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Trading with a Friend's Enemy

By Anton Moiseienko[*]

Abstract

Economic sanctions have been the West's response of choice to Russia's full-scale aggression in Ukraine. Predictably, speculation abounds as to what these sanctions portend for future responses to acts of interstate aggression. The principles underpinning the "trading with the enemy" laws of a seemingly bygone era have resurfaced but applied not to the sanctioning powers' own enemies but in solidarity with another state, at least insofar as the breaches of erga omnes *obligations through armed aggression are concerned. The contemporary expansion in sanctions practice may have far-reaching repercussions.*

I. Introduction

Russia's full-scale invasion of Ukraine in February 2022 has prompted the imposition of a wide swath of economic sanctions by Western nations. Those measures span the gamut from "targeted" to "comprehensive," from asset freezes and travel bans placed upon individual representatives of Russia's regime to wholesale restrictions on trade with Russia calculated to affect the entire country's economy.[1] This Essay argues that by adopting wide-reaching sanctions, nations such as the United States have effectively revived the historical practice of freezing and potentially confiscating belligerent assets—with the striking difference that in this instance, the sanctioning nations are not themselves involved in the hostilities. This raises complex issues of law and policy, especially as relates to sovereign immunities and multilateralism of economic sanctions.

For instance, it is widely accepted in international law that the confiscation of the belligerent's public property is permitted, although the precise legal basis for this position has never been articulated with clarity.[2] Thus, if the United States engaged in hostilities with Russia, the

[*] Lecturer in Law, Australian National University, Canberra, Australia, anton.moiseienko@anu.edu.au. This Essay is informed, in part, by the author's research on legal issues related to the potential ultimate disposal of frozen Russian assets, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149158. Thanks are due to the group of academics, practitioners, and civil society organizations that provided input into and commented on that paper.

[1] For a summary of U.S. sanctions on Russia, see Cory Welt, Kristin Archick, Rebecca M. Nelson & Dianne E. Rennack, Cong. Res. Serv., U.S. Sanctions on Russia, R45415 (2022). For a summary of UK, EU, Japanese, and Australian sanctions, see *Russia Sanctions Tracker*, Ashurst (June 16, 2022), *at* https://www.ashurst.com/en/news-and-insights/hubs/sanctions-tracker.

[2] James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 Brook. J. Int'l L. 709, 710, 713 (2006) ("This strong rule of confiscation [during wartime] also manifests itself under contemporary international law."). Unsurprisingly, most commentary on wartime confiscation powers dates to the pre- or post-World War II

Russian central bank's foreign exchange reserves would be fair game for confiscation under domestic and international law alike, sovereign immunities notwithstanding. However, as matters stand, Russia's sovereign immunities may affect any U.S. or like-minded states' efforts to seize its national treasure. This begs the question of why states should face greater constraints when they act as public-spirited guardians of a rules-based international order than they would when they are directly under attack.

This, in turn, leads to a broader reflection on the role of multilateralism in economic sanctions. There is an emerging policy imperative that international crimes, such as armed aggression and war crimes, should meet with a coordinated economic response. With regard to Russia's invasion of Ukraine, this response has been driven by informal cooperation arrangements between the EU, Five Eyes, and G7 economies. In the absence of any legal obligation to enact multilateral sanctions outside of the UN framework, they remain voluntary measures that cannot override other applicable international law rules, such as investment treaty protections or rules that shield state assets from attachment and execution. It might be desirable to create a formal sanctions alliance of Western nations that could impose mandatory sanctions with greater political and legal legitimacy.

This Essay proceeds as follows. First, it describes existing sanctions against Russia. Secondly, it draws parallels between those sanctions and historical "trading with the enemy" laws, noting their similarities and differences. Thirdly, building on that discussion, the Essay outlines the applicability of sovereign immunities to the potential confiscation of assets frozen under sanctions. Fourthly, it considers the implications of the *de facto* multilateral nature of the "unilateral" sanctions against Russia. The Essay ends by highlighting the disparity between states' ability to confiscate the property of their own enemies and the difficulties of doing so with respect to states engaged in aggression against third-party countries. It asks whether that disparity should continue to persist in international law, and whether the creation of a new multilateral sanctions mechanism could assist in overcoming it.

