

Targeting the Assets of the Russian Central Bank

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In response to Russia's aggression against Ukraine, western States have frozen around €250bn worth of assets of the Russian Central Bank (RCB). More than two years after the invasion, scholars and policymakers have been discussing ways to utilize the frozen assets to rebuild Ukraine. There have been ongoing debates about whether confiscating these assets, taxing them or their interest or using them as collateral would violate the rules of state immunity, investment treaties or even the principle of non-intervention. Most recently, the [European Council](#) decided to advance the work on concrete steps towards directing extraordinary revenues stemming from RCB assets for the benefit of Ukraine. While some argue that these measures could be justified as (third-party) countermeasures, this post aims to shed light on a less discussed avenue of justification: self-defense.

Countermeasures: Legal Uncertainties?

Before turning there, key issues concerning the justification as countermeasures will be briefly outlined. Countermeasures might justify otherwise unlawful conduct when taken by an injured State in response to a previous internationally wrongful act of another State and directed against that State. They are a law enforcement mechanism aimed to induce the wrongdoing State to return to compliance. It allows the victim State to engage in a form of remedial self-help.

In contrast, third States are generally not allowed to enforce the rights of a victim State even upon invitation. The right to take countermeasures is personal to the State and cannot be passed on. However, if a State breaches an obligation that all States have a legal interest in (*erga omnes*), [some argue](#) that also States not directly injured may use countermeasures against the wrongdoing State. Back in 2001, the ILC concluded that practice in this regard is "limited and rather embryonic" ([ARSIWA commentaries, Art. 53, para. 3](#)). More than 20 years later, the acceptance of the customary status seems to have increased, partly already with reference to the freezing of RCB assets. Nevertheless, using "third-party countermeasures" to target the assets rests on uncertainty. In particular, if countermeasures in the form of confiscation are employed to enforce Russia's secondary obligation to make reparation to Ukraine, the question arises whether such obligations enjoy *erga omnes* status.

Moreover, countermeasures must induce compliance and are thus impermissible as punishment and may not have punitive aim. Accordingly, they must be temporary and, to the extent possible, reversible. Therefore, countermeasures cannot be used as a basis for permanent measures. Rather the measures need to be connected to or conditional on Russia's fulfilment of its obligation to make full reparation (see [here](#)

and [here](#)). However, this might have the benefit that measures could be maintained even after hostilities between Russia and Ukraine have subsided.

Self-Defense: Advantages?

The right of self-defense, as affirmed by Article 51 UN Charter, also establishes a way of unilateral self-help in international law. In contrast to countermeasures, it is rooted in the self-preservation of States and evokes a “[war-like paradigm](#)”. Thus, self-defense allows for far-reaching measures such as the use of force or may even justify pre-emptive actions under narrow circumstances. Moreover, unlike countermeasures, it is generally accepted that collective self-defense authorizes third States to intervene when a victim State asks for assistance.

Unlike countermeasures, acts of self-defense do not have to be temporary or reversible. Yet, akin to countermeasures, they are limited by necessity and proportionality. Countermeasures must be “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act” ([Art. 51 ARSIWA](#)). The proportionality requirement regarding self-defense is more [disputed](#), since *inter alia* its interplay with the *jus in bello* is unclear. While an in-depth analysis would go beyond the scope of this post, [Buchan](#) concludes that the “principle of proportionality in the context of the law on countermeasures is more demanding than the principle of proportionality under the law on self-defense”. While this claim depends upon the underlying understanding of self-defense, it is corroborated by the following: self-defense grants the right to effectively end an armed attack, which may require the use of considerably more force than used by the aggressor. In contrast, countermeasures not commensurate with the injury suffered are disallowed, even if necessary to ensure compliance. Accordingly, targeting the RCB assets under the law of self-defense might allow for permanent and more invasive measures to be taken.

Furthermore, as [Ripenko](#) already indicated, confiscation as an act of self-defense might not affect the obligation of Russia to make reparations. Whereas a confiscating countermeasure needs to be connected to or is conditional upon Russia’s secondary obligation, confiscation under the law of self-defense would be autonomous. Simply speaking: States are not obliged to make restitution for acts of self-defense. However, acts of self-defense must also not be purely retaliatory. Thus, measures must be connected in some way to defending against Russia’s attack. As [Richter](#) argued, this might be fulfilled if the assets are used to buy weaponry to supply Ukraine. This is a sufficient nexus considering that actions preserving a primary repelling character may be simultaneously accompanied by subordinate retributive or punitive motives, as stated by [Nolte and Randelzhofer](#). The EU plans to allocate the extraordinary revenues from the RCB assets to the [European Peace Facility](#), a special budget which also finances arms delivery to Ukraine. While in this regard it offers a plausible connection with defending Ukraine, it must be stressed that rebuilding the war-torn country or supporting the civilian population might not do so. However, if military support can be financed through leveraging RCB assets, it frees financial resources to fulfill other goals.

