Dignity and Embarrassment: The Application of Immunities to Central Bank Sanctions

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I. Introduction

Armed conflict in Europe, economic sanctions from the United States: We are describing the year 1810, when the American schooner *Exchange* was taken by France. In the course of the Napoleonic Wars, France began seizing US merchant cargoes bound for England. The United States Congress responded by prohibiting trade with both Britain and France. France answered with the Rambouillet Decree, providing for confiscation of American vessels in French-controlled ports on the view that, since US law prohibited trade with France in any event, American ships were presumptively engaged in smuggling. The *Exchange* sailed from Baltimore on October 27, 1809 for San Sebastián, Spain and was seized by France on December 30, 1810. Armed and commissioned as a warship under the name of *Balaou,* it set sail for the Caribbean, only to be forced into port at Philadelphia by a storm, where its owners sued for their property back. The owners lost, famously, in the foundational case of the modern law of state immunities, *The Schooner Exchange v. M'Faddon.*[1]

Not so much has changed in two hundred years. Another war in Europe, Russia's invasion of Ukraine in February 2022, has again drawn attention to the law of State immunities, including in the context of freezes on central bank assets. This article will examine the law of central bank asset freezes as an exercise in the application of international law, proceeding in four parts. First, it will provide an introduction on what central bank asset freezes are. Second, it will examine whether the codified rules of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI) are applicable to central bank asset freezes, suggesting that these rules most likely are not applicable.[2] Third, it will consider asset freezes and central bank immunities under customary international law, tracing a split between State practice and leading treatises (custom provides less protection for central bank assets than the UNCSI) and certain academics (immunities must be understood expansively due to the principle of sovereign equality). This article will not address the separate debate on the lawfulness of

[1] 11 U.S. (7 Cranch) 116 (1812).

[2] United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, Resolution 59/38.

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seizing central bank assets under the law of countermeasures.[3] Fourth, it will seek to address this split by recalling that the current (relative) consensus on State immunities is of recent date and that State immunities derive not only from the sovereign equality of states, but also from other concepts including dignity and embarrassment. These neglected other foundations of immunities provide a conceptual justification for the outcome apparent from the UNCSI and State practice, namely that central bank asset freezes are consistent with the law of immunities.

II. Asset freezes on central banks

Following the Russian invasion of Ukraine on 24 February 2022, the European Commission, France, Germany, Italy, the United Kingdom, Canada, and the United States announced prohibitions on transactions with the Russian Central Bank on 26 February 2022, effectively freezing Russian central bank assets deposited with banks in these jurisdictions.[4] On 9 March 2022, the European Commission announced similar measures freezing assets of the Central Bank of Belarus.[5] These central bank sanctions

[3] On countermeasures, see, e.g., Ingrid (Wuerth) Brunk, 'Countermeasures and the Confiscation of Russian Central Bank Assets', Lawfare Blog (3 May 2023) <https://www.lawfaremedia.org/article/countermeasures-and-the-confiscation-of-russian-central-bank-assets> (accessed 30 June 2024) and Marco Longobardo, 'State Immunity and Judicial Countermeasures' (2021) 32 European Journal of International Law 457.

[4] See Joint Statement of the European Commission, France, Germany, Italy, the United Kingdom, Canada, and the United States dated 26 February 2022 <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1423> (accessed 30 June 2024). On the US measures, see U.S. Department of the Treasury Press Release, 'Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth', press release dated 28 February 2022 <https://home.treasury.gov/news/press-releases/jy0612> (accessed 30 June 2024). On the initial EU measures (subsequently amended), see Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022D0335&from=EN> (accessed 30 June 2024).

[5] See European Council, 'Russia's military aggression against Ukraine: EU agrees new sectoral measures targeting Belarus and Russia', press release dated 9 March 2022 <https://www.consilium.europa.eu/en/press/press-releases/2022/03/09/russia-s-military-aggression-against-ukraine-eu-agrees-new-sectoral-measures-targeting-belarus-and-russia/> (accessed 30 June 2024).

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are larger than any carried out before, with the potential to affect, in the case of Russia alone, US $643 billion in foreign currency reserves.[6]

A key precedent for freezing central bank assets is the freezing of assets of the Central Bank of Iran, a policy the United States has pursued in various forms, on and off, since 1979.[7] A 2015 estimate placed assets of the Central Bank of Iran in blocked accounts with central banks of Iran's trading partners, including China, Japan, India and South Korea, at US $50 billion or more.[8] Iran has protested these asset freezes, as well as US legislation and court decisions allowing judgments entered against Iran in US courts to be satisfied out of frozen Iranian central bank assets, in a variety of contexts, including in the *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* case decided by the International Court of Justice (ICJ) in 2023 (but not in respect of immunities, over which the Court found it did not have jurisdiction).[9] Other precedents of sanctions on central banks in recent years include freezes by the United States on the

[6] Alan Rappeport, 'U.S. escalates sanctions with a freeze on Russian central bank assets', *New York Times* (New York, 28 February 2022) <https://www.nytimes.com/2022/02/28/us/politics/us-sanctions-russia-central-bank.html> (accessed 30 June 2024).

[7] Executive Order No. 12170, 'Blocking Iranian Government property' (14 November 1979) <https://www.archives.gov/federal-register/codification/executive-order/12170.html> (accessed 30 June 2024).

[8] Patrick Clawson, 'Iran's "Frozen" Assets: Exaggeration on Both Sides of the Debate', Washington Institute for Near East Policy PolicyWatch 2480 <https://www.washingtoninstitute.org/policy-analysis/irans-frozen-assets-exaggeration-both-sides-debate> (accessed 30 June 2024). This amount is no longer current, not least because of subsequent unfreezing and refreezing of assets in the interim.

[9] Rulings and other documents from the case are available at https://www.icj-cij.org/en/case/164 (accessed 30 June 2024).

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assets of the central banks of Syria,[10] Venezuela[11] and Afghanistan[12] and freezes by the EU on the assets of the central banks of Syria[13] and Iran.[14]

III. The United Nations Convention on Jurisdictional Immunities of States and Their Property

Establishing the extent to which State immunities are available to central banks in general and in the context of sanctions in particular poses challenges. Contemporary scholars speak of a 'flux' in the law of State immunities. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (the '**UNCSI**' or the '**Convention**'), which still has yet to obtain thirty ratifications and enter into force, is described as an example of a 'less successful' multilateral treaty initiative, with lingering uncertainty as to the extent to which it reflects customary international law.[15] In what follows, we will consider both the UNCSI, the leading international attempt at codification of State immunities, and State practice.

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[10] See U.S. Department of the Treasury Press Release, 'Treasury Targets Syrian Regime Officials and the Central Bank of Syria' (22 December 2020) <https://home.treasury.gov/news/press-releases/sm1220> (accessed 30 June 2024).

[11] Executive Order 13850, 'Blocking Property of Additional Persons Contributing to the Situation in Venezuela' (1 November 2018) <https://www.federalregister.gov/documents/2018/11/02/2018-24254/blocking-property-of-additional-persons-contributing-to-the-situation-in-venezuela> (accessed 30 June 2024).

