

Non-UN Financial Sanctions against Central Banks and Heads of State: in breach of international immunity law?

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Ruys **Conventional Wisdom Challenged?**

Published on May 12,
2017

Recent years have seen a wide range of non-UN financial sanctions being adopted against States and their instrumentalities, including central banks, as well as against high-level State officials. Prominent examples include the EU and US sanctions against the central banks of Syria and Iran, and the asset freezes against the serving Presidents of Zimbabwe and Syria. In spite of the EU's firm [assertion](#) that its 'restrictive measures' "are fully compliant with obligations under international law", one might be inclined, intuitively, to regard such sanctions as a *prima facie* breach of international immunity rules (whether or not they qualify as (third-party?) countermeasures is a different story altogether – one which the present post will not touch upon). Thus, given the lack of a general exemption in respect of activities *de jure imperii*, [Castellarin](#) argues that the EU's financial sanctions against central banks are contrary to State immunity law – a position which is also subscribed to by [Thouvenin](#) and [Dupont](#). Others have arrived at the same conclusion in respect of asset freezes targeting Heads of State (see e.g. [Pillitu](#)). When discussing the matter with fellow scholars, it seems that the applicability of, and incompatibility with, immunity rules is often taken for granted.

Yet, is this conventional wisdom (if that is what it is) justified? It is quite remarkable to see how, on the one hand, the EU goes to some lengths to insert tailor-made [exemptions](#) to asset freezes in order to enable payments to or from diplomatic or consular posts (or exceptions to travel bans to allow officials to participate in international conferences) – even if the practice seems far from consistent –, while at the same time seeing no problems in the imposition of financial sanctions on Syria's central bank and Head of State. Equally remarkable is the fact that, in spite of, for instance, an abundant case-law by the EU Courts pertaining to EU sanctions, immunity issues have, to the present author's knowledge, never been raised in legal proceedings challenging the imposition of financial sanctions... Furthermore, while numerous (non-western) countries have repeatedly expressed concern over, if not outright opposition to, the use of unilateral coercive measures, such concerns have ostensibly never been framed by reference to relevant immunity rules.

Upon closer scrutiny, the present author is not convinced that the imposition of non-UN financial sanctions necessarily 'triggers' the application of immunity rules.

Asset Freezes against the State and its Instrumentalities, Including Central Banks

Let's first take a look at asset freezes directed against the State and its instrumentalities. Clearly, such asset freezes 'affect the property' of the State in the sense of Article 6(b) of the 2004 UN [Convention](#). Nor does their essentially 'temporary' character prevent them from qualifying as 'measures of constraint': as the 1991 [ILC Commentary](#) illustrates, 'interlocutory and all other prejudgment conservatory measures, intended sometimes merely to freeze assets in the hands of the defendant' can equally contravene the rules pertaining to State immunity from execution.

On the other hand, when looking at the 2004 Convention and the 1991 ILC Commentary, it is clear that State immunity is consistently framed by reference to 'a proceeding' before 'the courts' of another State. Thus, the 1991 ILC Commentary asserts that the rules on immunity from execution cover measures of constraint 'only to the extent that they are linked to a judicial proceeding'. Pursuant to Articles 18-19 of the 2004 UN Convention, such measures can be either 'pre-judgment' or 'post-judgment'. Even if the measures themselves may well be taken through a State's executive organs, they must still somehow relate to the enforcement of the 'judicial power' of another State (see e.g. [Fox](#), at 344). The insistence on a nexus to 'court proceedings' features equally in relevant national

legislation and in legal doctrine. It was also affirmed in passing by the ICJ in the [Jurisdictional Immunities](#) case (para. 93). More recently, the idea that State immunity rules are triggered only if there is a 'proceeding' before a 'court' was forcefully defended by Australia in the (now terminated) procedure before the ICJ with Timor-Leste (see Australia's [memorial](#), at para. 5.104).

Admittedly, some indications hint at a broad interpretation of the concept of 'proceedings before a court'. Thus, Article 2(1)(a) of the UN Convention defines a 'court' as 'any organ of a State, however named, entitled to exercise judicial functions'. The 1991 ILC Commentary in turn sets forth a broad definition of 'judicial functions', and acknowledges that the definition 'may, under different constitutional and legal systems, cover the exercise of the power to order or adopt enforcement measures (sometimes called "quasi-judicial functions" by specific administrative organs of the State'.

Still, non-UN financial sanctions are hard to fit into this framework. Clearly, the adoption of such sanctions is unrelated to the 'adjudication of litigation or dispute settlement' or to the 'determination of questions of law and of fact'. Nor is it a function 'normally exercised by, or under, the judicial authorities of a State' in the sense of the 1991 ILC Commentary. Rather, it is primarily a matter for the executive branch, and possibly the legislative branch, and falls squarely within the foreign policy of the acting State. The mere fact that the person or entity targeted by the sanctions might decide to challenge their legality by initiating a court procedure at the national or regional level – e.g., by lodging an action for annulment before the General Court of the EU – does not alter the fact that the sanctions themselves do not normally result from any 'court proceeding' and does not retroactively transform them into 'prejudgment' measures of constraint. In the words of [Ronzitti](#), asset freezes are 'measures autonomously dictated by the legislative or the executive branch', as opposed to acts of constraint that are 'the continuation of a judgment'. The tentative conclusion would therefore be that financial sanctions against a State and its instrumentalities do not trigger the regime on State immunity, and can accordingly not give rise to a breach of State immunity rules.