II. Sanctions Against Russia

To date, sanctions imposed against Russia, its state-owned enterprises, and individuals affiliated with the Russian government include:[3]

- Freezing the assets of, and imposing travel bans on, a range of Russian public officials, entrepreneurs, and other regime-affiliated individuals. Among them are President Vladimir Putin and Foreign Minister Sergei Lavrov, as well as hundreds of members of the Russian parliament.
- Freezing the foreign exchange reserves of the Russian central bank, reportedly amounting to over U.S.$300 billion worth of assets frozen across G7 members.
- Freezing the assets of several Russian commercial banks, as well as some defense and technology companies.
- Disconnecting certain Russian banks from the SWIFT interbank payment network.

period. *See, e.g.*, Charles Cheney Hyde, International Law: Chiefly as Interpreted and Applied by the United States 235 (1922); Lassa Oppenheim, International Law: A Treatise, Volume II War and Neutrality 157 (1921), cited in Return of Alien Property, Hearing on H.R. 10820 Before the H. Comm. on Ways and Means, 69th Cong, 275 (1926).

[3] Welt, Archick, Nelson, Rennack & Ashurst, *supra* note 1.

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- Prohibiting the sale of Russian sovereign bonds, as well as bonds issued by a range of Russian state-owned enterprises, on primary and secondary capital markets.
- Prohibiting the imports of certain Russian energy products.
- Prohibiting the exports of a range of dual-use goods to Russia.
- Prohibiting the provision of professional services, such as management consulting, accounting, and public relations, to Russian businesses, public and private alike.[4]

This kaleidoscope of sanctions presents a multitude of issues under domestic and international law. Insofar as individuals and companies are concerned, due process issues are as prominent as ever, because sanctions tend to be imposed based on lenient evidentiary standards and broad governmental discretion.[5] This interaction between low evidentiary standards and broad discretion has already started playing out in the Court of Justice of the EU with the first batch of "oligarchs" challenging their designations.[6]

Although concerns have also been raised about the impact of official immunities on sanctions, they are unlikely to take center stage.[7] High-ranking state officials are less likely to resort to litigation than oligarchs because the official Russian stance is that the former own no assets overseas and are content to spend all of their time in Russia.[8] Likewise, prohibitions on certain business activities involving Russia, such as denial of access to SWIFT, present restrictions on access to the sanctioning powers' markets and thus pose limited if any international law concerns.[9]

By contrast, key legal issues that are likely to arise include: the prohibitions on expropriating public and private assets under domestic and international law; the permissibility of allowing execution against such assets in satisfaction of reparations that might be ordered by international courts, such as the International Court of Justice in the ongoing Genocide Convention dispute; and, in relation to the Russian central bank's foreign exchange reserves specifically, the effect of sovereign immunities on their freezing and potential confiscation.[10]

Some of these issues, such as the possibility of using Russian assets to satisfy future claims by Ukraine or private persons affected by the war, will come to the fore if an attempt is made to confiscate, rather than simply freeze, the properties in question. Appropriately, a spirited discussion regarding applicable domestic and international norms is taking place, with a

[4] UK Foreign, Commonwealth & Development Office Press Release, Russia Cut Off from UK Services (May 4, 2022), *at* https://www.gov.uk/government/news/russia-cut-off-from-uk-services.

[5] Anton Moiseienko, *Due Process and Unilateral Sanctions*, *in* Research Handbook on Unilateral and Extraterritorial Sanctions 405 (Charlotte Beaucillon ed., 2021).

