DISCUSSION ON COMPENSATION UNDER INTERNATIONAL LAW WITH A FOCUS ON OPTIONS FOR ENFORCEMENT OF PAYMENTS AWARDED BY INTERNATIONAL HUMAN RIGHTS COURTS

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1. I propose to address (1) enforcement of (2) reparation (3) solely in relation to its form of compensation and (4) solely compensation awarded by the European Court of Human Rights (European Court) (5) against the Russian Federation's Central Bank assets for (5) the breach of the European Convention on Human Rights (ECHR) -- but (6) not limited to cases relating to the aggression by the Russian Federation against Ukraine.[1]

2. The immunity of Russian Central Bank's assets and the international law characterisation of possible measures in their regard has been subject to some discussion in other settings, helpfully summarised in a recent study prepared for the European Parliament by Philippa Webb.[2] I will refer to that debate where appropriate.

3. My starting point is the *primary* procedural role for individuals in the invocation of responsibility of ECHR Parties before the European Court. It is not *exclusive*, as reflected in inter-State claims before the ECHR and the role of the Committee of Ministers in supervising the execution of judgments. And, if, the ECHR regime fails to ensure the implementation of responsibility, the renewed focus on the traditional inter-State model hypothesised by Judge Bruno Simma and Dirk Pulkowski provides a helpful framework for this discussion.[3]

4. I take as a given the assumptions regarding the international obligation of the Russian Federation to pay compensation in accordance with the European Court's judgments, which provide legal certainty regarding the content and application of the rules at issue, and its refusal to comply with that obligation, set out in the discussion paper.[4]

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[1] UNGA Res 'Furtherance of remedy and reparation for aggression against Ukraine' (15 November 2022) UN Doc A/RES/ES-11/5.

[2] P Webb, 'Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine' (23 February 2004) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2024)759602>.

[3] B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483, 524-29.

[4] Discussion paper on means to ensure implementation of judgments of the Court with respect to the Russian Federation [2], [3], [6], [8], [10].

5. I will structure my presentation in three parts:

   - I will *first* consider how enforcement of payments against Russia's assets would be characterised by the relevant rules on immunities of States and their property,

   - then *evaluate* the effect of the *res judicata* European Court's judgments on any possible obligations owed by the ECHR Parties towards the Russian Federation,

   - and *conclude* with an outline of the feasibility of taking countermeasures.

   Another way of structuring this argument would be to start with the rubric of countermeasures and consider immunity as one of the limitations. My choice to proceed as I do is dictated by aesthetic considerations of symmetry of parts and nothing juridical should be read into it.

I. The immunities of States and their property

6. I turn now to the immunities of States and their property.

7. The overall context of the discussion suggests that the measures at issue would involve some form of transfer of (the title to) the assets of the Russian Central Bank frozen in Contracting Parties of the ECHR to the beneficiaries of the compensation judgments of the European Court (although it would be helpful to discuss the practicalities further, as different tools may raise different issues of international law). I will address in turn whether Central Bank property is covered by immunity, whether immunity or inviolability applies to conduct without connection to domestic judicial proceedings, and possible relevance of international law on the treatment of foreign property. I can be comparatively brief because the discussion regarding Russian Central Bank's assets, summarised in the most recent issue of the *European Journal of International Law*, is also applicable in this context,[5] and the audience will likely be familiar with it from other settings.

8. The *first* question is whether, as a matter of substantive scope of the rule, the property of the Russian Central Bank is protected by State immunity.

9. The 2004 UN Convention on Jurisdictional Immunities of States and Their Property (2004 Convention) includes 'property of the central bank … of the State' in Article 21, paragraph 1 *(c),* among the categories of property of a State that are covered by State immunity, in the absence of express consent or allocation.[6] The 2004 Convention has been described by the European Court in general terms as

[5] A Moiseienko, 'Legal: The Freezing of the Russian Central Bank's Assets' (2023) 34 EJIL 1007; R van der Horst, 'Illegal, Unless: Freezing the Assets of Russia's Central Bank' (2023) 34 EJIL 1021. On the applicable rules, cf. contributions by Thouvenin and Grandaubert with Ruys in T Ruys and N Angelet (eds), N Ferro (assistant ed), *The Cambridge Handbook of Immunities and International Law* (CUP 2019); reviewed in R O'Keefe in (2021) 32 EJIL 709, 711-13.