[12] Executive Order 14064, 'Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan' (11 February 2022) <https://www.federalregister.gov/documents/2022/02/15/2022-03346/protecting-certain-property-of-da-afghanistan-bank-for-the-benefit-of-the-people-of-afghanistan> (accessed 30 June 2024).

[13] Council Regulation (EU) No. 168/2012 of 27 February 2012 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, [2002] OJ L 51/1.

[14] Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran, [2012] OJ L 19/22.

[15] Tom Ruys et al., 'International Immunities in a State of Flux?', in Tom Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 3.

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By their terms, UNCSI Articles 18 and 19 grant broad immunities to central bank assets[16] from both pre-judgment and post-judgment 'measures of constraint…against property of a State…in connection with a proceeding before a court of another State'.[17] In the context of central bank asset freezes, this raises questions of whether 'measures of constraint' have occurred 'against property of a State', and whether 'a court' is involved.

A. UNCSI: Are central bank asset freezes 'measures of constraint' 'against property of a State'?

A first threshold question under the UNCSI is whether central bank asset freezes are 'measures of constraint' 'against property of a State'.

A standard commentary on the UNCSI by O'Keefe et al. describes the innovation by the International Law Commission (ILC) of 'measures of constraint' as a generic term for all possible methods, procedures and measures of constraint. The term was adopted by the ICJ in *Jurisdictional Immunities of the State,* although the ICJ has not addressed jurisdictional immunities outside the context of conventional litigation.[18] Authors suggesting that 'measures of constraint' are solely judicial measures include Xiaodong Yang, who imports a 'court' into the definition: 'measures of constraint' are 'coercive or

[16] UNCSI Article 19 grants immunity from post-judgment measures of constraint subject to an exception to the extent that property is in use, or intended for use, 'for other than government non-commercial purposes[.]' In turn, this Article 19 exception is disallowed under UNCSI Article 21(1)(c) for 'property of the central bank or other monetary authority of the State', which is considered *per se* used for government non-commercial purposes under the Convention.

[17] We will not focus on the separate, narrower wording of UNCSI Article 1, which states in full: 'The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.' The literature supports ignoring the language of Article 1 in favour of the operative provisions of Articles 18-21, historicizing Article 1 as prepared many years before other provisions in the UNCSI and as prepared in the context of 'the ILC's overwhelming focus…on immunity from proceedings. Indeed, it may well have been that, as originally conceived, the formulation of what would become Article 1 took no account whatsoever of measures of constraint, in which light the reference to the jurisdiction "of the courts" would have made perfect sense.' Roger O'Keefe et al., eds, *United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013), 38 (citation omitted).

[18] O'Keefe et al., eds, *United Nations Convention*, 290-291, citing *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening),* Judgment of 3 February 2012, paras. 110, 113 and 114. In the *Jurisdictional Immunities* decision, the ICJ held that Italy had breached its international obligations by failing to grant Germany immunity for *jus cogens* violations during World War II, such as forced labour and massacres of civilians, including in respect of a court-ordered measure of constraint against Villa Vigoni, a cultural centre owned by the Federal Republic of Germany.

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enforcement measures *taken by the court* either to restrain the foreign State in the disposition of its property, normally in the form of interlocutory injunctions, or otherwise to attach, arrest or seize the property of the foreign State' (emphasis added).[19]

A second threshold question in respect of providing central banks with immunity against asset freezes (as opposed to, for example, immunity from execution by judgment creditors, as the United States has permitted against Iranian central bank assets) arises from 'against property of a State': Asset freezes do not constrain central bank assets themselves, but instead enjoin the counterparties of a sanctioned central bank, such as custodian banks in the sanctioning State.

The O'Keefe commentary argues that 'against property of a State' covers judicial asset freezing orders, such as a *Mareva* injunction, 'directed not, like attachment and arrest, against a State's property as such but against the State itself in relation to its use or disposal of that property'. The commentary reasons that applicability should not 'arbitrarily depend on the formal characterization of a measure under municipal law' and that Article 18 should codify State practice of prohibiting 'the giving of relief against a State by way of injunction or order.'[20]

A sanctions asset freeze can be distinguished from a *Mareva* injunction both in its source (a national legislature or executive, rather than a single judge) and in its scope: A *Mareva* injunction will apply to a single property owner over whom the court exercises jurisdiction, whereas a sanctions asset freeze applies to every potential counterparty of a property owner under the jurisdiction of the State.

As with the question of 'measures of constraint', the question of 'against property of a State' is grounded in whether essentially judicial notions are applicable in legislative and executive contexts as well. The O'Keefe commentary states that immunity does not apply to legislative action, and (Wuerth) Brunk excludes executive action as well.[21]

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[19] Xiaodong Yang, 'Measures of constraint', in Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012), 343.

[20] O'Keefe et al., *United Nations Convention,* 301 (citations omitted).

[21] The O'Keefe commentary excludes legislative action from the UNCSI, without providing explanation or sources: 'While it is evident that the Convention does not apply to the assertion of State authority via the legislature, Part IV, dealing with State immunity from measures of constraint, regulates the exercise of authority by a State party as much via its executive organs as via its courts.' O'Keefe et al. (eds), *United*

B. UNCSI: Do central bank asset freezes involve 'a proceeding before a court'?

Beyond the difficulties in characterizing central bank asset freezes as 'measures of constraint' 'against property of a State' come the difficulties of characterizing central bank asset freezes by statute or executive order as 'a proceeding before a court' under the Convention.

The Convention provides its own definition of the term 'court' in Article 2(1): 'any organ of a State, however named, entitled to exercise judicial functions'.[22] The ILC commented on this definition in the context of the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property, the predecessor text to the Convention, by:

- defining a 'court' by reference to 'judicial functions'; and
- defining 'judicial functions' as functions which 'may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding'.[23]

The question thus becomes whether central bank asset freezes involve 'judicial functions', which may include, beyond legal proceedings as such, any 'determination of questions of law and of fact'. To the extent legislative and executive asset freeze actions

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Nations Convention, 37 (footnote—also without explanation or sources—omitted). If this exclusion is correct, it would follow that the UNCSI does not restrict purely legislative action, without use of delegated authority to executive bodies, against State property. A more expansive view, excluding not only legislative but also executive action from the coverage of the UNCSI, is put forward by Ingrid (Wuerth) Brunk, 'Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?', Lawfare Blog (7 March 2022) <https://www.lawfaremedia.org/article/does-foreign-sovereign-immunity-apply-sanctions-central-banks> (accessed 30 June 2024): 'For example, the UN Convention on the Jurisdictional Immunities of States and Their Property (not in force) provides immunity "from the jurisdiction of courts" and from "measures of constraint in connection with proceedings before a court." That's it. That language does not apply to the freezing of assets unrelated to court proceedings.' Brunk defends the view in greater detail in Ingrid (Wuerth) Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds', Vanderbilt University Law School Legal Studies Research Paper Series Working Paper Number 23-12 (last revised 12 April 2023) <https://ssrn.com/abstract=4363261> (accessed 30 June 2024), 14ff.

[22] For further discussion of the drafting history regarding 'court', see Roger O'Keefe et al., eds, *United Nations Convention*, 41 and reports cited.