[6] Andrew Rettman, *Russian Oligarchs Spam EU Court with Sanctions Cases*, EUobserver (June 2, 2022), *at* https://euobserver.com/world/155119.

[7] For analyses of the implications of official immunities for sanctions, see Paola Anna Pillitu, *European "Sanctions" Against Zimbabwe's Head of State and Foreign Minister: A Blow to Personal Immunities of Senior State Officials?*, 1 J. Int'l Crim. Just. 453 (2003); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 Eur. J. Int'l L. 881 (2006); Geoffrey Robertson, QC, *Europe Needs a Magnitsky Law*, *in* Why Europe Needs a Magnitsky Law: Should the EU Follow the US? (Elena Servettaz ed., 2013).

[8] Mike McIntire & Michael Forsythe, *Putin Faces Sanctions, But His Assets Remain an Enigma*, N.Y. Times (Feb. 26, 2022), *at* https://www.nytimes.com/2022/02/26/world/europe/putin-sanctions-money-assets.html.

[9] Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 0 Brit. Y.B. Int'l L. 1 (2020).

[10] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), *at* https://www.icj-cij.org/en/case/182.

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particular focus on the legal position in the United States.[11] This conversation is unfolding against the backdrop of Russia's obligation under international law to provide Ukraine with full reparations for the material and moral damage caused by the invasion,[12] alongside the concern that Russia will resist any attempts to compel its compliance with this obligation. Thus, the reported U.S.$300 billion in the Russian central bank's foreign exchange reserves that are frozen across G7 economies form the likeliest pool of assets for potentially satisfying Ukraine's future claims against Russia.[13] However, there are challenges related to making those assets available, including the sovereign immunity protections that central bank assets enjoy under international and domestic law, including in the United States and UK.[14]

There are also private assets frozen under Russia-related sanctions, although only limited information on the amounts involved is available to the public. Roman Abramovich, a Russian businessman and politician, reportedly had U.S.$7 billion frozen in the Bailiwick of Jersey, one of the UK Crown Dependencies,[15] and an additional £10 billion worth of assets linked to two of his associates were also made subject to sanctions.[16] Published figures for other states, such as France, refer to tens of billions in frozen assets but do not distinguish between public and private property.[17] Despite this uncertainty, there is little doubt that the amounts of frozen private property pale in comparison to the U.S.$300 billion in the Russian central bank's currency reserves that are currently frozen.

III. Trading with the Enemy

The scale of frozen Russia assets is unprecedented, but there are historical examples of asset freezes and confiscation during armed conflict, including in relation to state property.

[11] These include, e.g., Andrew Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable*, Just Security (Apr. 18, 2022), *at* https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable; Paul Stephan, *Giving Russian Assets to Ukraine—Freezing Is Not Seizing*, Lawfare (Apr. 26, 2022), *at* https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing; Lee Buchheit & Mitu Gulati, *Alphaville's Guide to Seizing Russian Assets*, FT Alphaville (Mar. 30, 2022), *at* https://www.ft.com/content/50aae1a2-088a-47f9-b936-30fa02cf03de; Evan Criddle, *Rebuilding Ukraine Will Be Costly. Here's How to Make Putin Pay*, Politico (Mar. 30, 2022), *at* https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649; Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, Lawfare (May 26, 2022), *at* https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets; Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, Lawfare (May 12, 2022), *at* https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine.

[12] Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Art. 31, UN Docs. A/56/83, A/56/49(Vol.I)/Corr.4.

[13] For the amounts of frozen central bank assets, see Charles Lichfield, *The Russian Central Bank Is Running Out of Options*, Atlantic Council (Mar. 4, 2022), *at* https://www.atlanticcouncil.org/blogs/new-atlanticist/the-russian-central-bank-is-running-out-of-options; *see also* Bank of Russia, Foreign Exchange and Gold Asset Management Report 6 (2022).

[14] 28 U.S.C. § 1611(b)(1); State Immunity Act 1978, sec. 14(4) (UK).

