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The New Frontiers of European Sanctions and the Grey Areas of International Law

Following Russia's invasion of Ukraine, the European Union (EU) adopted an unprecedented series of sanctions (also known as 'restrictive measures') between February 2022 and April 2023. Each 'package' of sanctions, of which there are ten to date, builds on and amplifies the legal framework of the sanctions imposed in 2014 following the annexation of Crimea, not only by expanding the list of sanctioned individuals and entities but also by targeting new activities, implementing new types of restrictions, and expanding their scope. The current discussions around a possible eleventh sanctions 'package' show that the EU has not yet exhausted this resource, which it has sought to deploy gradually, in the hope that the build-up of sanctions may induce Russia to withdraw from Ukraine, sufficiently affect its war effort or even, less explicitly stated, create the conditions for regime change in Russia.

Assessing the effectiveness of sanctions against Russia is a delicate matter—and not the purpose of this article. While sanctions have brought about neither an end to the conflict nor regime change, they cannot be assessed solely in this light. Sanctions are part of a multidimensional pattern that incorporates not only a whole set of constraints but also many related considerations.

The constraints are primarily those arising from the interests of the EU itself. No doubt their protection, at least in the medium term, has prevented it from adopting measures—for example, a total embargo on the import of Russian gas—which could have dealt a fatal blow to the resources of the Russian Federation, but which would undoubtedly have affected the European economy to just as great an extent. One should also not underestimate that this situation has also led the EU to consider the potential synergies between its response to the invasion of Ukraine and its other objectives of energy independence or the fight against climate change. This is the case, for example, of the REPowerEU plan presented by the European Commission in May 2022, which aims to promote energy savings, the production of clean energy and the diversification of energy supply sources.[1] To use Pierre Charbonnier's formulation, this 'war ecology'[2] can also be understood as embodying measures that aim to affect the Russian economy in the long run and to achieve the same objectives as economic sanctions, without being assigned the label of 'restrictive measures'. It is therefore not only necessary not to focus on the question of the effectiveness of sanctions, understood in the strict sense, but also not to let them overshadow the other measures with which they are closely related.

The constraints are also those of the law, mainly EU law and international law. The legality of possible confiscation measures of frozen assets belonging to the Russian Federation or to Russian oligarchs, which is currently the subject of much controversy, is a relevant example—we will return to it below. However, these constraints can be seen in reverse. While international law certainly restricts the right of states to adopt sanctions, one may wonder whether, in some instances, it doesn't authorize them to do so, or even impose on them an obligation to adopt restrictive measures—we will also have the opportunity to come back to this below.[3] Considering this possibility shows that we are potentially in one of those grey areas of international law that may serve as both a limit to and a justification for adopting sanctions.

Multiple aspects of the European sanctions adopted as part of the Ukrainian crisis belong to these legal grey areas. These sanctions—and those being seriously considered at this stage—are indeed different from those usually adopted by the Union, through their expansiveness, potential scope of application and the novelty of the instruments that are being (or are about to be) deployed. These grey areas are the focus of this article, which aims to show that they are also consubstantial with the evolution of international law. In other words, these sanctions also constitute a legal laboratory where the limits of international law are tested and where some of its mutations take shape.

After some general considerations on these new European sanctions and the analytical frameworks to which they belong (I), we will successively look at two aspects that deserve to be highlighted, namely the emergence of a new European extraterritoriality (II) and the breakthrough that would be represented by the development of a new framework for the confiscation of frozen assets (III).

1. European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU Plan, COM/2022/230 final, 18 May 2022.
2. Pierre Charbonnier, 'La naissance de l'écologie de guerre' (18 March 2022) *Le Grand Continent* https://legrandcontinent.eu/fr/2022/03/18/la-naissance-de-lecologie-de-guerre/.
3. See below section I.

I. European sanctions and the categories of international law

It is a truism to say that the restrictive measures adopted by the EU in the context of the Ukrainian crisis are unilateral. Russia's status as a permanent member of the Security Council with a veto right prevented any multilateral measures from being adopted by this UN body. The legality of unilateral sanctions under international law, which has given rise to a vast literature and various controversies,[4] can be safely set aside at this point.

