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The future of targeted sanctions and the quest for individual accountability:

Lessons learned from the US and EU “freeze and seize Task Forces”

Panel 6.14

Pre-paper

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Abstract:

Targeted measures aimed at individuals tend to revolutionize the practice and functions of “sanctions” in international relations. Once confined to the register of “measures not involving the use of force” under Article 41 of the UN Charter or that of “countermeasures” under the law of international state responsibility, they may reshape the structure of international security by seeking immediate individual accountability of targeted persons rather than the accountability of States. In the context of the unprecedented sanctions imposed on Russia, the “freeze and seize Task Forces” set up by the EU and the US are a clear example of this trend. “Asset freezing” has become the symbol of a – still emerging – international public order based upon individual accountability and respect for international humanitarian law, international human rights law as well as the rule of law and even the fight against corruption and economic crime. This trend, which offers a glimpse into the future of “international sanctions”, deserves informed developments.

Keywords: Asset freezing; seizures; accountability; Russia; Ukraine; International public order

The purpose of this paper is to highlight the most recent developments in the practice of targeted international sanctions taking the form of “asset freezing”, especially in the context of the invasion of Ukraine and measures affecting Russian individuals. Its aim is to demonstrate how “targeted sanctions” are affecting international relations and international law by holding individuals accountable for their actions.

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Context

Russia's invasion of Ukraine in February 2022 has justified unprecedented unilateral measures of asset freezing against hundreds of Russian public officials including the highest members of the Russian government, as well as private individuals – “oligarchs” – close to the leadership. Such “targeted measures” are not revolutionary in itself, especially in the context of a conflict or threat to international peace and security. For instance, the EU did not wait until February 2022 to set up a sanction regime against Russia but merely updated and extended in an unprecedented way the lists annexed to the already existing regime adopted in 2014 in the context of the annexation of Crimea².

Thus, the Russian Minister of Defence was listed as early as the 23 February, on the ground that he was so far “responsible for actively supporting and implementing actions and policies that undermine or threaten the territorial integrity, sovereignty and independence of Ukraine as well as stability or security in Ukraine”³.

On 25 February, the Russian President himself was listed on the same ground, having ordered the launch of the military operation in Ukraine the day before⁴. From 28 February, “oligarchs” close to the President who control most of Russia's economy also started to be listed considering their “active material or financial support to Russian decision-makers responsible for the annexation of Crimea and the destabilisation of Ukraine”⁵.

These restrictive measures are very conventional: They are administrative in nature; they answer to acts which are attributable to a foreign State; they are temporary and attached to a continuing wrongful act of a responsible State so as to induce it to cease and comply with its international obligations⁶.

The major evolution of the past six months has been to move beyond this state of affairs and not only freeze assets, as a temporary international police measure, but also seize them and even confiscate them, as part of judicial proceedings against the same targeted individuals. This pattern is a genuine feature of contemporary international relations and international law insofar as classic “targeted sanctions” are swiftly evolving towards a proper

² Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, p. 16.

³ Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 42I, 23.2.2022, p. 98.

⁴ Council Decision (CFSP) 2022/331 of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 52, 25.2.2022, p. 1.

⁵ Council Decision (CFSP) 2022/337 of 28 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 59, 28.2.2022, p. 1.

⁶ See the Statement of Reasons for listing in the annex of EU Council Decision (CFSP) 2022/337 of 28 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 59/1, 28.2.2022 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022D0337>>

international accountability of individuals rather than the classic international responsibility of States.

The following examples are eloquent:

On March 1st, the French Minister of economy Bruno Lemaire stated his will to turn asset freezing measures into actual measures of judicial seizure: “*Nous sommes en train de travailler juridiquement avec la chancellerie pour que le gel devienne une saisie, nous allons toucher au cœur le pouvoir russe (...) Aucun oligarque ne passera entre les mailles de nos filets, c’est notre objectif*”⁷.

On March 2nd, US Attorney General Merrick B. Garland stated that “*The Justice Department will use all of its authorities to seize the assets of individuals and entities [and] leave no stone unturned in our efforts to investigate, arrest, and prosecute those whose criminal acts enable the Russian government to continue this unjust war. Let me be clear: if you violate our laws, we will hold you accountable*”⁸.

