BUSINESS MEETING

Wednesday, January 24, 2024

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in S-116, The Capitol, Hon. Benjamin L. Cardin, Chairman of the Committee, presiding.

Present: Senators Cardin [presiding], Menendez, Shaheen, Coons, Murphy, Kaine, Merkley, Booker, Schatz, Van Hollen, Duckworth, Risch, Romney, Ricketts, and Paul.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR FROM MARYLAND

The Chairman: The business meeting of the Senate Foreign Relations Committee will come to order.

This is a very important business meeting because it will be the last that we have Brandon Yoder on our staff as he is moving on. So first, let me just acknowledge Brandon's extraordinary work on our Committee. We put so much on staff, and Brandon has been our principal staff person for the Western Hemisphere, Global Economic Policy, International Counterterrorism, and Law Enforcement. He has been with us for 10-and-a-half years. He is responsible for the drafting and the passing of major legislation in so many different areas, including illicit fentanyl and for implementing U.S. policies towards Ecuador, Haiti, Nicaragua, Venezuela, and the list goes on and on and on.

I am not surprised that he was such an effective staff person considering his roots in Maryland. He is a Blue Jay.

[Laughter.]

The Chairman: He graduated from Johns Hopkins University. But on a personal note, Brandon helped me understand the issues we have in Central America during the visit I was able to do with him and be embedded with the FBI in regard to gang activities in Central America. His expertise and help on that trip was incredibly important to me. And then more recently, with Senator Menendez, we had his expertise on our visit to Ecuador, Colombia, and Argentina.

He is moving on to be the Deputy Assistant Secretary of the Bureau of International Narcotics and Law Enforcement. We know that he will continue his public service. And, Brandon, we just want to wish you the best. Thank you, Brandon.

[Applause.]

The Chairman: On that issue, let me yield to Senator Menendez.

Senator Menendez: Well, thank you, Mr. Chairman. Just let me add, one of the best choices I ever made is having Brandon Yoder join the Senate Foreign Relations Committee. I view him as the premier individual in terms of knowledge on the Western Hemisphere and all of its dimensions. And he is someone who understands the intersection of policy, politics, and process. Not everybody gets all three elements of what is necessary to make something

happen. He does. So it will be a loss for the Committee, a gain for the administration, and I want to join you in wishing him the best of luck.

The Chairman: Today, we are considering eight nominations, one bill, and Foreign Service Lists. I am very pleased that we are considering the nomination of Kurt Campbell to be Deputy Secretary of State. Mr. Campbell is superbly qualified for this position. He is currently the Deputy Assistant to the President and Coordinator for Indonesia-Pacific Affairs on the National Security Council and has previously served as the Assistant Secretary of State for East Asia and Pacific Affairs, and Deputy Assistant Secretary of Defense for Asia and Pacific Affairs, among other positions. I would urge my colleagues to support him in Committee and to support his speedy confirmation.

In addition to Mr. Campbell, we have seven other nominees, including Sean Patrick Maloney to be U.S. Representative for OECD; Jeff Prescott to be U.S. Representative to the U.N. Food and Agriculture Agencies; and Nicole Shampaine to represent the United States at the Organization for the Prohibition of Chemical Weapons, along with seven other well-qualified nominees.

On legislation, we are considering S. 2003, the Rebuilding Economic Prosperity and Opportunity for Ukraine Act, better known as the REPO bill. This is an important bill, and I just really want to acknowledge my colleague, Senator Risch, for not only his extraordinary leadership in putting this bill together, but the manner in which he has made this bill a priority and has been able to get us to this markup today. Along with Senator Whitehouse, the

two of them understand the importance of this bill and what this bill really means.

First, we need to be clear what REPO is and what it is not, as there seems to be some confusion in the public domain. REPO would authorize the seizure of Russian sovereign assets immobilized in the United States—reportedly approximately five billion dollars, out of a total of around $300 billion immobilized worldwide—and the repurposing of those assets for the reconstruction of Ukraine. There is no question that Russia has the moral and legal responsibility to pay for Ukraine's reconstruction given the destruction its unlawful re-invasion of Ukraine in 2022 and the ongoing war has caused.

At the same time, REPO is NOT an alternative or a substitute for the supplemental appropriations bill that President Biden requested several months ago and that would provide $60 billion of urgently-needed funding for Ukraine, including for its immediate needs for continued defense against Russia, along with critical funding for Israel and Taiwan. The Supplemental remains the most urgent foreign relations priority for Congress—we absolutely have to pass it, as the consequences of not doing so would be catastrophic. Ukraine is on the verge of being overrun by Russia if we do not give them the help that they need in order to defend the front line of democracy, and we all know it will not end with Ukraine. Russia will go beyond Ukraine if it is successful, and we know that the alternatives for us helping Ukraine today with dollars is American troops potentially being in Europe.

Second, REPO's main contribution lies in its importance from a diplomatic perspective. While it could directly unlock a small fraction of the hundreds of billions of dollars of immobilized Russian assets worldwide, enactment of REPO will hopefully spur other countries, including our European partners and allies, which hold the vast bulk of immobilized Russian sovereign assets, to seize and repurpose those assets for Ukraine.

And let me point out that, finally, REPO is incredibly consequential. Central bank assets are the most protected class of assets under international law and pursuant to our domestic law. Confiscating central bank assets of a foreign country with which we are not at war would be a first for the United States, so we have to understand that this has to be done correctly. And I want to compliment Senator Risch and Senator Whitehouse for the manner in which they put this bill together.