The term 'sanction' is not itself a legal concept with a specific regime, and the assessment of the legality of these measures depends on a set of factors regarding the nature of the measure (restriction of economic activity, freezing, confiscation, etc.), its scope (extraterritorial or not) and the reasons that motivated its adoption (tensions between States, armed conflict, non-respect of the rule of law, violation of fundamental rights, violation of a peremptory norm of general international law). There is thus a significant difference in context between, on the one hand, the sanctions adopted by several states and the EU following Russia's invasion of Ukraine in violation of a peremptory norm of general international law and, on the other hand, the extraterritorial sanctions adopted by the United States against Cuba. In the case of the US embargo of Cuba, the United Nations General Assembly (UNGA) adopts every year, by an overwhelming majority, a resolution 'reiterat[ing] its call upon all States to refrain from promulgating and applying [such extraterritorial sanctions], in conformity with their obligations under the Charter of the United Nations and international law, which, inter alia, reaffirm the freedom of trade and navigation'.[5]

The UNGA also strongly condemned in March 2022 Russia's aggression against Ukraine in violation of the UN Charter.[6] It did not, however, recommend the adoption of sanctions by member states in response to this violation. It also did not do so in its most recent resolution of February 2023.[7] Some argue that the General Assembly could have coordinated the implementation of such measures in the absence of Security Council action.[8]

4. For an overview, see Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights – The Impact of the Principle of Common Concern of Humankind* (Brill 2022) 59 et seq. See also Jean-Marc Thouvenin, 'Articulating UN Sanctions with Unilateral Restrictive Measures', *in* Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021) 149 et seq.; Antonios Tzanakopoulos, 'The Right to Be Free from Economic Coercion' (2015) 4 *Cambridge International Law Journal* 616 et seq.
5. For the latest version, see UNGA Resolution 77/7 'Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba', A/RED/77/7, 3 November 2022.
6. UNGA, resolution ES-11/1, Aggression against Ukraine, A/RES/ES-11/1, 2 March 2022.
7. UNGA, resolution ES-11/6, Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine, A/RES/ES-11/6, 23 February 2023.
8. Rebecca Barber, 'What can the UN General Assembly do about Russian Aggression in Ukraine?' (26 February 2022) *EJIL:Talk!*, https://www.ejiltalk.org/what-can-the-un-general-assembly-do-about-russian-aggression-in-ukraine. See also Rebecca Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70(2) *ICLQ* 343 et seq.

The fact remains that states can always adopt retaliatory measures that do not violate any international obligation and, that for several years now, a (still debated) practice of third-party countermeasures, adopted by states other than the one injured, has also been developing.[9]

If what states are entitled to do lies indeed in a grey area, a new space of uncertainty is emerging between what states *can* do and what they *must* do when the violation of a peremptory norm is at stake. Consider, for example, the customary rules on state responsibility, which require states to refrain from rendering aid or assistance in maintaining a situation created by a serious breach of a peremptory norm of general international law.[10] Couldn't this obligation of non-assistance be construed as requiring states to adopt restrictive measures designed to prevent any (indirect) support of the military efforts behind the violation? This is only legal conjecture at this point, but as we can see, the rules of international law that govern what is usually referred to as 'sanctions' leave room for many options and alternative interpretations. Unsurprisingly, the states that have firmly condemned Russia's actions do not necessarily draw the same consequences from their condemnation.

In this respect, the European Union's response has been impressive, given the scale of the sanctions adopted, despite the procedural requirement for the Council to act unanimously to adopt restrictive measures, some of which have been coordinated within the G7. Most of the measures are based on the usual two main axes, namely the introduction of economic restrictions, on the one hand, and individual sanctions targeting individuals and entities, on the other. However, there are some novelties in terms of the instruments used and the intensity of the sanctions imposed.