[6] 2004 UN Convention on Jurisdictional Immunities of States and Their Property <https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf> art 19, paragraph 1(c); also arts 18(a)-(b), 19 (a)-(b).

enshrining the codification of custom,[7] and, while State practice is somewhat varied, one may see 'an overall – although not entirely uniform – trend towards more generous immunity from execution for foreign central bank property', with the pragmatic expectation that 'States seeking to attract or maintain investments by foreign central banks … fall on the protective end of that continuum'.[8]

10. The *second* question relates to institutional scope. It calls for consideration whether immunity from measures of constraint, which in this sense would likely include confiscation, applies only in relation to conduct by organs exercising judicial functions – as the language of 'State immunity from measures of constraint in connection with proceedings before a court' in the title of Part IV of the 2004 Convention suggests[9] – or also to conduct by organs exercising legislative and executive functions without connection to domestic judicial proceedings. (I note that Article 23 of the European Convention of State Immunity uses the somewhat different language of 'no measure of execution or preventive measures', but the title of the relevant Chapter III is 'Effect of Judgment', which leads back to a place similar to the 2004 Convention).

11. On one view, as argued by Sir Michael Wood for Timor-Leste in the case before the International Court of Justice (ICJ or the Court) concerning *Questions relating to the Seizure and Detention of Certain Documents and Data*,

> the network of treaties and customary law that has developed in respect of [inviolability and immunity of State property] create a web of interrelated and closely linked rights and obligations, all stemming from the principle of equality of States, sovereignty and non-intervention.[10]

Another view, presented by Australia in the same case, is that 'there is no general principle of immunity or inviolability of State … property'.[11]

12. On immunity in particular, the ICJ has repeatedly held that 'the law of immunity is essentially procedural in character'.[12] Australia's position on immunity therefore seems to be the better one, and conduct by organs not exercising judicial functions would not implicate it. Sir Michael's broader argument about inviolability (perhaps covering immunity from measures of constraint not in connection with proceedings before a court), buttressed by what some would describe as systemic teleology and considerations of effectiveness, raises thornier issues. Some will think that

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[7] *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011 [18], [54].

[8] Wuerth, 'Immunity from Execution of Central Bank Assets' in Ruys and Angelet (n 5) 266.

[9] 2004 Convention (n 6) Part IV, also arts 18, 19.

[10] CR 2014/3 18 [28], also [32] (Wood).

[11] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)* (Provisional Measures, Order of 3 March 2014) [2014] ICJ Rep 147 [25].

[12] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* [2012] ICJ Rep 99 [58].

neither the ICJ[13] nor the International Law Commission (ILC) have clarified the issues much in recent years.[14] I will not say more since the ILC is currently reflecting on related matters in the context of criminal jurisdiction, except to note that *this* is one issue under customary international law for States to reflect upon.

13. The *third* question goes beyond procedural inquiries and considers primary obligations of States regarding the substance of treatment of foreign property, which may be articulated in investment protection and human rights law as well as customary law on the treatment of aliens. For example, in the recent judgment in *Certain Iranian Assets,* the ICJ found that the United States had breached the obligation on the prohibition of takings (except for a public purpose and with the prompt payment of just compensation) by its judicial decisions ordering the attachment and execution of property of Iranian companies.[15] This case was decided under a bilateral Treaty of Amity, rather than customary international law, and due to the instrument's jurisdictional scope did not address the assets of the Central Bank of Iran and primary obligations applicable in that regard,[16] but is a helpful reminder of possible other fields of international law beyond the law of immunity that States need to reflect upon. I note here as well the case pending before the ICJ concerning *Alleged Violations of State Immunities (Iran* v. *Canada).*[17]

14. The rest of the talk assumes that international obligations towards the Russian Federation regarding its assets have been implicated in one way or another. (Determining which particular obligations are engaged is important because different instruments may have different mechanisms of implementation, exceptions, and derogations, which will in turn raise different issues.)

