and not the EU MS or other partner countries.

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SUMMARY

Confiscation and Other Ways of Using the Frozen Russian Assets as a Lawful Response to Russian Military Aggression: a Legal Analysis

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This thesis provides an in-depth analysis of the available legal options for confiscating frozen Russian assets as a lawful and reasonable response by the international community to the brutal Russian war of aggression against Ukraine. Even though confiscation remains a topic of heated debate within the international community, this work demonstrates that there are legal avenues for undertaking decisive steps towards Russian frozen assets and reinforcing the principle that the aggressor should pay. It proceeds that state immunity as a principle of customary international law cannot be perceived as an absolute immunity for states and serve as an excuse to evade state responsibility for the committed wrongdoings. Moreover, the thesis elaborates on the permissibility of third-party countermeasures and the concept of collective self-defence as legal grounds justifying confiscation. The topic of this master thesis clearly distinguishes these two concepts, providing a comparative analysis. While countermeasure is a more controversial option for states due to the requirements of reversibility, collective self-defence does not require reversibility, thus making ita more viable solution for the states to consider.

Also, the study analyzes the possibility of confiscating private assets under EU law through criminal proceedings for violating the Union's restrictive measures. At the same time, the thesis highlights a number of shortcomings of this legal instrument under EU law, which may undermine its effectiveness. In addition, considering the persisting controversies over confiscation of assets, the thesis also examines other viable options of using frozen Russian assets, such as transferring the income and taxes on income from such assets to Ukraine or Ukraine-related causes. The analysis of EU legal acts, CJEU jurisprudence and legal doctrine regarding asset freezing and possible confiscation enables us to determine existing drawbacks and the best ways of addressing them, so that robust compensation and frozen assets' usage mechanisms could be developed.