[23] *Yearbook of the International Law Commission, 1991,* vol. II, Part Two, 14 <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf> (accessed 30 June 2024).

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do not involve such determinations, they would seem not to involve 'judicial functions', and thus not a 'court'.[24]

Lastly, there is the question of whether the implementation and administration of asset freezes could involve 'other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding'. OFAC, like peer sanctions authorities in other States, oversees exceptions from asset freezes in the form of general and specific licenses for transactions with frozen assets, such as for humanitarian purposes.[25] A licensing procedure, although carried out by an administrative agency, resembles a court proceeding involving the judicial function of making a 'determination of questions of law and of fact'. Such a proceeding, however, results not in constraint but in permission to carry out relevant transactions.[26] It would thus seem that licensing procedures will likewise not implicate immunities.

The foregoing discussion has noted that the UNCSI grants immunities to State assets against 'measures of constraint' 'against property of a State' 'in connection with a

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[24] Taking as an example the asset freeze imposed by the United States on the Central Bank of Russia in 2022, President Biden signed Executive Order 14024 on 15 April 2021, prior to the Russian invasion of Ukraine, delegating authority to the Secretary of the Treasury and the Secretary of State to freeze ('block') all assets of entities determined to be a 'political subdivision, agency, or instrumentality of the Government of the Russian Federation', including 'the Central Bank of the Russian Federation'. Executive Order 14024, 'Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation' (15 April 2021), Sec. 1 (a)(iv) and Sec. 6(b) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/15/executive-order-on-blocking-property-with-respect-to-specified-harmful-foreign-activities-of-the-government-of-the-russian-federation/> (accessed 30 June 2024). After the Russian invasion of Ukraine, the Director of the Department of the Treasury's Office of Foreign Assets Control (OFAC) triggered the previously authorized central bank asset freeze, making a *pro forma* determination on behalf of the Secretary of the Treasury that the Russian central bank is an agency of the Russian government (as already stated, but not 'determined', by the Executive Order). Office of Foreign Assets Control, 'Directive 4 (as amended) under Executive Order 14024: Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation' (28 February 2022, amended 19 May 2023) <https://ofac.treasury.gov/media/918806/download?inline> (accessed 30 June 2024). In neither instrument is there a determination of law (as opposed to law making). Both instruments contain assertions of fact that the Russian central bank is part of the Russian government, but without fact-finding or other 'legal proceedings'.

[25] See, e.g., U.S. Department of the Treasury, 'Ukraine- / Russia-related Sanctions' <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> (accessed 30 June 2024).

[26] For U.S. licensing regulations, see, e.g., 31 CFR § 501.801.

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proceeding before a court of another State'. As set forth above, finding each of these elements in respect of central bank asset freezes would be an uphill battle against the plain language of the Convention, the commentaries and the literature. Even if all three elements were present, central bank assets may not enjoy immunity to the extent in commercial use, the point we will turn to next.

IV. Are central bank assets immune when in commercial use?

Thus far we have assumed that central bank assets are immune *per se,* without regard to their use. This is a likely outcome under the UNCSI, if not certain. It is contentious as a matter of State practice.

At first blush, the UNCSI protects central bank assets categorically. Post-judgment immunity under UNCSI Article 19 excludes property in use or intended for use 'for other than government non-commercial purposes', but UNCSI Article 21 then excludes from the exclusion specified categories of property, including all central bank property.

Yet the O'Keefe commentary nonetheless considers the possibility that central banks may lose immunity in respect of assets used for commercial purposes test not under Articles 19 and 21 but via commercial purposes excluding a central bank from the definition of 'State' in Article 2: 'Despite appearances, the effect of Article 21(1)(*c*) is not necessarily to render immune from foreign measures of constraint all property of a foreign central bank or other monetary authority.'[27] The commentary observes that if a central bank has separate legal personality, then it is a 'State' under UNCSI Article 2(1)(b)(iii) only to the extent 'entitled to perform and…actually performing acts in the exercise of sovereign authority of the State', whereby 'purely commercial conduct' may not constitute such conduct.

Having identified this loophole, the commentary concedes that a narrow reading of 'State' in Article 2(1)(b)(iii) is in tension with the plain meaning and drafting history of Article 21(1)(c): 'It is not clear whether—but unlikely that—this potential consequence of the interplay of the definition of "State" in Article 2(1)(*b*)(iii) and the deeming provision in Article 21(1)(*c*) was intended.' The commentary suggests further that the UNCSI's (likely) approach of categorical deemed non-commercial use of central bank assets is an

[27] O'Keefe et al. (eds), *United Nations Convention,* 343.

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outlier in the context of State practice, provided for in national immunities legislation only in Pakistan, Singapore, South Africa and the United Kingdom.[28]

State practice is inconsistent on immunities of foreign central bank property. Ingrid (Wuerth) Brunk identifies a non-uniform 'trend towards more generous immunity from execution for foreign central bank property' over the past twenty years, dividing States into three groups. The most protective group of States follow the UNCSI approach of granting immunity from execution to all central bank assets absent an explicit waiver. A middle group of States observe immunities for central bank assets 'used for central banking functions or for government or sovereign purposes'. The least protective group of States provide no special protections for central bank assets and also deny immunity from execution for property used for a commercial activity based on the nature, not purpose, of the activity. Undermining the existence of *opinio juris* is the fact that legislation on central bank immunities is motivated by economic considerations, namely the desire of States to attract and retain foreign central bank assets.[29]

In addition to noting that State practice on central bank immunities is 'sometimes [...] an explicit effort to attract investment by foreign central banks', Brunk notes 'a trend towards reciprocity', with jurisdictions including Argentina, China and Russia granting immunity from execution for central bank assets only to States that themselves grant such immunity.[30] Here *opinio juris* is undermined further: States that extend central bank immunities solely to States granting reciprocal immunities would appear to be acting out

[28] *Id.,* 344.

[29] Ingrid Wuerth, 'Immunity from Execution of Central Bank Assets', in Tom Ruys et al., eds, *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 266. See also David Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/02, 24 <https://www.oecd.org/daf/inv/mne/WP-2010_2.pdf> (accessed 30 June 2024): 'In its 1984 report, the Australian Law Reform Commission cited legislative history and authoritative commentators that suggested that the special treatment of central banks under US and UK law was "at least partly motivated by the desire to protect the positions of New York and London respectively as investment centres for foreign state reserves". The recent changes in Chinese law apparently had in part a similar genesis. With the expansion of the central bank role with regard to SWFs, the competitive issues relating to foreign central banks may have expanded beyond attracting reserves to investment more generally.' (Citations omitted.)

[30] Wuerth, 'Immunity from Execution', 266, 270.