II. Enforcement of judgments of the European Court of Human Rights

15. I turn now to my second point and consider whether obligations by ECHR Parties discussed above are affected by the fact that the Russian Federation's obligation of payment of compensation follows from the *res judicata* judgments of the European Court.[18] I will consider in turn the possible enforcement on the horizontal, inter-State level and in terms of what Philippa Webb in her report I mentioned

[13] *Arrest Warrant of 11 April 2000* (*DRC* v. *Belgium*) [2022] ICJ Rep 3 [51], [54], [58], [70], [71]; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* [2008] ICJ Rep 177 [160], [170], [173] (referring to immunity and inviolability without distinction). But see the somewhat cryptic *Certain Questions* ibid [174].

[14] 2022 draft articles on immunity of State officials from foreign criminal jurisdiction <https://legal.un.org/ilc/reports/2022/english/chp6.pdf> Commentary 1 to draft article 2, Commentary 13 to draft article 9.

[15] *Certain Iranian Assets (Iran* v. *US)* ICJ Judgment of 30 March 2023 <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf> [184]-[192].

[16] Ibid Section II.A.

[17] <https://www.icj-cij.org/case/189/institution-proceedings>.

[18] Discussion (n 4) [2], [9].

earlier has described as a vertical relationship with an international or supranational tribunal. [19]

16. Webb first refers, with some caution, to the possibility of enforcing the European Court's judgments through general rules on enforcement of foreign judgments.[20] The caution is, in my view, warranted. To quote the Grand Chamber of the European Court:

> the ultimate choice of the measures to be taken to execute a judgment remains with the States under the supervision of the Committee of Ministers, provided the measures are compatible with the "conclusions and spirit" set out in the Court's judgment.[21]

This reflects the general position regarding compliance with judgments of international courts, commonly driven by the particular State's executive and also legislature. Even if some domestic legal orders themselves provide further role for domestic judicial bodies in implementing the European Court's judgments, e.g. by reopening judicial proceedings or directly applying sufficiently clear and precise judgments, the focus is still on the domestic legal order *of the particular State*, not enforcement through legal orders of other Parties to the ECHR. That may be contrasted with the sort of language used in international instruments providing for domestic enforcement of decisions of international tribunals (such as Article 54, paragraph 1, of the ICSID Convention[22] or Article 32 of the Protocol on the SADC Tribunal).[23] In any event, it is not entirely clear whether analogy with enforcement of domestic judgments helps much with the immunity argument: recall that in *Jurisdictional Immunities of the State,* the ICJ found that Italy had 'violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts'.[24]

17. Webb's second but in the substantive sense primary argument is that:

> there is no reason why [sovereign immunity] ought to be applicable on a vertical basis where an international or supranational entity is ordering an enforcement against the sovereign assets of one state. An international court, such as the

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[19] Webb (n 2) 16, 37.

[20] Ibid 32-35.

[21] *Proceedings under Article 46 § 4 of the Convention in the case Kavala v. Turkey* (no. 28749/18, 11 July 2022) [128].

[22] <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> ('Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State').

[23] <https://www.sadc.int/sites/default/files/2021-08/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf>.

[24] *Jurisdictional Immunities* (n 12) [139.3], also [124]-[133].

ICJ or ECtHR, is unlike a national court, in that its adjudication of a dispute concerning a member state will not jeopardise the sovereign equality of that state.[25]

That is a creative claim. It calls for consideration of State practice, including that expressed in relevant treaties on how enforcement (does not) affect(s) other obligations, and judicial decisions. Perhaps the audience will know of more relevant practice than the somewhat dated examples mentioned so far.[26]

18. I will leave the detail to discussion so will only say that, unlike Webb, I do not find much help in the pleadings by Gerald Fitzmaurice on behalf of the United Kingdom in the ICJ case concerning *Monetary Gold Removed from Rome in 1943*, where he referred to 'the right of countries, within certain limits, to take action to enforce or execute decisions of this Court'.[27] The Court did not address Fitzmaurice's argument because the UK lost the case on other grounds; the discussion predated many of the important developments in modern international law on sources, responsibility, and dispute settlement; and it is not at all clear to me that subsequent State or judicial practice shows that this argument was picked up as persuasive in other quarters. Whatever view one takes of the merits of the argument, it should not turn on Sir Gerald.