In short, The evolution consists in juxtaposing criminal judicial proceedings on existing asset freezing measures: from an “asset freezing”/“*gel des avoirs*”/“*congelamento*” to a judicial “seizure”/“*saisie d’avoirs*”/“*sequestro*”. Some confusions regarding the scope of these procedures must be cleared out.

Distinguishing “asset freezing”, “seizures” and “asset forfeiture”

The “asset freezing” measures decided in February and March 2022 caused many semantic confusions and generated confused debates, making it necessary to recall a few distinctions.

In the internal legal order, “asset freezing” is a typical administrative police measure taken against natural or legal persons for the purpose of preventing public order and crime. It is intended to be *preventive* and to bring about a change in the behaviour of the targeted individuals. Its temporary and reversible nature justifies its termination as soon as the situation permits. Put differently, “asset freezing” only triggers an administrative responsibility out of an administrative police measure.

In the international legal order, the same “asset freezing” measure have become a privileged instrument of the UN Security Council at the turn of the 1990s, under the heading of “measures not involving the use of armed force” in Article 41 of the United Nations Charter. However, in the last decade, States, groups of States or regional organisations increasingly implemented similar measures in a unilateral and therefore decentralised manner, with the aim of exerting temporary pressure on a larger number of recipients, and in order to

⁷ B. Lemaire, *France Info*, 1 March 2022, <https://www.francetvinfo.fr/monde/europe/manifestations-en-ukraine/guerre-en-ukraine-nous-allons-provoquer-l-effondrement-de-l-economie-russe-affirme-bruno-le-maire_4987341.html>

⁸ US DoJ, Press release, 2 March 2022, <<https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture>>

bring about a change in their behaviour. Asset freezing has thus long been perceived, at best, as a “countermeasure” of the law of international responsibility of the State when it was triggered by an injured State, or as a “third-party countermeasures” when taken by a non-injured State, regardless of whether or not such measures are permissible under customary international law and whether these measures are therefore justifiable or not⁹.

“Seizures” are essentially different from asset freezing in that they are implemented through civil or criminal legal proceedings in order to either secure a legal remedy to a creditor so as to ensure the preservation of his due until the settlement of a dispute, or to secure evidences in the course of a criminal trial, as an investigative measure carried out for evidentiary purposes. Judicial seizures and asset freezing share the same character of reversibility, although the former is driven by its conservatory character while the latter has primarily a preventive character. They both differ from measures of “forfeitures” which are judicial measures of confiscation amounting to a permanent deprivation of property and are thus similar to a form of expropriation without compensation and therefore an actual penalty. In France, the so-called “*Biens mal acquis*” case – ill-gotten gains – case is a good example of this type of procedure. In July 2021, the French highest Court confirmed the confiscation of goods and assets belonging to the son of the President of Equatorial Guinea considering that they were the product of the offenses of money laundering and concealment, offenses that he committed in France¹⁰.

“Freeze and seize task forces” have been the instrument of this major shift from asset freezing to judicial seizures.

What are “Freeze and Seize and Task Forces”?

“Freeze and Seize Task Forces” are mutual support mechanisms aimed at facilitating asset tracing for the purpose, in the first time, of freezing those who belong to listed individuals and, in the second time, of facilitating criminal judicial proceedings against such individuals. As explained by the EU Commission, the “Freeze and seize Task Force” is a tool for judicial and prosecuting authorities to “explore the links between assets belonging to persons listed under EU sanctions and criminal activities”¹¹. Similarly, the “KleptoCapture Task Force” set up by the US Department of Justice in March 2022 seeks to sanction Russian oligarchs by confiscating their assets insofar as they are the products of illicit activities carried out on US soil, in particular corruption, tax evasion, fraud and money laundering.

Within the EU, the “Freeze and Seize Task Force” is composed of the Commission which coordinate the strategy of Member States, Eurojust and Europol which ensure an operational coordination between States, and national contact points from each Member State which enable the actual search of assets.

⁹ On this debate, we take the liberty of referring you to: D. Ventura, “Le gel des avoirs d’individus dans l’ordre juridique international : caractérisation et qualification d’une voie d’exécution en mutation”, *Revue générale de droit international public*, 2022, n°2. pp. 247-280.

¹⁰ French *Cour de Cassation*, Crim., 28 July 2021, 20-81.553.

¹¹ European Commission, Press release, 8 April 2022, available online: <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2373>.