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of courtesy, not in recognition of an obligation under international law.[31] The United States Supreme Court (if not the State Department, the Congress or US law professors) has been of the view for two hundred years, since *The Schooner Exchange,* that State immunity is a matter of 'grace and comity', not an international legal obligation at all.[32]

Brunk asserts that customary international law requires, at a minimum, 'immunity from execution for central bank or monetary authority assets not used for a commercial activity [...] whether the bank or monetary authority is a foreign State, or agency or instrumentality thereof. Although some decisions from decades ago, in Germany, for example, found that central bank assets were not entitled to immunity at all if the central bank was legally distinct from the foreign State, case law and statutes since then uniformly hold to the contrary.'[33] This last assertion is questionable at least in respect of statute. For example, some jurisdictions do not distinguish between central bank assets and State property generally, and courts in such jurisdictions may continue to consider corporate structure and operational independence in their State immunity analyses.[34]

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[31] See, e.g., Sompong Sucharitkul, 'Immunities of Foreign States before National Authorities' (1976) 149 Recueil des Cours de l'Académie de Droit International 87, 119: 'The ideal of international courtesy or comity of nations is conditioned upon reciprocity, which in turns breeds uncertainty in legal developments.'

[32] Relevant cases range from *The Santissima Trinidad,* 20 U.S. (7 Wheat.) 283, 353 (1822) (Justice Story: foreign sovereign immunity 'stands upon principles of public comity and convenience') to *Rubin v. Islamic Republic of Iran,* 583 U.S. __ (2018), slip op. at 4 (Justice Sotomayor: foreign sovereign immunity 'is a matter of grace and comity on the part of the United States'). See generally Lori Fisler Damrosch, 'The Sources of Immunity Law – Between International and Domestic Law' in *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) and William S. Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071.

[33] *Id.,* 280. No citation to caselaw is given, but the reference may be to LG Frankfurt a. M. 2.12.1975, O 186/75, English translation *Nonresident Petitioner v Central Bank of Nigeria* (1977) 16 ILM 501. In that case, one of the Nigerian cement cases, the district court affirmed that 'in accordance with general case law, legal publications, and writings on international law, separate legal entities of a foreign state enjoy no immunity'. 16 ILM 502 (1977) (numerous citations omitted). Another decision finding no immunity in case of separate legal personality is cited by the Austrian Supreme Court in *Dralle v Republic of Czechoslovakia* OGH 1 Ob 167/49, 1 Ob 171/50, 17 ILR 155 (1950), namely a 1928 Austrian Supreme Court decision ('Entscheidung vom 22. Mai 1928, Rspr. 1928, Nr. 381') declining immunity to the Bulgarian National Bank, notwithstanding revival of the rule of absolute immunity in Austria in 1926, for reasons including the Bulgarian National Bank's separate legal personality.

[34] Gaukrodger provides examples from the sovereign wealth fund context, which, in the absence of statutory privileging of central bank assets, may be comparable. Gaukrodger, 'Foreign State Immunity', 14-18.

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Lastly, the commercial activity approach to central bank immunity, taken by States including Australia, Canada and Israel, is of particular relevance in the context of asset freezes against central banks of commodities-driven economies, including Iran and Russia. The UNCSI omitted a commercial activity exception from immunity for central bank assets after controversy and consideration of other approaches, including a proposal by Special Rapporteur Motoo Ogiso, not adopted, to limit immunity to central bank assets 'used for monetary purposes'.[35] Brunk rightly does not suggest the UNCSI reflects customary international law on this point.[36]

Depending on whether central banks are immune to the extent their assets are used for 'monetary purposes' or other government non-commercial purposes, the immunity of central bank assets for core *jure imperii* activities could be construed narrowly, such as to immunity for assets funding official activities of diplomatic missions, consular authorities and international organizations, which are carve-outs referenced in certain EU sanctions legislation.[37]

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[35] The O'Keefe commentary notes that 'Germany, supported by Australia, Qatar, and the five Nordic countries' argued that only central bank 'property serving monetary purposes' 'should be classified as not in use or intended for use for commercial purposes', but that drafting proposals in this regard were 'unsuccessful.' O'Keefe et al. (eds), *United Nations Convention,* 337, 342.

[36] *Yearbook of the International Law Commission, 1990,* vol. II, Part Two, para. 227 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1990_v2_p2.pdf> (accessed 30 June 2024): 'With regard to the new article 22 proposed by the Special Rapporteur, many members supported the addition of the words "and used for monetary purposes" in paragraph 1 (c), although one member opposed the addition because of the way those words could be interpreted by local courts. Another member endorsed the view that there was an organic link between the new article 22 and draft article 11 bis which should be duly taken into account. The same member, however, stressed the importance of the concept behind subparagraph (c), namely that property of the central bank of the foreign State which was in the territory of the forum State was unconditionally exempted from measures of constraint whatever the purpose for which it was used; central banks were instruments of the sovereign power and all activities conducted by them enjoyed immunity from measures of constraint; moreover, central banks should, because of their legal status, be considered as State bodies and automatically enjoy immunity on that basis. This member further suggested that the Drafting Committee should consider how the wording of paragraph 2 could be improved to ensure protection of the specific categories of property in question against all measures of constraint, in other words to allow no derogations from the principle of immunity in respect of that property.'

[37] Emanuel Castellarin, 'Le gel des avoirs d'une banque centrale étrangère comme réaction décentralisée à un fait internationalement illicite: rétorsion ou contre-mesure?' (2013) 25 Hague Yearbook of International Law 173, 188-189.

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In an unusual case of a State seeking to expand, rather than limit, the treatment of its central bank activities as commercial, the ICJ's 2019 preliminary objections judgment in *Certain Iranian Assets*[38] that it lacked jurisdiction to consider questions of immunities triggered a reversal of legal positions by Iran and the United States partway through the case. Unable to seek remedies for violations of immunities, Iran argued that, notwithstanding its past position before US courts that its central bank activities were non-commercial under US domestic law, its central bank activities should be regarded as commercial for treaty purposes before the ICJ so that Iran's central bank could benefit from treaty provisions protecting commercial companies. For example, Iran stated that 'the most profitable of these various [central bank] commercial activities are the selling of foreign currencies, mainly coming from Iran's oil exports, to commercial banks in the Iranian foreign exchange market, and the investment in foreign currencies and various financial – cash or derivative – instruments.'[39] The ICJ ultimately ruled that for treaty purposes Iran's central bank activities were not commercial and its central bank was not a 'company'.[40] There were numerous dissents on the point, including suggestions that after the litigants reversed their views on whether Iran's central bank activities were commercial, the Court contradicted its own (binding) 2019 preliminary objections judgment in the 2023 final judgment.[41]

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[38] *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* Preliminary Objections, Judgment of 13 February 2019, 35 <https://www.icj-cij.org/public/files/case-related/164/164-20190213-JUD-01-00-EN.pdf> (accessed 30 June 2024):

> Consequently, the Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them.

[39] *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* Reply of the Islamic Republic of Iran (17 August 2020), 12 <https://www.icj-cij.org/public/files/case-related/164/164-20200817-WRI-01-00-EN.pdf> (accessed 30 June 2024).

[40] *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* Judgment of 30 March 2023, paras. 40-54 <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf> (accessed 30 June 2024).

[41] The point was criticized in the separate opinions of Judge Bennouna, Judge Yusuf, Judge Robinson and Judge *ad hoc* Momtaz and the declaration of Judge Salam. See, e.g., *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* Separate Opinion, Partly Concurring and Partly Dissenting,

Given the diversity of State practice in the area, it is possible that central bank assets in commercial use, for example revenues from commodities exports, are not covered by immunity.