[15] Robert Wright, Cynthia O'Murchu & Robert Smith, *Jersey Freezes $7bn Worth of Assets Linked to Roman Abramovich*, Fin. Times (Apr. 13, 2022), *at* https://www.ft.com/content/365b2f7a-2746-44d8-86bd-4beae7dfec51.

[16] UK Foreign, Commonwealth & Development Office Press Release, UK Hits Key Russian Oligarchs with Sanctions Worth Up to £10 Billion (Apr. 14, 2022), *at* https://www.gov.uk/government/news/uk-hits-key-russian-oligarchs-with-sanctions-worth-up-to-10bn.

[17] *France Says It Has Frozen More Than 800 Million Euros Worth of Russian Oligarch Assets*, U.S. News (Mar. 23, 2022), *at* https://www.usnews.com/news/world/articles/2022-03-23/france-says-it-has-frozen-more-than-800-million-euros-worth-of-russian-oligarch-assets.

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For much of history, a belligerent's property, public and private alike, could be confiscated solely because it belonged to the enemy. For instance, the UK and United States adopted their Trading with the Enemy Acts in 1914 and 1917 respectively, to codify the common law and serve the exigencies of World War I.[18] The UK legislation was subsequently replaced with the more detailed Trading with the Enemy Act in 1939. The U.S. and UK Acts defined the "enemy" to include, among other things, "[t]he government of any nation with which the United States is at war" and "any State, or Sovereign of a State, at war with His Majesty," respectively.[19]

The Acts operated not only to criminalize commerce with the enemy but also to vest enemy property, including property owned by private parties, in the Alien Property Custodian in the United States or the Board of Trade in the UK. No determination was made in the Acts as to the ultimate disposition of the seized property. This was settled by post-war reparation treaties, namely the Treaty of Versailles and the post-World War II Paris Conference on Reparations.[20] These Acts were controversial for their treatment of (mostly) German private property, which was used for reparations.[21] By contrast, there was no controversy about the long-standing view that public property was a legitimate target for wartime confiscation, as explained in this quote from the 1921 edition of Lassa Oppenheim's magnum opus, *International Law: A Treatise, Volume II War and Neutrality*:

> In former times all private and public enemy property, immoveable or moveable, on each other's territory could be confiscated by the belligerents at the outbreak of war, as could also enemy debts; and the treaties concluded between many States with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of the *private property of their subjects*. Through the influence of such treaties as well as of Municipal Laws and Decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate *private* enemy property nor annul enemy debts on their territory.[22]

Such references to state practice might be understood to be pointing to a rule of customary international law. However, customary international humanitarian law, to the extent it has been codified by the International Committee of the Red Cross, today only permits the limited seizure of public and private property in occupation, but does not authorize the confiscation of property in the territory of a belligerent state.[23] For instance, it would not account for the confiscation by the United States of German property during and immediately after World War II, which proceeded in several steps: from the original freezing of Danish and

[18] For a detailed analysis of the U.S. Trading with the Enemy Act 1914, see C.H. Hand Jr., *The Trading with the Enemy Act*, 19 COLUM. L. REV. 112 (1919). For the historical background to the U.S. and UK Acts, see Nicholas Mulder, *The Trading with the Enemy Acts in the Age of Expropriation, 1914–49*, 15 J. GLOB. HIST. 81 (2020).

[19] Trading with the Enemy Act, 50 U.S.C. § 4302(b) (1917) (U.S.); Trading with the Enemy Act, 2 & 3 Geo. 6, ch. 89, sec. 2(1)(a) (1939) (UK).

[20] *The Policy and Practice of the United States in the Treatment of Enemy Private Property*, 34 VA. L. REV. 928, 931–32, 939–40 (1948).

[21] HYDE, *supra* note 2, at 240; *cf.* Edward A. Harriman, *Confiscation of Enemy Private Property*, 3 B. U. L. REV. 156 (1923).