Russia's aggression against Ukraine has indeed been an opportunity to implement new types of restrictions that the EU had never before deployed. For example, the establishment of price ceilings for Russian oil products, the ban on several Russian media (Sputnik, Russia Today, etc.) accused of disinformation and destabilisation campaigns, a ban on providing legal advice to the government of Russia or legal persons, entities or bodies established in Russia, and the freezing of the Russian central bank's foreign exchange reserves.

Other measures are surprising in their intensity or particularly comprehensive nature, which tend to show that they are not aimed solely at targeting those responsible for violations of international law or at affecting the Russian economy and, by extension, its ability to maintain its war effort. The prohibition on European banks to accept deposits above a certain threshold from Russian nationals

9. Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?' (2016) 29 *Questions of International Law* 3 et seq.
10. International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 41(2).

or individuals residing in Russia may be surprising in that it imposes restrictions on individuals solely on the basis of their nationality or place of residence, while emphasizing that it 'shall not apply to nationals of a Member State, of a country member of the European Economic Area or of Switzerland'.[11]

The individual measures imposing an asset freeze and an EU travel ban were also surprising in their scope. These sanctions are aimed not only at persons responsible for actions or policies that primarily 'undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security of Ukraine',[12] those supporting, materially or financially, such actions,[13] those supporting, materially or financially, or benefiting from Russian decision-makers responsible for such actions,[14] but also 'leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation'[15] and, for all these persons, 'natural or legal persons, entities or bodies associated with them'.[16] This last category, as well as that of 'leading businesspersons', which targets those usually referred to as 'oligarchs', have given rise to some questions, considering the very vague nature of the concept, which allows the EU to target a very large number of people who do not necessarily have direct or indirect links with the reprehensible acts.[17] The proportionality of these sanctions is also questionable, since precisely the same measures of a complete freeze of assets and a ban on travel to the EU are applied indiscriminately on the one hand to leading Russian decision-makers and, on the other hand, for example, to persons merely associated with leading businessmen.

It is not possible to assess the legality of all these measures under international law in this article. The question of legality under EU law, particularly EU fundamental rights, has already been raised, as claims have been lodged against certain European restrictive measures. EU courts have already had the opportunity to annul certain restrictive measures against a person because the existence of a family relationship was insufficient to characterise an association with another sanctioned person.[18] They also rejected RT France's request to annul the Council's acts banning the broadcasting of certain Russian media[19]—an appeal is pending in this case before the Court of Justice of the European Union (CJEU).[20] A claim has also been lodged by the *Ordre des avocats à la cour de Paris* before EU courts regarding the prohibition on providing legal services, as the Association considers, among other things, that it hinders the right to an effective remedy and access to an impartial tribunal, which includes, within the meaning of the EU Charter of Fundamental Rights, the right 'of being advised, defended and represented'[21]. It will thus be up to the CJEU in the coming months to position itself as the regulator of these new forms of restrictive measures that the EU has deployed.

II. The creeping extraterritoriality of European sanctions

If the EU has implemented new forms of restrictive measures following Russia's aggression, the less obvious novelty of these sanctions is their creeping extraterritoriality, which will undoubtedly be reinforced in the coming months when new 'packages' of sanctions are adopted. The term extraterritoriality is used here to designate the objective of regulating a situation taking place abroad and not involving persons with no nationality relation with the state issuing the regulation.[22] In the context of European sanctions, a good example would be the attempt by the EU to regulate a transaction between a Russian company and a Chinese company.

The possibility of extraterritoriality of European sanctions may be surprising, given that the Union has sometimes been vocal in denouncing the extraterritoriality of US sanctions. As early as 1982, the European Community reacted vigorously to measures prohibiting the export from the US of goods and technologies intended for European companies involved in the Euro-Siberian gas pipeline project with the USSR. Insofar as these sanctions were designed to regulate the behaviour of non-US persons abroad, the Community stated that 'goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them'.[23] A step forward was taken in 1996 when the Community reacted to the US extraterritorial economic sanctions against Cuba (the Helms-Burton Act) and Libya and Syria (the Amato-Kennedy Act), which also applied to non-US persons in respect of their relations with those countries. The Community had adopted a blocking regulation to protect and counteract the US measures, the preamble to which stressed that 'by