V. Opposing conventional wisdoms

The foregoing two sections have sketched a conventional narrow view of immunities of central bank assets, both under the UNCSI (legislative and executive action generally not covered) and under customary international law (central bank assets in commercial use potentially not covered, including assets connected with commodities exports).

This narrow view is supported by Webb, who suggests that the protections of State immunities can be avoided by pursuing solely executive and legislative, not judicial, confiscations, although such non-judicial action may still 'infringe broader international obligations such as sovereign equality and protections accorded to foreign-owned property.'[42] This narrow view is also supported by Jennings and Watts in their treatise:[43]

- Notwithstanding 'special considerations of courtesy and prudence', there is no general requirement in international law that all foreign State property be granted special inviolability or other exemption from governmental action.
- State property is liable to temporary seizure or expropriation, orders restricting the foreign State's freedom to deal with the property or requiring it to deal with

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of Judge Robinson (30 March 2023) <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-07-EN.pdf> (accessed 30 June 2024), noting that the Court's finding that Bank Markazi, Iran's central bank, is not a 'company' and not entitled to protection under the 1955 Treaty of Amity 'is based on reasoning that is flatly contradicted by the Court's 2019 preliminary objections Judgment.... The Court ought to have been more transparent by stating that both Parties changed their positions after the Court, in its 2019 Judgment, found that it had no jurisdiction in respect of the question of the sovereign immunity of the Bank. ... The Court should not have joined this strategic, tactical and inconsequential interplay between the Parties.'

[42] Philippa Webb, 'Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine', European Parliamentary Research Service Members' Research Service, PE 759.602 (February 2024), <https://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf> (accessed 30 June 2024), 14 (citation omitted).

[43] Robert Jennings and Arthur Watts, *Oppenheim's International Law,* 9th ed. (Oxford University Press 2008), vol. I, para. 111, 363-364. Jennings and Watts mention in n. 11 that Executive Order 12170 in 1979 and regulations thereunder 'had the effect of denying Iran the benefit of immunity from pre-judgment attachment which it would otherwise have enjoyed', an arrangement addressed in extensive litigation and resolved by the Algiers Accords between the United States and Iran in 1981.

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the property in a certain way, and to taxation, provided that the local governmental action is not arbitrary and otherwise consistent with the international law of private foreign-owned property (for example on compensation in case of expropriation).

- State immunities can apply, however, in case of enforcement of such actions (e.g., judicial orders to pay judgment creditors, as has been permitted in the United States with frozen Iranian central bank assets).[44]
- Most on point for central bank asset freezes: A State has an acknowledged right to take action against a foreign State's property in case of war, hostilities or other 'serious tension or differences between the states concerned': 'The circumstances justifying such action are unclear, as are the permissible limits of the action taken, but blocking the foreign state's assets, a requirement to register such assets, and a prohibition upon financial transactions with the foreign state except under licence are not unusual in this context.'

Against this narrow view, others argue for immunities and inviolability to extend to block effectively all unilateral sanctions. In respect of inviolability, Ruys sketches arguments to expand the traditional scope of inviolability to include all assets held by heads of State, although these arguments would not extend to central bank assets.[45] Moiseienko discusses arguments to expand inviolability from the property of diplomatic missions protected by treaty to central bank assets on the basis of certain broad statements in ICJ caselaw. He notes, however, that no State appears to have ever invoked the inviolability, as opposed to immunity, of central bank assets, suggesting that these arguments are unsupported by State practice and *opinio juris.*[46]

In respect of immunities, Ruys notes a competing contemporary 'conventional wisdom' of an expansive view, in part unpublished ('when discussing the matter with fellow

[44] This view is echoed, including in the context of the relevant United States domestic legislation, namely the Foreign Sovereign Immunities Act, by Ingrid (Wuerth) Brunk: 'Under the FSIA, immunity protects foreign states from jurisdiction of courts in the United States and it protects a foreign state's property in the United States from "attachment arrest and execution." Those three terms refer to actions against property that are related to or arise out of judicial proceedings.' Wuerth, 'Does Foreign Sovereign Immunity Apply'.

[45] See Ruys, 'Immunity, Inviolability and Countermeasures', 699-701.

[46] Anton Moiseienko, 'Seizing Foreign Central Bank Assets: A Lawful Response to Aggression?' (17 April 2023) <https://ssrn.com/abstract=4420459> (accessed 30 June 2024), 27-28.

scholars'), that central bank asset freezes violate State immunities under customary international law in light of sovereign equality.[47]

In one article, Thouvenin and Grandaubert take the view that central bank asset freezes are 'non-judicial measures' outside the scope of the UNCSI, but that 'non-judicial measures can hinder the foreign State's management of its property and should in principle be covered by immunity from execution under customary international law.' The authors do not define the contours of an immunity to all measures that 'hinder the foreign State's management of its property', although, among the scholars they cite, one (Florence Poirat) argues for a definition of State immunity from execution expanded to include 'freezing orders and even embargos'.[48]

In a separate article, Thouvenin has also argued that (i) immunity from execution can apply outside the context of judicial proceedings, (ii) States generally avoid actions that coercively affect the goods of third States, explaining a blind spot in legal doctrine on a scope of State immunity beyond the traditional context of court proceedings, and (iii) no analysis of State practice and *opinio juris* is needed because the principle of sovereign equality directly prohibits States from exercising jurisdiction vis-à-vis other States, whether through judicial, legislative or executive action.[49]

Ruys replies to Thouvenin's arguments that (i) the ILC sought to codify existing custom, with national legislation likewise requiring a nexus to 'court proceedings', (ii) the relevance of 'omissions' for purposes of ascertaining custom requires the parallel existence of explicit *opinio juris*, (iii) the suggestion of a blind spot in legal doctrine is contradicted by the increasing frequency with which States take recourse to asset freezes and other unilateral sanctions (and indeed that customary international law may be evolving towards an ever-greater acceptance of asset freezes and sanctions), and (iv) the rules on State immunity do not follow exclusively from the principle of sovereign equality, but instead balance sovereign equality against the full and exclusive territorial

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[47] Tom Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions', in Tom Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 673-674.

[48] Jean-Marc Thouvenin and Victor Grandaubert, 'The Material Scope of State Immunity from Execution', in Tom Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 250-251.

[49] Jean-Marc Thouvenin, 'Gel des fonds des banques centrales et immunité d'exécution', in Anne Peters et al. (eds), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2014), 212-213.

jurisdiction of States.[50] Moiseienko concurs that, in view of numerous asset freezes of State property—without State protest—over the years since the publication of Thouvenin's article, Thouvenin's suggestion of a doctrinal blind spot is 'surely obsolete'.[51]

Beyond the doctrinal debate, it is not clear that extending the reach of immunities would yield just outcomes in practice. There are valid critiques of the overreach and the human and environmental cost of unilateral sanctions, above all by the United States. Yet it is perilous to form a general legal position to pursue specific policy goals, and expansive interpretations of immunities denying the lawfulness of US sanctions on Cuba and Iran may also deny the lawfulness of US and EU sanctions on Russia for invading Ukraine. It is also challenging to identify cases in which the application of State immunity was equitable. As early as 1925, Edwin Dickinson referred to State immunities as 'an arbitrary and somewhat archaic principle' in tension with 'the requirements of substantive justice'.[52] To better assess the split between narrow and expansive conventional wisdoms on State immunities, we will next look to these immunities' origins.