[22] OPPENHEIM, *supra* note 2 (emphasis added).

[23] International Committee of the Red Cross, *Customary IHL: Rule 51. Public and Private Property in Occupied Territory*, *at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51.

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Norwegian state assets following the German occupation of those countries in 1940,[24] to the extension of those measures to the U.S.-based assets of all European nations save for the UK in 1941,[25] to working with neutral nations in the aftermath of the war to confiscate German property held outside Germany.[26] While the United States restored the assets of most European nations to them following their liberation, German property was disbursed to cover war damages based on the Paris Reparation Agreement, which was concluded between victorious powers at a time when Germany had temporarily ceased to exist as a sovereign state.[27]

The (permanent) confiscation of property—as distinct from its (temporary) freezing—took place after the hostilities ended, meaning that it was not governed by international humanitarian law. The exercise by the United States, UK, France, and the Soviet Union of "supreme authority with respect to Germany" is likely to have provided a plausible legal foundation for such confiscatory measures.[28] This leaves unanswered the question, paramount in the context of current Russia-related sanctions, of what rules of international law could justify the confiscation of enemy property other than in the circumstances of occupation (governed by international humanitarian law) or outright capitulation.

Even in situations short of actual hostilities, the practical possibility of confiscating public and private assets stayed at the forefront of some governments' minds after World War II. A concern about confiscation generated the "Eurodollar" market in London in the 1950s, which refers to U.S. dollars held in deposits in non-U.S. financial institutions, primarily in the UK. The demand for Eurodollars arose because the Soviet Union needed dollars for international commerce but was concerned that assets stored in the United States might be seized by the U.S. government.[29]

Today, much of Russia's foreign currency holdings have been frozen in a coordinated manner. Western nations have thus achieved a result analogous to that attained previously under the trading with the enemy laws, when U.S.$900 million in Axis property (approximately U.S.$13 billion in today's money) was at one point held by the U.S. Alien Property Custodian.[30] The context, therefore, is different but policy issues that surface are similar, the most important of which is the ultimate fate of the frozen assets.

Whereas wartime trading with the enemy laws allowed but did not require confiscation of frozen assets,[31] the prevailing understanding of sanctions laws entails restoration of frozen property to its owner.[32] That said, there has been some convergence between these two fields of law. In 2011, the U.S. statute that forms the bedrock for most economic sanctions regimes,

[24] Exec. Order No. 8389 (1940).

[25] Exec. Order No. 8785 (1941).

[26] William Z. Slany, U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II: Preliminary Study 95–147 (1997).

[27] On the legal status of Germany post-World War II, see Max Rheinstein, *The Legal Status of Occupied Germany*, 47 Mich. L. Rev. 23 (1948).

[28] Slany, *supra* note 26, *at* 122–23.

[29] Oliver Bullough, *The Real Goldfinger: The London Banker Who Broke the World*, Guardian (Sept. 7, 2018), *at* https://www.theguardian.com/news/2018/sep/07/the-real-goldfinger-the-london-banker-who-broke-the-world; Robert C. Effros, *The Whys and Wherefores of Eurodollars*, 23 Bus. Lawyer 629, 637 (1968).

[30] Slany, *supra* note 26, *at* 196.

[31] *See* 50 U.S.C. § 4312 (vesting the president with broad powers to direct the Alien Property Custodian on the ultimate disposal of frozen assets) and Section 7 of the Trading with the Enemy Act 1939 (UK).

[32] U.S. Department of the Treasury, The Treasury 2021 Sanctions Review 4 (2021).

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the International Emergency Economic Powers Act of 1977 (IEEPA), was amended to authorize confiscation "when the United States is engaged in armed hostilities or has been attacked by" a foreign country or foreign nationals.[33] As a result, both the Trading with the Enemy Act and the International Emergency Economic Powers Act authorize the United States to freeze *and confiscate* enemy property.