11. Article 5b of Council Regulation (EU) no. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as last amended by Council Regulation (EU) 2023/427 of 25 February 2023.
12. Articles 3(1)(a) and (b) of Council Regulation (EU) no. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
13. Regulation 269/2014, Article 3(1)(b).
14. Regulation 269/2014, Article 3(1)(d).
15. Regulation 269/2014, Article 3(1)(g).
16. Regulation 269/2014, Article 3(1) al. 2.
17. See eg, Etienne Muller, 'Aspects sectoriels – Les avoirs' (2022) RFDA 629; Yulia Miadzvetskaya and Celia Challet, 'Are EU Restrictive Measures Really Targeted, Temporary and Preventive? The Case of Belarus' (2022) 6(1) *Europe and the World: A Law Review* 10.
18. General court, T-212/22, *Violetta Prigozhina v Council*, 8 March 2023 (ECLI:EU:T:2023:104).
19. General court (Grand Chamber), T-125/22, *RT France v Council*, 27 July 2022 (ECLI:EU:T:2022:483).
20. Case no C-620/22 P.
21. Charter of Fundamental Rights of the European Union, Article 47 para 2.
22. On the issue of extraterritoriality, see Régis Bismuth 'Pour une appréhension nuancée de l'extraterritorialité du droit américain - Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas' (2015) *AFDI* 785 et seq.
23. European Communities, Comments on the US Regulations Concerning Trade with the USSR (1982) 21 *International Legal Materials* 891.

their extraterritorial application' these sanctions 'violate international law'.[24]

The EU's sanctions packages have traditionally rejected any form of extraterritoriality. Indeed, the Council's sanctions guidelines emphasise that 'EU restrictive measures should only apply in situations where links exist with the EU'[25] and that the EU 'will refrain from adopting legislative instruments having extra-territorial application in breach of international law'.[26]

The general provisions defining the scope of application of EU sanctions aimed at the situation in Ukraine follow the same model. Both Regulation 269/2014 and Regulation 833/2014 emphasise that they apply within the territory of the EU, on board any aircraft or any vessel under the jurisdiction of a Member State, to nationals of the Member States, to any legal person, entity or body incorporated or constituted under the laws of a Member State, and to any business done in whole or in part within the EU.[27] This being said, the geographical scope of European sanctions should be re-evaluated in light of several elements, particularly those designed to avoid circumvention of European sanctions.[28]

The two main regulations specify that European operators are subject to prohibitions on carrying out certain operations 'directly or indirectly'[29], thus suggesting that transactions carried out via economic operators in third countries could fall within the scope of the sanctions, even though these operators are not themselves in the scope. The Commission stressed in its FAQs about regulation 833/2014 that while it does not apply to Russian subsidiaries of European companies because they are incorporated under Russian law and fall outside the scope of the measures, it is however 'prohibited for EU parent companies to use their Russian subsidiaries to circumvent the obligations that apply to the EU parent, for instance by delegating to them decisions which run counter the sanctions, or by approving such decisions by the Russian subsidiary'.[30]

On another level, the criteria used for adopting individual sanctions are also broad enough to target individuals from third states for their activities related to Russia. Thus, in October 2022, the Council sanctioned several Iranian individuals for having supplied military equipment (notably drones)[31] to Russia because they 'support[ed], materially or financially, actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine'.[32] Equally relevant is the adoption by the Council, to counter sanction circumventions and to target situations taking place outside the territory of the Member States, of a new criterion for placing on the individual sanctions list 'natural or legal persons, entities or bodies facilitating infringements of the prohibition against circumvention [of restrictive measures]'.[33] Although the transaction at stake will undoubtedly have to have a link with the EU (e.g. importing goods from the EU for re-export to Russia from a third state), the EU's willingness to target third-state entities with individual sanctions for carrying out prohibited transactions may be reminiscent of US secondary sanctions.