VI. Where do State immunities come from?

'The Court considers', the ICJ wrote in *Jurisdictional Immunities of the State,* 'that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.'[53] This recital should be understood as the majority's effort to resolve numerous debates on the law of immunities through assertion and omission. Although the Italian Constitutional Court found that the ICJ's result in *Jurisdictional Immunities* violated the 'fundamental principle of judicial protection of

[50] Ruys, 'Immunity, Inviolability and Countermeasures', 685-686.

[51] Moiseienko, 'Seizing Foreign Central Bank Assets', 25.

[52] Edwin D. Dickinson, 'Waiver of State Immunity' (1925) 19 American Journal of International Law 530, 559.

[53] *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening),* Judgment of 3 February 2012 <https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> accessed 30 June 2024, para. 57.

fundamental rights' under the Italian constitution,[54] this paragraph 57 of the judgment is widely taught and cited. In a single sentence, the ICJ declared State immunities to be a rule, not a principle,[55] to be international law, not national law, to be 'important', rather than 'an arbitrary and somewhat archaic principle' (Dickinson, above), and to derive proleptically from a concept of later date, namely sovereign equality, a coinage from the Four Power Declaration in 1943.[56]

James Crawford captured the disorder of the field that the ICJ so neatly elides: 'Since 1945, state immunity has been transformed from a topic with a few rather straightforward rules in which immunity dominated subject to limited exceptions, to an increasingly complex field riddled with exceptions, established and asserted.'[57] Much State practice differs from the position that '[t]he Court considers'. Outlier States deny immunity from execution entirely, and other States regard immunity from execution only as a default rule subject to conditions or which can be lifted by executive action. This practice has attracted criticism both for potentially infringing a fundamental right of access to justice (when the executive branch does not lift immunity; challenges before the European Court of Human Rights have not succeeded) and for fomenting international conflict (when the executive branch does lift immunity).[58] Moreover, the approach of allowing

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[54] In response to Italian courts disregarding the judgment of the ICJ, Germany instituted new ICJ proceedings in 2022. International Court of Justice, press release, 'Germany institutes proceedings against Italy for allegedly failing to respect its jurisdictional immunity as a sovereign State' (29 April 2022) <https://www.icj-cij.org/taxonomy/term/450> accessed 30 June 2024.

[55] Cf. Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 European Journal of International Law 853 (State immunity as a principle, not a rule).

[56] See Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53 Yale Law Journal 207: 'The term "sovereign equality" used in the Four Power Declaration probably means sovereignty and equality, two generally recognized characteristics of the States as subjects of international law...'

[57] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), 491.

[58] August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 European Journal of International Law 803, 813-817, provides examples of total denial of immunity from execution, including a 1973 Dutch Supreme Court case ('International law is not opposed to any execution against foreign State-owned property situated in the territory of another State') and Turkish court decisions from 1993 and 2001 as well as examples of modern jurisdictions, including Croatia and Greece, that allow executive discretion on immunities from execution, noting: 'The decision to grant or deny immunity from execution thereby becomes politicized, subject to political considerations of the

immunities to be lifted in the discretion of the executive seems inconsistent with recognising a binding obligation under international law. Among States that have not accepted the ICJ's rule of State immunities are China, which still adheres to the traditional rule of absolute immunity, including for commercial transactions, India, which allows for immunity to be lifted by executive discretion, and the United States, with its settled caselaw that immunity is a creature of domestic law.[59]

Certain States observe State immunities subject to reciprocity, including Russia in general and China and other States with regard to central bank assets in particular. There is also the growing 'terrorism' exception from jurisdictional immunities, which Shan and Wang regard as a subtle form of reciprocity.[60] Ruys writes, 'The United States and Canada are so far the only two countries to have introduced an exception to State immunity for State-sponsored terrorism', with the legality of the exception also apparently accepted in a decision by the Italian Supreme Court of Cassation.[61] Ruys omits to mention that States targeted by the terrorism exception have reciprocated, with terrorism exceptions observed by Cuba, Iran, Russia and Syria.[62]

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executive branch, and, unless the executive regularly grants immunity, is likely to lead to even more friction than an exclusively judicial decision.' Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Yearbook of International Law 220, 242 gives historical examples between the 1920s and the 1940s including Greece, Italy and Soviet Russia (execution can be permitted by the Minister of Justice) and Switzerland (execution can be permitted by the Federal Council).

[59] India's Code of Civil Procedure, 1908, s. 86, as amended <https://legislative.gov.in/sites/default/files/A1908-05.pdf> (accessed 30 June 2024), allows a foreign State to be sued in an Indian court 'with the consent of the Central Government' if 'it appears to the Central Government' that one of a list of conditions is met, including the extremely broad condition that the defendant State 'by [itself] or another, trades within the local limits of the jurisdiction of the Court' without any nexus requirement. Regarding China, it 'still officially adheres to the absolute doctrine, despite having signed (but not ratified) the UNCSI in 2005. Fei Li, the then Deputy Director of the Legal Committee of the Standing Committee of the National People's Congress, clarified in 2011 that' China 'firmly upholds' the absolute doctrine. Wenhua Shan and Peng Wang, 'Divergent Views on State Immunity in the International Community', in Tom Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 63 (citations omitted).

[60] Shan and Wang, 'Divergent Views on State Immunity', 67-69.

[61] Ruys, 'Immunity, Inviolability and Countermeasures', 684, n 91.

[62] The Law Library of Congress, Global Legal Research Center, 'Laws Lifting Sovereign Immunity in Selected Countries' (May 2016) <https://permanent.fdlp.gov/gpo115652/lifting-sovereign-immunity.pdf> (accessed 30 June 2024). David P. Stewart, 'Immunity and Terrorism', in Tom Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law,* 656 n 32 (Cambridge University Press 2019), cites this source but overlooks relevant legislation in Syria.

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In the mid-twentieth century, scholars and judges led by Sir Hersch Lauterpacht took the view that State immunities have no foundation in international law at all. Clive M. Schmitthoff identified three theories of State immunity, not only the usual theories of absolute and restrictive immunity, but a third 'theory which denies the existence of sovereign immunity', proposed by Lauterpacht (who 'argued that the doctrine of sovereign immunity has no sound basis in international law') and supported by judges including Lord Denning and by publicists including Ian Brownlie, Daniel O'Connell and Max Sørensen in their treatises.[63]

In his 1951 article on 'The Problem of Jurisdictional Immunities', Lauterpacht criticized State immunities as 'the shackles of an archaic and cumbersome doctrine of controversial validity and usefulness'.[64] For 'the view, so often expressed in textbooks and elsewhere, that the immunity of foreign states and their property from the jurisdiction of courts of foreign states follows from a clear principle of international law, namely, the principle of equality and independence of states', Lauterpacht found neither 'support in classical international law' nor logical validity.[65] In Lauterpacht's view, the distinction between *jure gestionis* and *jure imperii* was already widespread but incoherent in 1951, citing numerous contradictory decisions.[66] Lauterpacht was prescient here as elsewhere, and the UN General Assembly Legal Committee and leading scholars regard the distinction between *jure gestionis* and *jure imperii* as still not 'satisfactorily solved' today.[67] Ultimately Lauterpacht rejected the existence of State immunities under customary international law altogether:

> The view that there is at present no rule of international law which obliges states to grant jurisdictional immunity to other states is, admittedly, unorthodox and,

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[63] Clive M. Schmitthoff, 'The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading' (1972) 2 Denver Journal of International Law & Policy 199, 201 n 16, 202 and works cited.