19. The final point is this: one need not be dogmatic if genuine consensus for anchoring enforcement to existing domestic or international regimes exists. International law may be open to some pragmatic adjustment of the scope of available enforcement mechanisms, to which the European Union's practice in investment law could provide inspiration.[28]

III. Feasibility of countermeasures

20. I turn now to my third and last point, namely the feasibility of countermeasures.

21. Much has been said on countermeasures against Russia's assets, of which Federica Paddeu's entry of 1 March on *Just Security* blog is a particularly worthy read.[29] I will therefore focus only on issues of particular relevance for enforcement of the European Court's judgments on compensation. I will not say anything about the right of States other than injured States to take countermeasures, conditions

[25] Webb (n 2) 37.

[26] See *Socobel* v. *Greece* [1951] ILR 3, 7-8.

[27] Webb (n 2) 32, 36, quoting *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America)* Oral Pleadings 126.

[28] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) *OJ L 11, 14.1.2017, p. 23–1079 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)* arts 8.27, 8.28, 8.41.

[29] F Paddeu, 'Transferring Russian Assets to Compensate Ukraine: Some Reflections on Countermeasures' (1 March 2024) <https://www.justsecurity.org/92816/transferring-russian-assets-to-compensate-ukraine-some-reflections-on-countermeasures/>.

relating to resort to countermeasures, and proportionality, since the extent that they are or are not satisfied in general will likely be directly applicable here. Nor will I address the broader systemic and policy costs for accepting the applicability of countermeasures (for which the best argument is made by Tom Ruys in the *Cambridge Handbook on Immunities and International Law*), more than to say that they have to be taken into account by those thinking through these issues.[30] I will also assume, for the purposes of this talk, that customary international law on the issue is accurately reflected in the relevant provisions of the 2001 ILC articles on responsibility of States for internationally wrongful acts (2001 ILC articles), and in particular that conditions for application of countermeasures are cumulative, and both those addressed and not addressed in the remainder of my talk would have to be satisfied for their wrongfulness to be precluded.

22. I will make five points. The *first* point relates to the legal interest to invoke responsibility. Paragraph 9 of the discussion paper states that:

> The legal certainty [that the binding *res judicata* character of the European Court's judgments] reinforces is core to any legal system and is a part of the common heritage of the Council of Europe member States … . any State Party to the ECHR, even one not directly engaged in the judgment as an applicant or respondent, can be considered as injured by such non-compliance and may request compliance with this principle in its own interests and those of the community of High Contracting Parties to the ECHR.

Is every State Party to the ECHR indeed 'injured', beyond the States that have been applicants themselves in inter-State cases or have nationals as applicants? On one view, other State Parties might be not injured in the sense of being 'specially affected' or having their position radically changed, [31] but rather have a legal interest to invoke responsibility for the breach of *erga omnes partes* obligations.[32] (In line with what I noted before, I am speaking here solely of the right of States other than injured States to invoke responsibility, and not their possible right to apply countermeasures for implementation of that responsibility).

23. A related question is how broadly or narrowly the rationale of the right to invoke responsibility is justified, for which a relevant perspective could consider pending and possible future cases before the European Court or other international courts and tribunals. For example, would the same argument apply in every case where the respondent fails to comply with a judgment of an international court or tribunal regarding breach of an *erga omnes partes* obligation (of which several are pending before the ICJ, including against Council of Europe Parties)? Or all cases where Council of Europe Parties fail to comply with the European Court's judgments (or only those when it has been determined by Proceedings under Article 46 § 4 of the

[30] Ruys (n 5) 705-8.

[31] 2001 ILC articles on responsibility of States for internationally wrongful acts <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> art 42(b)(i), (ii).

[32] Ibid art 48(1)(a).

ECHR)? Or only the case where a Contracting Party has been expelled from the ECHR and has formally refused to comply with the European Court's judgments?