However, unlike the Trading with the Enemy Act, U.S. sanctions laws authorize the freezing of foreigners' U.S.-based assets in a much broader range of circumstances. In light of this, one may ask whether the parallels between these two areas of law could be taken further still, and whether any sound reasons of legal principle prevent the United States from enabling the confiscation of assets frozen under sanctions, should it consider doing so politically expedient. One of these obstacles, namely, sovereign immunity rules, is the subject of the following Part.

IV. Sovereign Immunities

The desirability of confiscating assets frozen under sanctions is an issue fraught with political and legal challenges.[34] This Essay will focus on one of the legal difficulties especially relevant to Russia-related sanctions given that the bulk of frozen assets constitute state property, specifically the Russian central bank's foreign currency reserves.

Under customary international law, states enjoy immunities from jurisdiction and execution in foreign courts. Because the freezing of assets under sanctions is imposed by executive authorities rather than courts, there is considerable uncertainty as to whether immunities apply. The traditional understanding of immunities is that they preclude a state from "adjudicating acts in the exercise of sovereign power, *jure imperii* of another State," which entails the involvement of a court.[35] This leads to the seemingly paradoxical result that sovereign immunities are likely to be violated if a state's foreign assets are frozen based on another state's court order or judgment, which would have to be ratified by the judicial system of the state where the assets are located, but not if the freezing takes place based on an executive fiat.[36]

The limits of that logic remain untested. For example, would it be compatible with sovereign immunities to confiscate a foreign state's property on the basis of executive, non-judicial action? If the non-judicial nature of the measure is determinative, the answer would be yes. Yet it is difficult to overlook a certain radicalism about the suggestion, not least because it is exceedingly rare, in a *Rechtstaat*, for property to be confiscated on any grounds other than a valid court judgment. In contrast, states appear to have embraced a relatively laissez-faire approach to the (temporary) freezing of assets, at least in terms of immunity.

[33] 50 U.S.C. § 1702(C); *see also* Paul B. Stephan, *Seizing Russian Assets* 8 (University of Virginia School of Law, Public Law and Legal Theory Research Paper Series 2022-40, 2022).

[34] Anton Moiseienko, *Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets,* Just Security (Aug. 17, 2022), *at* https://www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets.

[35] Hazel Fox, QC & Philippa Webb, The Law of State Immunity 26 (3d ed. 2015).

[36] Ingrid Wuerth, *Immunity from Execution of Central Bank Assets*, *in* The Cambridge Handbook of Immunities and International Law (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019); Ingrid Wuerth, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?*, Lawfare (Mar. 7, 2022), *at* https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks; *cf.* Matthias Goldmann, *Hot War and Cold Freezes: Targeting Russian Central Bank Assets*, Verfassungsblog (Feb. 28, 2022), *at* https://verfassungsblog.de/hot-war-and-cold-freezes.

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Even if sovereign immunities apply to purported confiscation of certain property, circumstances precluding wrongfulness, namely countermeasures and collective self-defense, could conceivably render confiscation lawful.[37] Because a war of aggression contravenes an *erga omnes* obligation, all states are arguably entitled to apply countermeasures in response.[38] Countermeasures must, however, in the words of the International Law Commission, "as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[39] On the one hand, this requirement would appear incompatible with a confiscation of assets protected by sovereign immunities. On the other hand, the rationale of the rule is evidently that a state should not continue to face the effects of countermeasures once it ceases its own non-compliance. If the countermeasures are a response to the aggressor state's failure to provide full reparations to the aggrieved state, the confiscation of the former state's assets would place it in no worse position than it would have been had it complied with its obligation. The difficulty with that argument is that the obligation to make full reparations is, in and of itself, not an *erga omnes* obligation, although it arises from a breach of one.