[64] Lauterpacht, 'The Problem of Jurisdictional Immunities', 247.

[65] Lauterpacht, 'The Problem of Jurisdictional Immunities', 228-229.

[66] *Id.,* 248.

[67] Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013), 4: '...the five problem areas identified by the UNGA Legal Committee and its working party have not been entirely resolved; in particular the criterion for the distinction between immune and non-immune acts upon which the whole restrictive doctrine depends has not been satisfactorily solved in the definition of 'commercial transaction' set out in Article 2(2) of the Convention[.]'

> being at variance with the view almost uniformly expressed in textbooks, at first sight startling. This is so, in particular, if we contrast it with the opinion, again uniformly expressed by writers, to the effect that one of the consequences of independence—or equality—of states is the duty of municipal courts to abstain from exercising jurisdiction over foreign states and that such duty is a rule of international law. That statement is now usually accompanied by the acknowledgement of the exception connected with acts *jure gestionis.* It is not explained why, if immunity from jurisdiction is a rule of international law, it should not apply to acts *jure gestionis;* or, assuming that absolute immunity from jurisdiction was originally a rule of international law, when and how states consented to a limitation of that rule in matters *jure gestionis.* [...] In fact it is not easy to see why the principle of independence and equality should preclude the courts of a state from exercising jurisdiction over another state and its property so long as the state exercising jurisdiction merely applies its ordinary law, including its rules of private international law, and so long as it applies it in an unobjectionable manner not open to the reproach of a denial of justice or of the disregard of the legislative and administrative sovereignty of the foreign state.[68]

Lauterpacht's own proposal was for immunities of foreign States to be assimilated to the immunities of the domestic State.[69] Although the academic consensus of the *jure gestionis* exception has prevailed, not Lauterpacht's view, the fault lines that Lauterpacht identified in 1951 endure today. Today the extent to which practice on State immunities is

[68] Lauterpacht, 'The Problem of Jurisdictional Immunities', 228.

[69] Although Lauterpacht regarded his solution as permissible for every State under customary international law, he nonetheless proposed implementation by way of an international agreement prepared under the auspices of the ILC. *Id.,* 236-239, 247-250.

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contradictory is accepted by courts[70] more than scholars.[71] Even Lauterpacht's own article, although recognized by the British Supreme Court as 'influential'[72], was misstated by Fox in 2019, perhaps to honour Lauterpacht's legacy while obscuring his teachings.[73] Lauterpacht's doubts appear to have been more familiar thirty years before, including to

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[70] Detailed discussions of State immunities have been provided by, e.g., the Austrian Supreme Court in *Dralle v Republic of Czechoslovakia* OGH 1 Ob 167/49, 1 Ob 171/50, 17 ILR 155 (1950), the West German Federal Constitutional Court in *Claim against the Empire of Iran* (1963), Entscheidungen des Bundesverfassungsgerichts, 16 (1964), 27, and the British Supreme Court in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62. In *Dralle* the Austrian Supreme Court noted that Austrian caselaw took the approach of absolute immunity until 1907, then of restrictive immunity until 1926, then a more absolute approach between 1926 and 1950 under the influence of a law professor, Gustav Walker: 'In späteren Entscheidungen ist der Oberste Gerichtshof anscheinend unter dem Einfluß des inzwischen erschienenen Werkes von *Walker*, Internationales Privatrecht, von dieser Praxis wieder abgegangen und zur älteren Judikatur zurückgekehrt. Er verlangte jetzt wieder eine ausdrückliche Unterwerfung unter die inländische Gerichtsbarkeit.'

[71] As noted, a helpful counterexample is Reinisch, 'European Court Practice'.

[72] Lord Sumption wrote in *Benkharbouche* at [29]: 'I am indebted to the extensive reviews of this large body of material by Sir Hersch Lauterpacht in his influential article "The Problem of Jurisdictional Immunities of Foreign States"[.]'

[73] Hazel Fox, 'The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status', in Tom Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law,* 21-22, n 7 (Cambridge University Press 2019) writes: 'As late as 1951 Hersch Lauterpacht accepted as unorthodox the adoption of a restrictive rule of State immunity,' citing the passage quoted at n 63 above. In fact, Lauterpacht suggested that the restrictive rule was already 'predominant' (at 248) and that the absolute rule had already 'been largely abandoned by judicial practice' in 1951 (at 236). What he termed 'unorthodox' was his view that State immunity does not exist under customary international law at all. The latter view seems to have been an unorthodox view built on another unorthodox view, namely Lauterpacht's position that uniform practice is required for custom. As the West German Federal Constitutional Court wrote in *Claim against the Empire of Iran* (as translated in 45 ILR 79):

> Lauterpacht is of the opinion that customary international law applies only in the case where uniform practice has unambiguously developed, as for instance for the immunity of diplomats and heads of State and in relation to vessels of war. In other cases, pending comprehensive international regulation, the granting of State immunity must be regarded as reserved for the law of the country (Oppenheim/Lauterpacht, International Law, vol. 1, 8th ed., 1955, para. 115, p.274, and British Year Book p.220 [236 ff.]). Similarly, E.J. Cohn (loc.cit. p.662), while he grants the principle of State immunity the character of international law as such, believes the details of its form must today be taken as being left to national law.

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Fox herself.[74] This serves as a reminder that the confidence of international lawyers that the law of State immunities is settled has only really emerged since the *Jurisdictional Immunities* judgment in 2012, reflecting the influence of the UNCSI and, at the ICJ, an 'interpretive community in international law' as critiqued by Waibel.[75] An authority as recent as Jennings and Watts' 2008 treatise retains language (going back to Lauterpacht in a prior edition he edited) characterizing State immunities as a sort of comparative law that has solidified into international law by inertia:

> The jurisdictional immunity of foreign states has often also been variously — and often simultaneously — deduced not only from the principle of equality but also from the principles of independence and of dignity of states. It is doubtful whether any of these considerations supplies a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state.... However, the practice of states over a long period has established that foreign states enjoy a degree of immunity from the jurisdiction of the courts of another state. This practice has consisted primarily of the application of the internal laws of states by judicial decisions, taking into account, in some states, communications made to the courts by the executive branch of government. Consequently the decisions reached have varied in points of detail, and sometimes in substance, according to the laws of the different states concerned.[76]

VII. What ideas should inform the application of State immunities?

In the consideration of the ICJ quoted above, State immunities derive solely from the precept of sovereign equality enshrined in the UN Charter. This sort of fundamentalism leads to questionable results, whether a denial of legal remedies to victims of war crimes or the discovery that peacetime embargoes violate international law. It leads to

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[74] 'As [Christoph Schreuer] warns, the law of State immunity is in danger of falling apart and becoming "a matter of comparative rather than international law".' Hazel Fox, 'State Immunity: Some Recent Developments by Christopher *[sic]* H. Schreuer' (1989) 38 International and Comparative Law Quarterly 705, 706.