Within the US, the “KleptoCapture task force” is an interagency mechanism led by the Office of the Deputy Attorney General of the United States as well as the Deputy Directors from both the National Security and Criminal Divisions of the US Department of Justice and comprised *inter alia* of agents and analysts from the FBI, the Department of Homeland Security and the IRS (Treasury).

For completeness, it is also necessary to mention the G7 countries initiative to coordinate their joint efforts through a worldwide platform launched the 16 March 2022: the “Russian Elites, Proxies, and Oligarchs (REPO) Task Force” whose aim is also to “take all available legal steps to find, restrain, freeze, seize, and, where appropriate, confiscate or forfeit the assets of those individuals and entities that have been sanctioned in connection with Russia’s premeditated, unjust, and unprovoked invasion of Ukraine and the continuing aggression of the Russian regime”¹².

The ability to freeze and subsequently seize and confiscate assets does not ensure by itself the legality of such procedures. The interrogation turns out to be on which grounds could frozen assets be judicially seized and confiscated?

How to justify that frozen assets be judicially seized and confiscated ?

It appears from the latest developments of the past six months that two methods are available.

- The first one consists in seizing and, as the case may be, confiscating assets on grounds which are essentially different from those which justified freezing.

For instance, in France, the *Parquet National Financier* (National Financial Prosecutor office) opened an investigation into the assets acquired in France by Russian oligarchs close to President Vladimir Putin on July 1st 2022. In the United States, the District Court for the District of Columbia issued as early as March 25th a warrant to forfeit a Yacht owned by Viktor Vekselberg (located in Palma de Majorca, Spain) insofar as there is probable cause that the owner committed bank fraud and evaded KYC obligations in the US so that the yacht is forfeitable in an *in rem* procedure¹³. The yacht was successfully seized by Spanish authorities on April 4th. On June 6th, the District Court for the Southern District of New York issued a warrant for the forfeiture of two aircrafts believed to pertain to Roman Abramovitch for violations of the US rules on export control and licensing of items (such as these aircrafts) which are identified on the US Commerce Control List as part of the sanctions against Russia¹⁴.

At the EU level, it is worth mentioning that the European Commission issued in May a *Proposal for a Directive on asset recovery and confiscation* including the violation of EU

¹² See the Ministerial joint statement:

<https://ec.europa.eu/commission/presscorner/detail/fr/statement_22_1850>.

¹³ USDC (Columbia), *in the Matter of the Seizure of the Motor Yacht Tango*, Warrant to seize property subject to forfeiture, Case No. 22-SZ-5, available online:

<<https://www.justice.gov/opa/press-release/file/1490356/download>>.

¹⁴ USDC (SDNY), *USA v. a Boeing 787-8 Dreamliner Aircraft and a Gulfstream G650ER Aircraft*, Warrant of seizure, 22 MAG 4860, available online:

<<https://www.justice.gov/usao-sdny/press-release/file/1510781/download>>.

restrictive measures as a criminal offense in all EU countries¹⁵. This proposition enable the confiscation of the assets of Russian oligarchs who try to violate the restrictive measures (article 12), for example by moving their yachts outside the EU or changing the ownership of their properties. Remarkably, its article 11 allows Member States to issue an urgent freezing measure which shall not exceed seven days in order to preserve any property which might be confiscated.

In all of these cases, the targeted individuals remain the same but the grounds for the judicial proceedings are distinct from those which justified freezing the assets. This method has the merit of removing all doubts about the extraterritoriality of the judicial procedures. For instance, there is nothing extraterritorial for France in prosecuting acts of money laundering accomplished in the French riviera. There is nothing extraterritorial either in criminalizing “sanction evasion” insofar as the offense is attached to the same territory.

- The second method is considerably more far-reaching. It consists in seizing and confiscating the goods and assets on the exact same grounds as those that justified freezing them.

In the context of the war in Ukraine, it means that the criminal liability would be sought with regards to the individual involvement in the current conflict and its correlated violations of international human rights law and international humanitarian law. This is exactly the approach Canada has been taking when amending the 2017 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*¹⁶. Its original scope used to be limited to authorizing the Canadian Governor to freeze the assets of a foreign national through an “order” if he is of opinion, for instance, that this individual is responsible or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state (section 4(2)). The European Union followed the same path in December 2020 through Council Decision 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses¹⁷. Both the Canadian law and the EU Decision are rooted in the belief that serious international human rights violations and abuses worldwide justify targeted restrictive measures such as travel ban and asset freezing.