Similarly, some have suggested that collective self-defense could provide a justification for the confiscation of frozen Russian assets.[40] Ordinarily, one speaks of self-defense in connection with resorting to armed force, and the customary requirements of necessity and proportionality have been interpreted in that context,[41] but there is no reason why non-military measures could not be taken in self-defense.[42] This logic, if correct, would apply to any human rights-compliant measures against Russia, not only economic sanctions, provided that the requirements of necessity and proportionality are fulfilled.

If reliance on either countermeasures or collective self-defense were accepted, the parallels between historical trading with the enemy laws and sanctions laws would be all the more pronounced. Both could lead to the employment of a wide suite of coercive economic measures, up to and including confiscation of property. Sanctions would become, in effect, a species of novel "trading with a friend's enemy" laws, which could be brought to bear against third-party aggressor states by nations not directly party to the conflict. This convergence is particularly remarkable given the century or so that divides U.S. and British trading with the enemy laws from the emergence of economic sanctions as a key pillar of international responses to aggressive war.

[37] The discussion of countermeasures was strikingly absent from *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 ICJ Rep. 99 (Feb. 3), possibly because the ICJ had no jurisdiction to rule on German conduct in 1943–1945.

[38] Note, however, that the ARSIWA are ambiguous on this issue, as discussed in Linos-Alexandre Sicilianos, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community as a Whole*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1137 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010).

[39] ARSIWA, *supra* note 12, Art. 49(3). For a further catalogue of possible obstacles to lifting immunity as a countermeasure, see Marco Longobardo, *State Immunity and Judicial Countermeasures*, 32 EUR. J. INT'L L. 457, 481–83 (2021).

[40] Jean-Marc Thouvenin, *Let's Guarantee That Russia Will Pay for the Reconstruction of Ukraine*, LE MONDE (May 2, 2022).

[41] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 ICJ Rep. 110, para. 232 (June 27).

[42] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report of the International Law Commission on the Work of Its Fifty-Third Session, 74, UN Doc. A/56/10 (2001).

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V. Multilateral Sanctions

One limitation of the analogy between trading with the enemy laws and sanctions is that the latter were never intended to be more than one state's unilateral attempt to undermine the adversary's economy.[43] By contrast, current sanctions against Russia are *de facto* multilateral and evince a significant degree of international coordination. However, this multilateralism has no obvious bearing on the legality of resulting sanctions and their interplay with other applicable areas of international law, such as bilateral investment treaties.

In international law today, there are two kinds of sanctions: "unilateral," also known as "autonomous"; or UN-mandated.[44] The latter must be implemented by all UN members,[45] but the former are taken by states acting alone. The *same* sanctions regime put in place by 150 states is merely 150 "unilateral" sanctions regimes. Its multilateralism is irrelevant from a legal, if not legitimacy, standpoint.

This is not an unalloyed negative. The unaccountable nature of the UN Security Council's sanctions has given rise to multiple human rights concerns, as well as intractable conflicts between domestic human rights standards and international law.[46] That said, just like the dichotomy between "unilateral" and UN sanctions may be too stark, it is possible to envisage a multilateral sanctions mechanism that would not absolve states of the responsibility to comply with applicable human rights standards, but would be understood by participating states to justify departures from sovereign immunity rules, or perhaps have a bearing on the determination of whether "necessity" as a circumstance precluding wrongfulness applies in interstate disputes that may ensue.[47]

The closest analogue for this proposal is to be found in the interbellum period, with Article 16(1) of the Covenant of the League of Nations providing as follows:

> Should any Member of the League resort to war . . ., it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nations and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

This use by the League of Nations of the "economic weapon" was pusillanimous in practice and fell short of the grandiose ambition for it to become a major means of forestalling

[43] *See* Andrew Clapham, War 169–233 (2021).

[44] *See, e.g.*, Charlotte Beaucillon, *The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions*, *in* Research Handbook on Unilateral and Extraterritorial Sanctions *supra* note 5, at 118.

[45] UN Charter, Art. 25.