[75] See Michael Waibel, 'Interpretive Communities in International Law', in Andrea Bianchi (ed), *Interpretation in International Law* (Oxford University Press, 2015).

[76] Jennings and Watts, *Oppenheim's International Law,* vol. I, para. 109, 341-342 (citations omitted).

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questionable factual claims, for example that immunities reduce conflict in international relations and play a 'pacifying and stabilizing role' between States.[77] It is ahistorical. Sompong Sucharitkul, one of the Special Rapporteurs who oversaw the preparation of the UNCSI, identified six foundations of State immunities, with sovereignty and equality only two concepts among many: (i) the analogy with immunities of the local sovereign, (ii) diplomatic immunities, (iii) 'principles of sovereignty, independence, equality and dignity of States', (iv) reciprocity, comity of nations and courtoisie internationale or political embarrassment in international relations, (v) functional necessities and (vi) difficulties or impossibility of execution.[78]

These foundations make clear what the ICJ suppressed, namely that immunities arise from a complex interplay between feudal and modern aspects of diplomacy, national law and international law. Among these foundations, Lauterpacht took note of the dignity of States: 'the traditional claim, transposed into the international arena, of the sovereign state to be above the law and to claim, before its own courts, a privileged position compared with that enjoyed by the subject.'[79] In remarking that 'strained emanations of the notion of dignity are an archaic survival and ... *cannot continue* as a rational basis of immunity', he conceded that dignity is such a basis (albeit irrational).[80] He viewed dignity as a remnant, already much decayed in 1951 ('the level of amenities of international intercourse [have] fallen below the standards punctiliously adhered to before the First World War'). In parallel, he argued (against, among others, Chief Justice Marshall in

[77] See, e.g., Stefan Oeter, 'The Law of Immunities as a Focal Point of the Evolution of International Law', in Anne Peters et al. (eds), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2014), 365, supports 'scepticism towards "progressive" attempts to brush aside immunities systematically' (no attempts cited) and concludes, of allowing national courts 'to judge the legality of sovereign acts with strong repercussions in other jurisdictions', 'If we went that way without any bounds, international relations would become extremely conflictuous *[sic]*' (also uncited). Thouvenin and Grandaubert ('The Material Scope of State Immunity', 265) write, 'It has indeed long been accepted that despite the frustrations experienced by individuals when trying to hold States accountable, State immunity from execution remains necessary to "play a pacifying and stabilizing role" between States' (citing Oeter).

[78] Sucharitkul, 'Immunities of Foreign States before National Authorities', 115-125.

[79] Lauterpacht, 'The Problem of Jurisdictional Immunities', 230.

[80] *Id.,* 231 (emphasis added), also noting in n 7 that 'van Praag, the most modern adherent of absolute immunity, supports it on the ground that assumption of jurisdiction over a foreign state is inconsistent with respect due to it)' (citation omitted).

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The Schooner Exchange) that subjecting States to the jurisdiction of impartial courts is consistent with their dignity.[81]

Notwithstanding the views of the majority in *Jurisdictional Immunities of the State,* exercising jurisdiction over State property in respect of war crimes, torts and parking tickets may not impair international relations beyond minor disputes.[82] It may nonetheless be undignified for judges, police officers and other low-level officials to be allowed authority over high-level foreign States. In a famous definition of the object of international law, Sir Robert Phillimore included preventing 'the ordinary use of courts of justice *in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state*[.]'[83] Chief Justice Marshall grounded his judgment in *The Schooner Exchange* on dignity. A further principle mentioned by Chief Justice Stone in *Ex parte Republic of Peru* is that 'courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations.'[84]

State immunities serve to ensure that a State exercises authority over another State only at a sufficiently high level, consistent with its dignity, and in a manner consistent with the former State's foreign policy. These principles explain both the State practice of India today (immunity from execution can be lifted 'with the consent of the Central Government') and of the United States fifty years ago (judges would defer to the State Department for a case-by-case determination on immunity). In contrast to sovereign equality, the concepts of dignity and embarrassment offer ready means to apply State immunities to central bank asset freezes. It is consistent with the dignity of a State to have its assets frozen by the order of a foreign legislature or executive at the highest levels, as it would not be to have an asset freeze order made by a judge of a court of first instance. Furthermore, whereas the order of a judge against State assets could interfere with foreign policy, no such embarrassment occurs by legislative or executive action of one government against another.

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[81] *Id.,* 231-232.

[82] For example, temporary reciprocal embassy bank account freezes. See Reuters, 'Belgium, Rwanda in diplomatic bank account row' (11 November 2011) <https://www.reuters.com/article/idUSL5E7MB2GN/> (accessed 30 June 2024).

[83] *The Charkieh* (6200) [1873] [L.R.] 4 A. & E. 59, 97 (emphasis added).

[84] *Ex parte Republic of Peru,* 318 U.S. 578, 588 (1943).

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VIII. Conclusion

This article has considered the potential applicability of State immunities to asset freezes on central bank assets. The author has suggested that State immunities are likely applicable to such asset freezes neither under the codified rules of the UNCSI nor under principles of customary international law. Opposing arguments exist in the literature, supporting expansive interpretations of immunity on the basis of the sovereign equality of States. These expansive interpretations are difficult to sustain, however, either as a matter of judicial precedent (courts rarely intervene in matters of foreign policy) or in view of the object and purpose of immunities. The object and purpose of immunities should be understood in historical context as arising from a diversity of sources, including the personal dignity of the sovereign[85] as well as concepts of the dignity of States and the avoidance of embarrassment. As State immunities have improved their legal pedigree over time, replacing descent from feudal hierarchy with descent from sovereign equality, they remain motivated by twin purposes: Immunity should apply to prevent judges and courts of one State from taking action against higher-ranking persons and institutions of another State, and immunity should not apply to allow judges and courts of one State to take action against higher-ranking persons and institutions of the same State. In *The Schooner Exchange,* Chief Justice Marshall applied State immunities to avoid judicial interference with a foreign executive's asset seizures, loath to order the hostile act of taking back a ship and risking war. In the inverse scenario today, courts can be expected to find State immunities inapplicable to avoid judicial interference with executive and legislative asset freezes of central bank assets, loath to undermine intentional hostile acts by their own governments.

[85] Lauterpacht, 'The Problem of Jurisdictional Immunities', 228: State immunities are 'rooted, to some extent, in the doctrine of the personal immunity of heads of states. It is with regard to these that the distinction between acts *jure imperii* and acts *jure gestionis* first attained prominence in Germany in the eighteenth century in the relations of the numerous German states and principalities.'

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