Being connected to or conditional upon Russia's secondary obligation, it is argued that countermeasures could be maintained even after the hostilities have subsided. In contrast, self-defense is naturally only permissible while the armed attack is ongoing, which could put confiscation efforts on a strict timeline, in particular including potential judicial review. However, this might not be the case in all scenarios. For instance, if Russia occupies parts of Ukraine even after hostilities have ended, Ukraine could have an ongoing right to self-defense to recover that territory. This raises the difficult question when and if such a right ceases, as recently discussed [in the context](#) of the Nagorno-Karabakh conflict.

Self-Defense: No Less Legal Uncertainties?

However, targeting the RCB assets under the law of self-defense might be hanging by a thread after all. Conventionally, States invoke the right of self-defense to justify measures that would otherwise contravene the prohibition on the use of force, so-called forcible measures. Simply relying on an *argumentum a fortiori*, it could be argued that measures below the use-of-force threshold must also be included. However, in her [separate opinion](#) in the *Wall Advisory Opinion*, Judge Higgins asserted that she “remain[s] unconvinced”.

In a similar vein, [Milanovic](#), in discussing legal aspects of the Israel/Hamas conflict, also concluded that, “Article 51 is not some kind of freestanding rule that can apply without Article 2(4)”. A perspective described by [Buchan](#) as “conventional wisdom”, but nevertheless [challenged](#). Essentially, the argument is that self-defense is intrinsic or [parasitic](#) to the prohibition of the use of force. This [functional equivalence](#) could limit the right to forcible measures.

However, this understanding of self-defense leads to contradictory results, as it could incentivize direct military participation in a conflict. For instance, at the beginning of the Russo-Ukrainian war, there was a [scholarly debate](#), whether the supply of weapons to Ukraine by third States violates the law of neutrality. While third States would be allowed to use the weapons directly against the aggressor under the law of collective self-defense, the mere supply could not be justified.

Article 21 ARSIWA seems to hold the answer, in its commentary thereto the [ILC](#) states that “self-defense may justify non-performance of certain obligations other than that under Article 2(4) UN Charter.” However, upon a closer reading, most scholars understand it to refer to ancillary breaches of international law triggered by a use of force. Nevertheless, the provision shakes the strict conception of self-defense as an exception specific to the use of force and already foresees different implications.

Moreover, consideration of proportionality militates for non-forcible measures. The principle may oblige States to answer an armed attack by way of non-forcible measures to avert the scourges of war. This argument was already brought forward in the [Chatham House Principles of International Law on the Use of Force in Self-Defence \(2005\)](#).

Lastly, [Buchan](#) and [Richter](#) both explain that the right of self-defense developed in international law before the prohibition of the use of force, which logically disallows a functional equivalence. As the ICJ [stated](#), Article 51 UN Charter did also not “subsume and supervene” existing customary law.

Accordingly, it could be argued that self-defense functions as a general right, allowing for all types of necessary and proportionate measures. However, this might open the floodgates to undermine complex legal regimes with stand-alone security exceptions in times of war.

Self-Defense: Unwanted by States?

Moreover, it is uncertain whether States are determined to go down that avenue. Supporting States have been hesitant to frame past measures, such as the supply of weapons or the freezing of RCB assets, as acts of collective self-defense or explicitly denied doing so. This can possibly be explained by the way third States use these legal arguments and concepts to shape their political communication and debate. There has also been the concern to be otherwise regarded as belligerent in the Russo-Ukrainian conflict. However, from a legal point of view, the use of the justification of collective self-defense alone does not suffice to be “[at war](#)”.

Besides implications for the political debate, the reluctance of States could be problematic in light of the obligation under Article 51 UN Charter to notify the Security Council of measures taken in the exercise of self-defense. This obligation affirms the subsidiary nature of the unilateral right of self-defense to the powers of the Security Council to address threats to the peace. However, given the deadlock in the Security Council due to Russia’s veto power, the fulfilment of the obligation seems futile. While the failure to notify is a violation of the UN Charter itself, it is not decisive for the power to act in self-defense. However, as the [ICJ](#) has stated, “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense” (para. 200).

Self-Defense: The Solution?

The right of collective self-defense could provide a legal basis for permanent and far-reaching measures targeting the assets of the RCB. While there are good arguments supporting such a broader understanding, it lacks widespread acceptance in international law, leading to legal uncertainties akin to those surrounding countermeasures. Moreover, the reluctance of States might close that avenue of justification. Nevertheless, further exploring and analyzing the right of collective self-defense targeting the RCB could be fruitful to shed light on the legal framework governing measures targeting the RCB.