On the wake of the war in Ukraine, the Canadian Magnitsky Act of 2017 has been amended through Bill C-19 (entered into force the 23 June 2022) so as to enable the judicial forfeiture – *i.e.* confiscation – of the frozen assets on the sole basis that they are actually owned by the foreign national or controlled by him. Section 4.1. of the amended Act gives the Minister for Foreign Affairs the right to apply to a judge to seek a forfeiture order which he must order if he determines that the assets are described in an order and are actually owned by the foreign national or controlled by him.

¹⁵ European Commission, *Proposal for a Directive on asset recovery and confiscation*, 25.5.2022, COM(2022) 245 final, 2022/0167 (COD), available online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0245#>>.

¹⁶ 18 October 2017, SC 2017, C 21.

¹⁷ OJ L 410I, 7.12.2020, 13.

The amendments of June 2022 go even further insofar as the Canadian government can even sell the seized property under the Magnitsky Act and use the proceeds for specifically defined purposes to assist the victims of the impugned acts¹⁸. These unprecedented procedures considerably alter the nature of asset freezing measures. As a matter of fact, Canada does not implement international sanctions against a foreign State at all. This is actually explicitly noted in the *Justice for Victims of Corrupt Foreign Officials Regulations* implementing the Canadian Magnitsky Law¹⁹:

“These measures are not directed at the states of which these individuals are nationals.”

Conversely,

“the main objectiv[e] of the Regulations [is] to end impunity for those responsible for or complicit in these acts.”

The initial measure of asset freezing operates *de facto* as a judicial measure of attachment of assets, pending their confiscation. Put differently, asset freezing is becoming an instrument ensuring the preservation of property for judicial purposes. In contrast, it is not meant to stop as a result of a change of behaviour: It is not a countermeasure in any way. In addition, unlike the French and American procedures, the Canadian amendments have an extraterritorial reach insofar as the deprivation of property belonging to a foreign national is the direct consequence of actions which are not related to the territory of Canada. It could be argued that the Canadian forfeiture order reflect the claim of a quasi “universal” jurisdiction.

Why are such “Task Forces” the stigma of a major evolution of international accountability?

Every initiatives reviewed above, regardless of their respective means of implementation, demonstrate a significant shift in the purpose of the so-called “targeted individual sanctions”. A very clear pattern exists towards a genuine accountability of individuals in the international legal order rather than a classic and mere responsibility of States implemented through individualised administrative measures. Contrary to a widespread opinion that has been relayed until now by the CJEU²⁰, it is now clear that asset freezing may not be adopted for the sole purpose of an administrative procedure aimed at the prevention of conflicts but may actually be based on a clear allegation that a criminal offence has been committed.

¹⁸ See Section 4.4. of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* read in conjunction with the amended version (23.06.2022) of Subsection 13(3)(e) of the *Seized Property Management Act*, S.C. 1993, c. 37.

¹⁹ *Justice for Victims of Corrupt Foreign Officials Regulations*, P.C. 2017-1346 November 2, 2017, available online:<<https://gazette.gc.ca/rp-pr/p2/2017/2017-11-15/html/sor-dors233-eng.html>>

²⁰ Trib. EU, *Amisi Kumba/Conseil*, 12 February 2020, T 163/18, EU:T:2020:57, § 83. See also, Trib. EU, *Antonio José Benavides Torres/Conseil*, 14 July 2021, T-35/19, EU:T:2021:466, § 49. Previously and in the same direction, see Trib. EU, *People’s Mojahedin Organization of Iran/Conseil*, 23 October 2008, T-256/07, EU:T:2008:461, § 108.

By way of consequence, individual asset freezing measures can no longer be confined to the indiscriminate register of “unilateral coercive measures” taken as a whole, insofar as they may simply pursue different objectives. The main purpose of the latter is to bring about a change in the behaviour of a State when that of the former may be to secure a potential conviction of an individual. Yet, it is striking that either the United Nations General Assembly²¹ as well as the UN Human Rights Council²² and its successive Special Rapporteurs on the subject²³ have considered “unilateral coercive measures” as a homogeneous legal category including not only global and sectoral economic measures affecting a State but also individual targeted measures affecting individuals. Worse, they unambiguously asserted that “unilateral coercive measures” as a whole are “contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States”.