24. The *second* point relates to whether responsibility may be invoked for failure to comply with the European Court's judgments regarding individual claims. The answer is 'yes': responsibility of a State under Part One of the 2001 ILC articles arises for failure to comply with its obligations, regardless of the character of the beneficiary of the obligation. Article 27, paragraph 1, of the ICSID Convention is an example of an instrument confirming the right of the State to 'bring an international claim … [when] other Contracting State shall have failed to abide by and comply with the award rendered' in investor-State disputes.[33]

25. The *third* point relates to the possible implication of paragraph 9 on entitlement of every State to individually invoke responsibility outside any institutional framework. The 2001 ILC articles address the practicalities of implementation of responsibility for breach of multilateral obligations by a general point about cooperation through lawful means.[34] Neither the 2022 ILC draft conclusions on peremptory norms of general international law (*jus cogens*)[35] nor judicial decisions and State practice add further granularity directly helpful here. Whether called for by legal principle, there would be scope for discussion about the policy wisdom of tempering self-help measures as much as possible by implementation through the still-functioning elements of the *lex specialis* multilateral mechanisms of the ECHR such as the Committee of Ministers. The framework proposed by Simma and Pulkowski that I referred to in the beginning of my talk could be helpful for thinking through these issues. The point about lawful cooperation through international institutions could be also assist with sorting other relevant issues, such as selection or prioritisation for enforcement of particular European Court's judgments.

26. The *fourth* point relates to the relevance of the concept of obligations not affected by countermeasures, expressed in Article 50 of the 2001 ILC articles, which, in my view, is a provision with a complicated drafting history to which there may sometimes be less than catches the eye.[36] Caution about broader inferences is therefore due, whether the argument is *ejusdem generis* or particularly for extension by analogy.

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[33] <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> ('No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute').

[34] See 2001 ILC articles (n 31) art 41, paragraph 1 ('States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40').

[35] Cf. 2022 ILC draft conclusions on peremptory norms of general international law (*jus cogens*) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf> draft conclusion 19, paragraph 1 ('States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*)').

[36] M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYBIL 264 Section V.

27. My *last* point relates to the thorniest aspect of the law of countermeasures, much discussed and with various degrees of persuasiveness: inducement of compliance and reversibility of measures. I will leave the detail to the discussion and just make three broader observations of principle:

    - *first*, countermeasures must be terminated as soon as the responsible State has complied with its obligations regarding content of responsibility;

    - *secondly*, international law is agnostic on whether the State taking countermeasures against the responsible State's assets has their possession during the application of countermeasures – what matters is the ability to ensure reversibility when the obligation to terminate countermeasures comes into effect; and

    - *thirdly*, if political will is present, the tools of conditional pledges and obligations, as well as waivers may go at least some way in addressing the requirements of international law.

28. I will conclude with a historical example of transfer of blocked foreign assets to satisfy international responsibility regarding mistreatment of non-State actors that had, for some, a satisfying punchline (if somewhat different from the current dynamic). To quote from Eileen Denza and Lauge Poulsen's article on *Settling Russia's Imperial and Baltic Debts,* published in the *American Journal of International Law* last year:

    > The compromise [between the UK and Soviet Union] authorized the UK to expropriate the Baltic gold and use it to compensate [British] claimants [against the Soviet Union] whose losses derived from the 1940 [Soviet] annexation [of Baltic States] and consequent seizures of property. … According to the Foreign Office, the agreement also allowed the UK to resolve the matter without giving *de jure* recognition to the annexation of the Baltic States and presented it as a "0–0 draw."
    >
    > Few others saw it this way. … Only in the Agreement with the UK did the claimant state use blocked Baltic assets as part of the settlement … .
    >
    > … when the Baltic states reemerged from Soviet servitude … , they demanded restitution of their assets which they had entrusted to British safekeeping. The Foreign Office accepted that the UK did in fact owe compensation under international law. … In the end, UK Prime Minister John Major ultimately repaid the Baltic states for the expropriation of their gold … .[37]

    The modest point that I leave you with is that you are not faced with entirely new questions, whether for backdrop rules, tools and policies to be considered in evaluating whether particular conduct is 'consistent with international law' or policy benefits and costs.

[37] E Denza and L Poulsen, 'Settling Russia's Imperial and Baltic Debts' (2023) 117 AJIL 441, 468-9, 479.