If State immunity rules are not affected, how about 'inviolability'? International law indeed draws a distinction between immunity and inviolability – although the distinction between the two is often blurred. Several treaty instruments provide for some form of inviolability of specific types of property owned by (or, at times, used by) third States. Obvious examples include the property of the diplomatic mission (Article 22 VCDR) or the property of 'special missions' (Article 25 of the Special Missions Convention). The other side of the medal is that no similar conventional regime exists covering *all* State property, raising the question whether such protection can nonetheless be found in customary international law. In the aforementioned ICJ procedure between Australia and Timor-Leste, the two States gave contradictory answers to the question. [Watts and Jennings](#) in their 1992 edition of *Oppenheim's International Law* nonetheless appear to answer in the negative: 'there does not seem to be any general requirement in international law that all such property be granted, just because it is State owned, any special inviolability or other exemption from governmental action by the State in which it is situated' (para. 111). The recent sanctions practice of the EU, the US and other States appears to support the latter position (interestingly, a number of authors who take the view that financial sanctions breach immunity rules at least acknowledge that evolutions in customary international law could alter this (see e.g. [Castellarin](#))).

Asset Freezes against High-Level State Officials

Much of the reservations expressed above can be reiterated *mutatis mutandis* in respect of asset freezes against high-level State officials. In a nutshell, there is *a priori* no reason why the required nexus to court proceedings would apply only with regard to State immunity, but not with regard to 'individual' immunities. This view is supported by the fact that the immunities of foreign officials are essentially derived from those pertaining to State immunity (and seek to prevent the circumvention of the latter rules). It is interesting, for instance, how the ILA's 2001 Vancouver [resolution](#) on the immunities of Heads of State and Heads of Government distinguishes between 'inviolability', 'immunity from jurisdiction *before the courts of a foreign State*', whether 'in criminal matters' or in 'civil and administrative matters'. In the end, given the lack of a nexus to 'court proceedings', it could again be argued that

asset freezes against high-level State officials do not trigger (nor breach) international immunity rules.

Conventional ‘inviolability’ rules do not seem to pose a major obstacle to asset freezes against high-level State officials either, as they apply only to specific categories of State officials, primarily diplomatic personnel (Art. 30 VCDR) and members of ‘special missions’ (Art. 30 of the Special Missions Convention). Even if the inviolability of private property enshrined in these treaty provisions also extends to the bank accounts of the persons concerned (as may be inferred from the 1958 ILC [Commentary](#) on Draft Article 28), their scope of application is obviously limited. Thus, members of special missions (and their property) are protected only for the duration of the special mission.

Furthermore, the customary inviolability of high-level State officials is generally construed along the lines of the 1969 Special Missions Convention. In particular, it appears that customary international law only accords inviolability to senior State officials (and their private property) whilst they are abroad during official visits (and, at least in the case of Heads of State, also during private visits) (see e.g. [Watts](#) and [Foakes](#)). Yet, inviolability of (residence and) property during a (senior) State official’s visit to a third country is ultimately of little relevance in the present context, as non-UN financial sanctions are normally adopted while the targeted official is in his home State.

Could an argument nonetheless be made, at least in respect of high-level officials enjoying immunity *ratione personae*, that the imposition of asset freezes hinders them in the ‘effective performance’ of their functions, in the sense of the ICJ’s [Arrest Warrant](#) judgment? The argument seems more compelling in respect of a travel ban, than in respect of an asset freeze. Even if an asset freeze is undoubtedly adopted with a view to influencing the official concerned, it is difficult to see how such measure prevents a senior official from representing the State, including by traveling abroad to take part in international meetings. A Head of State or Head of Government will not normally be dependent on his private resources to cover the expenses flowing from the performance of his task, including costs related to official visits abroad, as these costs will normally be borne by the State (the EU [Guidelines](#) on sanctions moreover suggest an exemption with regard to costs related to official visits). It is hardly surprising then that the US financial sanctions imposed on Robert Mugabe did not prevent him from giving (inflammatory) speeches before the UN General Assembly in New York in September 2015 and September 2016.

Concluding Thoughts

This post has – somewhat provocatively – sought to question the ostensible conventional wisdom that financial sanctions against central banks and Heads of State flout international immunity law. While there is little *express* case-law and doctrine to rely on – [Thouvenin](#) speaks of a ‘blind spot’ (“*un angle mort*”) in this connection –, it was tentatively argued that immunity rules do not apply because these sanctions lack the required connection to a court proceeding at the national level. On the other hand, inviolability rules protect only specific categories of (State or private) property and only on a temporary/conditional basis (e.g., during an official visit abroad). Of course this creates something of a paradox. To paraphrase [Timor-Leste](#), it places certain persons and property ‘in the absurdly paradoxical position of being inviolable and immune from judicial measures, but at the mercy of administrative or executive actions’. Yet, international law is no stranger to paradoxes. It may well be that immunity law was never intended to curtail the foreign policy powers of States’ executive or legislative branches. In the end, precedents pointing at a broader scope of application of immunity and/or inviolability rules appear to be lacking (*EJIL Talk!* readers are warmly invited to signal contrary evidence if available!). Meanwhile, State practice appears to further embed the view that there is no general inviolability attached to State property abroad that would prohibit asset freezes.

For the sake of clarity, it must be stressed that, even if targeted sanctions do not breach immunity and/or inviolability rules, that is not to say that they are necessarily lawful. Other legal obstacles indeed exist, whether derived from customary international law (e.g., the law of jurisdiction or the non-intervention principle) or from bilateral or multilateral treaty law (e.g., BIT provisions), which may well engage the international responsibility of the State imposing these sanctions...