These developments are also seen in the more general context of the EU's ambition to cause the alignment of the policies of third countries with its own in terms of sanctions. Indeed, it can't be ruled out that the Union will go further in its following sanctions packages by implementing economic restrictions on operators who trade with Russia. The March 2023 joint statement by Commission President von der Leyen and President Biden is very eloquent on this point: 'we are taking new steps together to target additional third-country actors across the globe to disrupt support for Russia's war from any corner of the world where it is identified'.[34]

The idea is to use the leverage of access to the EU market to compel operators in third countries to comply with European measures. In other words, it would be a matter of transforming an economic privilege (market power) into a legal privilege (the ability to impose extraterritorial rules of conduct).[35] In a way, third states could no longer be economically neutral.

These developments may come as a surprise given the EU's traditional position on the extraterritoriality of US sanctions, which undeniably raises questions of consistency. When criticising US extraterritoriality, the EU focused more on the situation that the rule was intended to govern (a transaction between a sanctioned country and an operator in a third state) than on the reason for which the sanctions were imposed. On this last point, a distinction is warranted between the American sanctions against Cuba, which were taken for reasons specific to American foreign policy, and those of the EU against Russia, which were adopted in response to the violation

24. Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.
25. Council of the European Union, Sanctions Guidelines, 5664/18, 4 May 2018, no. 51.
26. *Ibid* no. 52.
27. Article 17 of Regulation 269/2014; Article 13 of Regulation 833/2014.
28. See Jan Dunin-Wasowicz, 'The Long Arm of EU Sanctions' (25 October 2022) *Blog EU Law Live*, https://eulawlive.com/op-ed-the-long-arm-of-eu-sanctions-by-jan-dunin-wasowicz/#.
29. Regulation 269/2014, Article 2(2) ; Regulation 833/2014, Articles 2(1), 2(2), 2*bis*, 2*bis bis*, 3, 3*ter*, 3*quater*, 3 *septies*, 3*octies*, etc.
30. European Commission, General Questions – Council Regulation 833/2014: Council Regulation 269/2014, 26 July 2022, n° 14.
31. Council implementing regulation (EU) 2022/1985 of 20 October 2022 implementing Regulation (EU) no. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
32. Article 3(1)(b) of Regulation 269/2014.
33. Article 3(1)(h) of Regulation 269/2014.
34. 'Joint Statement by President Biden and President von der Leyen', 10 March 2023, <https://ec.europa.eu/commission/presscorner/detail/fr/statement_23_1613>.
35. Régis Bismuth, 'Au-delà de l'extraterritorialité, une compétence économique', *in* SFDI, *Extraterritorialités et droit international* (Pedone 2020) 113.

of a peremptory norm of general international law. It would indeed be possible to consider—this is at least one of those grey areas of international law—that the obligation of non-assistance in the event of a violation of a rule of *jus cogens* could generate a responsibility for states to take restrictive measures against operators of third states that contribute even indirectly to the continuation of the situation resulting from this violation.

It is interesting to note when rereading the Council's guidelines on European restrictive measures that there is a slight difference between the English and French versions on the issue of extraterritoriality. While the French version refers to sanctions '*qui, par leur application extraterritoriale, violeraient le droit international*'[36] (in this case, focusing on the situation that the rule intends to govern), the English version refers to sanctions 'having extra-territorial application in breach of international law'[37], suggesting that there may be extraterritorial sanctions that are not 'in breach of international law'. The obligation of non-assistance in the context of the violation of a peremptory norm of general international law may constitute an argument to justify such extraterritoriality. This would be consistent with more flexible forms of extraterritoriality that have been developed by the EU in previous years, not only for the protection of the EU market or of EU citizens (in matters of competition or data protection) but more for the protection of norms relating to international human rights law or the environment, which are of an *erga omnes* nature.[38]

III. The possibility of the confiscation of frozen assets

The possibility of confiscating frozen assets to compensate victims, finance the reconstruction of Ukraine or measures taken to help refugees was raised as soon as the first freezing measures were adopted, particularly those targeting Russian oligarchs.[39] It has taken on an altogether another dimension after the immobilisation of the foreign exchange reserves of the Central Bank of Russia, which represent a much higher value than the other frozen assets (300 billion euros versus approximately 20 billion euros). The prospect of seizing the assets of the Central Bank of Russia thus becomes particularly attractive given the disproportionate financial consequences of this conflict, which are already higher than the value of all the frozen or immobilised assets (383 billion euros for the reconstruction of Ukraine alone, according to the most recent World Bank evaluation of March 2023).[40]

The purpose of this article is not to discuss all these different options and the legal problems they raise,[41] but to address the extent to which the most recent initiatives pushing the frontiers of European sanctions fall in a grey area of international law.