[46] As seen, most prominently, in the *Kadi* litigation in the Court of Justice of the European Union. Kadi v. Council and Commission, Court of First Instance, Case T-315/01 (Sept. 21, 2005); Kadi and Al Barakaat v. Council and Commission, Court of Justice, Joined Cases C-402/05 P and C-415/05 P (Sept. 3, 2008) (appeal against the first judgment); Kadi v. Commission and Council, General Court, Case T-85/09 (Sept. 30, 2012) (a first instance judgment following Kadi's relisting); Council and Commission v. Kadi, Court of Justice, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (July 18, 2013) (appeal judgment following the relisting).

[47] One example of such a court case would be the ongoing litigation between Iran and the United States. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, Judgment, 2019 ICJ Rep. 7 (Feb. 13).

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war.[48] But, in its design, it remains notable as a multilateral mechanism for imposing economic sanctions in response to armed aggression. It is of interest that the Covenant did not specifically require, nor approve, confiscation of the aggressor state's property. The omission may have reflected the drafters' view that a complete cessation of commercial intercourse would so affect the aggressor state that it would not be able to prosecute the war—an effect that confiscation of foreign assets is less likely to have. (This is the argument that, a century later, would be made by some to suggest that seizing frozen Russian assets would have limited additional utility in supporting Ukraine's war effort.)[49]

While the League of Nations presents a cautionary tale of a mandatory sanctions arrangement that floundered due to differing levels of commitment on the part of its members, one of the questions that should be facing today's policymakers is whether it is time to formalize, and therefore vest a degree of legal authority in, the *de facto* sanctions alliance of Western nations. This is not wholly devoid of risk, since in fact only a minority of states worldwide has imposed sanctions on Russia, and while those who have done so represent most of the world's leading economies, an attempt by them to formally join forces in applying economic coercion could have unwelcome connotations of a global "minority rule." Whether that would be a meaningful improvement on today's system, which relies on a wholly ad hoc, crisis-driven coordination of "unilateral" sanctions by economically powerful states, with no legal status to speak of in international law, is in the eye of the beholder.

VI. Conclusion

Just like the images of European train stations filled with refugees evoke flashbacks to the troubled times of the World Wars, Western states are now contending with policy dilemmas that used to arise in the context of freezing and seizing belligerents' property. In essence, economic sanctions have come to play a role analogous to that of the "trading with the enemy" laws of yore, the key difference being that it is an attack on a third country, Ukraine, that is being vindicated through the use of such sanctions.

This distinction matters because what is relatively uncontroversial as between belligerents is uncharted waters when applied to non-belligerents, especially in the context of confiscating Russian state-owned property. Whether this difference should in fact be determinative is a live question. Depending on which view one takes on the contested legality of "third-state" countermeasures, it is arguable that states adopting economic sanctions in support of a third party that fell victim to aggressive war should be entitled to go as far as they could if their own security was affected. Clarity on this would be desirable for the effective utilization of economic sanctions in the future.

One other salient difference between traditional "trading with the enemy" laws and current sanctions against Russia is the multilateral nature of the latter. At present, however, international law is oblivious to it. While multilateralism is no doubt relevant to the political legitimacy of sanctions, in international law they are simply treated as imposed outside the UN framework and therefore "unilateral." While it is right and proper that there should be no

[48] Nicholas Mulder, The Economic Weapon: The Rise of Sanctions as a Tool of Modern War 202–22 (2022).

[49] *Why the West Should Be Wary of Permanently Seizing Russian Assets*, Economist (June 9, 2022).

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safety in numbers when it comes to, say, respecting the human rights of those targeted, one might query if the application of sovereign immunities or circumstances precluding wrongfulness could legitimately be swayed by whether sanctions were authorized multilaterally, following a well-defined decision-making procedure, in response to an act of aggression. If so, then it might be time for governments to modify the current ad hoc approach to sanctions coordination and consider establishing a formal international body that would be entrusted with this task.

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