The findings of this paper allow to question such a classic – yet surely dated – representation of international sanctions. The view according to which an economic embargo and a targeted asset freezing measure share the same nature as an intrinsically wrongful act which could only be justified through the action of the UN Security Council or through the invocation of countermeasure does not seem to be supported by facts. In our specific case, asset freezing and subsequent seizures and forfeitures have become a clear instrument of individual accountability in the international legal order. “Freeze and Seize Task Forces” in particular are telling examples of how “targeted measures” are linked to the emergence of an actual international public order based upon individual respect for international humanitarian law, international human rights law as well as the rule of law and even the fight against corruption and economic crime.

Interestingly enough, the conclusions that can be drawn from the existence of the Task Forces could already be suggested earlier in the close but distinct context of civil rather than criminal seizures and confiscations. For instance, the measures of asset freezing taken against the Libyan regime through UNSC resolutions 1970 and 1973 in February 2011 were already evidence of the hybridization of asset freezing. Initially justified by a threat to international peace and security (a context of civil war and systematic human rights violations committed by the Libyan regime), the assets were never intended to be “unfrozen” once the situation is over. Indeed, the Security Council expressed its firm intention “to ensure that assets frozen [...] shall at a later stage be made available to and for the benefit of the Libyan people” (§ 18)²⁴. This statement helps understanding why asset freezing never ceased for many of the listed individuals – including the deceased one – who did not pose a threat to international peace or security anymore. Asset freezing remains justified to this day pending a judicial settlement of the ownership of these assets. As the panel of experts established by Resolution

²¹ See for instance Resolution 71/193 adopted on 19 December 2016, A/RES/71/193.

²² Under the ‘Human rights and unilateral coercive measures’ agenda of the HRC, see for instance among others, Resolution 6/7, 28 September 2007 and more recently, Resolution 34/13, 7 April 2017.

²³ See for instance the first report of the newly appointed Special Rapporteur Alena Douhan, ‘Negative impact of unilateral coercive measures: priorities and road map’, A/HRC/45/7, 21 July 2020. See also the fifth annual report submitted to the HRC by the former Special Rapporteur Idriss Jazairy on the ‘Negative impact of unilateral coercive measures on the enjoyment of human rights’, A/HRC/42/46, 5 July 2019.

²⁴ Resolution 1970(2011), 26 February 2011, § 18.

1973 rightly stated, “freezing assets does not affect the property rights attached to them”²⁵ so that the automatic transfer of these assets to the Libyan government “would constitute an illegal transfer of property”²⁶.

It is in this vein that the Libyan government of national unity established the Libyan Asset Recovery and Management Office (LARMO) in 2017 as an independent authority to judicially recover the looted assets of the former regime. LARMO can absolutely be considered a “Task Force” in the sense of our analysis. Interestingly, in December 2021, the State of Libya, on the initiative of LARMO, filed a lawsuit in the US District Court for the Southern District of New York so as to order six major US banks to produce all documents related to the assets of Gaddafi and his relatives²⁷.

“Freeze and Seize Task Forces” are the stigma of a major evolution of international law in general and international accountability in particular. From a strictly political point of view, there are no doubts as to the willingness of the EU as well as G7 countries to pressurize oligarchs to prompt a change of behaviour of a State – which is the purpose of classic unilateral sanctions. Yet, from the standpoint of law and procedures, such Task Forces undoubtedly went beyond this agenda insofar as they pave the way of an individual criminal responsibility. Current measures of asset freezing coupled with seizures and confiscations are blossoming somewhere in the shadow of both the UN Security Council and the International Criminal Court. Undoubtedly, such practice remain unclear and symptomatic of the current “grey areas” of international law. The coming months will allow us to draw all the useful consequences of this new feature of individual accountability.

²⁵ S/2012/163, Rapport final du groupe d’experts sur la Libye créé par la résolution 1973 (2011) du Conseil de sécurité, 17 February 2012, § 207.

²⁶ S/2014/106, Rapport final du groupe d’experts sur la Libye créé par la résolution 1973 (2011) du Conseil de sécurité, 19 February 2014, § 246.

²⁷ Bloomberg, “JPMorgan, Citi Among Banks Targeted in Qaddafi-Looting Subpoena”, 9 december 2021, Available online: <<https://www.bloomberg.com/news/articles/2021-12-09/jpmorgan-citi-among-bankstargeted-in-qaddafi-looting-subpoena>>.