Concerning the issue of frozen assets, particularly those of oligarchs, the hypothesis of a European extrajudicial confiscation mechanism, which had been discussed in the past, has been abandoned. It would have raised too many legal risks concerning the potential violation of fundamental rights and would also have weakened the freezing measures themselves. Indeed, European courts have considered that asset freezing measures 'do not therefore infringe the "essential content" of the right to property' because they 'are by nature temporary and reversible'.[42] Complementing the freezing framework with an automatic confiscation framework would have transformed the nature of freezing measures and made them more vulnerable in the eyes of EU courts. Therefore, the contemplated confiscation measures could be taken in the context of criminal proceedings. To facilitate the confiscation of frozen assets, the EU is in the process of adopting a directive to add the violation of sanctions to the list of EU criminal offences. This new offence would fall in the scope of a future directive on asset recovery and confiscation.[43]

The legality under international law of the potential confiscation of the Russian Central Bank's assets has given rise to heated debate.[44] To simplify, the analysis rests mainly on two issues.[45] First, whether a measure of confiscation of the assets of a central bank falls within the scope of the rules relating to the sovereign immunity from execution, even though the rules relating to this immunity concern measures taken in the context of

36. In free translation from French: 'which, by their extraterritorial application, would violate international law'. See Conseil de l'Union européenne, *Lignes directrices relatives aux sanctions*, 5664/18, 4 May 2018, no. 52.
37. Council of the European Union, *Sanctions Guidelines*, 5664/18, 4 May 2018, no 52.
38. See Régis Bismuth, 'The European Union Experience of Extraterritoriality – When a (Willing) Victim Has Become a (Soft) Perpetrator', *in* Austeen Parrish, Cedric Ryngaert (eds), *Extraterritoriality and International Law*, (Edward Elgar, forthcoming 2023). See also Haut Comité Juridique de la Place Financière de Paris, *Rapport sur l'extraterritorialité du droit de l'Union européenne* (May 2022).
39. Régis Bismuth, 'Du gel à la confiscation des avoirs des personnes liées au régime russe ?', *Blog Le Club des Juristes*, 3 March 2022, ‹https://www.leclubdesjuristes.com/ukraine/du-gel-a-la-confiscation-des-avoirs-des-personnes-liees-au-regime-russe-par-regis-bismuth-professeur-a-lecole-de-droit-de-sciences-po›.
40. World Bank, *Updated Ukraine Recovery and Reconstruction Needs Assessment de dollars*, 23 March 2023, ‹https://www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment›.
41. These issues are addressed by two other contributions to this issue, see in the issue the contributions by Anton Moiseienko (page 34) and Leanna Burnard and Mira Naseer (page 22). See also Andrew Dornbierer, 'From Sanctions to Confiscation while Upholding the Rule of Law, Basel Institute on Governance', Basel Institute on Governance Working Paper 42, ‹baselgovernance.org/publications/wp-42›.
42. General Court, T-215/15, *Mykola Yanovych Azarov v Council*, 7 July 2017 (ECLI:EU:T:2017:479), para 102.
43. European commission, Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245, 25 May 2022.
44. In addition to the contribution by Anton Moiseienko (page 34), see Ingrid (Wuerth) Brunk, 'Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?' *Lawfare Blog*, 7 March 2022, ‹lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks›; Daniel Franchini, 'Seizure of Russian State Assets: State Immunity and Countermeasures', *Articles of War*, 8 March 2023, ‹https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasure›.
45. We refer here to the situation where the confiscating state is not in direct conflict with the state whose property is seized and is not the victim of the damage which the confiscation aims to compensate.

judicial proceedings and not those taken by the executive authority. If so, the second issue is whether an infringement of the sovereign immunity from execution could constitute a lawful countermeasure within the framework under the international law of state responsibility. This raises certain difficulties since countermeasures are supposed to be reversible, insofar as possible, to induce the responsible state to comply with its international obligations, while confiscation measures are by their very nature irreversible.

The answers to each of these questions are far from obvious, and one should not overlook the risks arising from invasive measures such as the confiscation of frozen Russian assets, i.e. exposing oneself to equivalent measures in Russia or putting at risk the attractiveness of European markets for the management of foreign central bank assets. Significantly, France had previously established specific legislation reinforcing the immunity from execution of foreign central banks' assets to preserve the competitiveness of its financial centre.[46] It is therefore not surprising that the EU has adopted a precautionary approach, a working group on this issue having been established under the Swedish Presidency of the EU Council.

It appears difficult for the EU to commit itself at this stage to a total confiscation of the assets of the Central Bank of Russia for the legal, political, and economic consequences that such a step would imply. The chairman of the working group has stated that it will have to be 'a bit innovative in order to move forward'[47] and that it is not inconceivable that the confiscation would not directly affect the assets but would be limited to 'income or interest on the capital'[48], which would also guarantee the reversibility of the immobilisation measure.

Future EU initiatives in this area will address issues where international law is unclear and leaves room for interpretation. They will necessarily raise risks inherent to all unprecedented initiatives, or that appear to be transgressive. Still, these measures are also necessary for the evolution of the law, especially when the violation of a peremptory norm of general international law is at stake.

This dynamic of the development of international law was highlighted in the dissenting opinion of Judge Yusuf in the *Jurisdictional Immunities of the State* case, in which the Court found Italy in breach of its international obligations by the refusal of its courts to grant sovereign immunity for Germany in a dispute involving violations of *jus cogens* rules.[49] While recognizing the violation of a *jus cogens* rule as a new exception to sovereign immunity did not meet with consensus at the time, Judge Yusuf noted that the development of international law in this area could not be linear and would necessarily involve national initiatives that are initially isolated. These may come from national courts, but also from the practice of legislators and executive bodies. Judge Yusuf stressed that '[c]ertain rules of international law may remain in a grey zone, and their existence may be debated in legal scholarship, until such time as a court of law—in the case of State immunities, a domestic court of law—clarifies their status and establishes their legal quality.'[50] He added that the exceptions and derogations to sovereign immunity have not developed 'through diplomatic exchanges, or though the conclusion of conventions', but that '[their development] has most often occurred through single, and sometimes isolated, domestic court decisions, which gradually turned mainstream.'[51] Therefore, it cannot be excluded that isolated initiatives may denote an international law in development, even when they 'are considered, at first sight, not to conform to what may have hitherto been viewed as State practice.'[52]

Thus, it is in the interstices and on the ridges of a body of law in motion that the EU is, in a way, trying to draft the international law of tomorrow, be it on the issue of the extraterritoriality of EU sanctions or on the issue of the possible implementation of measures to confiscate Russian assets.

46. Régis Bismuth, 'Expanding Immunity from Execution Through the Backdoor: The French Example', *in* Régis Bismuth *et al.* (eds), *Sovereign Immunity Under Pressure – Norms, Values and Interests* (Springer 2022), 449 et seq.; Régis Bismuth, 'L'immunité d'exécution après la loi Sapin 2' (2018) *JDI* 445 et seq.
47. '"Not Easy" to Seize Russia Assets: EU Task Force Head', *Euractiv*, 25 March 2023, <https://www.euractiv.com/section/global-europe/news/not-easy-to-seize-russia-assets-eu-task-force-head/>.
48. *Ibid.*
49. ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p 99.*
50. Dissenting opinion of Judge Yusuf, para 47.
51. *Ibid.*
52. *Ibid*, para 48.