They make it clear in the bill that we have to work with our allies globally in order to get this done. And I am just quoting from the bill: "Any effort by the United States to confiscate or repurpose Russian sovereign assets should be undertaken alongside international allies and partners as part of a coordinated and multilateral effort, including with the G7 countries, the European Union, Australia, and other countries in which Western sovereign assets are located."

Then, secondly, I want to point out that this is an important tool in our toolbox to allow Russia to do the right thing. Russia can avoid the consequences of confiscated assets clearly -- and it is spelled out clearly in the

bill. Russia can do that. Withdraw your troops from Ukraine. Acknowledge your liability either directly by compensating Ukraine or join an international mechanism to compensate Ukraine for the damage that you caused. You do that and there is no need to confiscate assets. So, I think it is the right message, and, again, I want to compliment Senator Risch and Senator Whitehouse for what they are doing in regard to that matter.

With all this in mind, we have to ensure that the product we move out of this Committee and the precedent we set reflects our interest and our values obviously as they relate to Ukraine, but also in regard to U.S. national and economic security, the stability of the international financial system, and the commitment of the rule of law. And then, lastly, let me once again thank Senator Risch and our staffs for putting together a manager's package which will resolve most of the issues, and we will talk about the manager's package a little bit later. With that, let me yield to Senator Risch.

STATEMENT OF HON. JAMES E. RISCH,
U.S. SENATOR FROM IDAHO

Senator Risch: Thank you, Mr. Chairman. First of all, thank you for those kind remarks. You know, of all the things I have done around here in the years I have been here, it was surprising to me when I unveiled this, the enthusiasm, not just here in the United States but around the globe. I mean, I had a path beaten to my door by the Europeans and others talking about what a good idea this was and how we ought to really pursue it. But, as usual, this is a poster child for nothing around here is easy, and we always wind up

arguing about how many angels can dance at the head of the pin on some aspects of the bill, but, look, we do have that behind us.

You are going to offer Amendment Number 4. One of the last unresolved issue that we have, which we have now resolved, has to do with the jurisdiction that the United States -- that Russia will have in the -- in the court of the United States of America, and we all agree the courts are going to do what they are going to do when we talk about jurisdiction. Nonetheless, the language in the bill right now indicates that they will not have jurisdiction. I have conceded to your Amendment Number 4, which provides an expedited process for that.

I am going to record a no vote on that because I want the record to reflect that as the author of this bill, I do not believe that Russia has jurisdiction -- has jurisdiction to raise constitutional questions in the United States' court because they do not have the constitutional protections that they claim they are going to have. So, I am going to record the no vote for that. Having said that, the provision that is in there that provides an expedited provision I think is probably than just letting it hang in the wind.

So, anyway, I want to thank staff for how hard they worked on this. It is just amazing to me, like I said, the people that have grabbed onto this. Believe it or not, the Canadians have actually beat us to the punch and have the thing in place. This is going to take coordination obviously with allies. Your comments about the sacred temple we are entering here are absolutely appropriate. I have no hesitation about it because of the circumstances that we are at.

This is a really unique thing. Nobody thought -- when the Iron Curtin came down, we all thought Russia was going to take the international stage with most others, and, eh, they poison people once in a while, but others do. They interfere with elections sometimes. Others do. But nonetheless, who would have guessed they were going to start an evil war in the 21st century, and something has got to be done about that.

This is intended to be a big hammer. It is intended to be a very new way of attacking a country that does not behave itself, and I really appreciate everybody's support on it. So that is where we are.

The Chairman: Thank you, Senator Risch. I appreciate those comments.

Without objection, we will now consider en bloc eight nominations and two FSO lists. The lists are PN-283-2, PN-1129, Kurt Campbell to be Deputy Secretary of State; Cardell Kenneth Richardson to be Inspector General of the Department of State; Robert David Gioia to be U.S. Commissioner on the International Joint Commission; Nicole Shampaine to be the U.S. Representative to the Organization for the Prohibition of Chemical Weapons; Sean Patrick Maloney to be U.S. Representative to the Organization for Economic and Cooperation -- Economic Cooperation and Development; Jeffrey Prescott to be U.S. Representative to the United Nations Agencies for Food and Agriculture; Charlie Christ to be the U.S. Representative to the Council of International Civil Aviation; and Joann Lockard to be Ambassador to Burkina Faso.

Senator Risch: I think that is nine.

The Chairman: No. It is eight nominations plus two FSO lists.

Senator Risch: Oh, okay. Mr. Chairman, I would just ask -- I have no objection to voting en bloc. I would ask anybody who wants to be recorded on those be allowed to be recorded.

The Chairman: Without objection, we will consider the nominations and the FSO Lists en bloc.

Is there -- there is a motion to report them favorably. Is there a second?

Senator Menendez: So moved, yeah.

Senator Shaheen: Second.

The Chairman: We have a motion and a second. The question is on the motion to approve all the nominations and the FSO Lists noticed for this business meeting en bloc.

All in favor, signify by saying aye.

[Chorus of ayes.]

The Chairman: Opposed, nay.

[Chorus of noes.]

The Chairman: The ayes have it. With a majority of members present having voted in the affirmative, the ayes have it, and the items are agreed to.

Senator Risch: Mr. Chairman, I would like to be recorded as "no" on Prescott and Crist, please, for the record.

The Chairman: That will be so noted.

Senator Romney: Mr. Chairman, I would also like to be recorded as a "no" on Prescott and Crist.

The Chairman: So noted.

Senator Paul: Mr. Chair -- oh, go ahead.

The Chairman: Senator Ricketts?

Senator Ricketts: I would also like to be recorded "no" on Maloney, Prescott, and Crist, please.

The Chairman: So noted. Senator Paul?

Senator Paul: I would like to be recorded as a "no" on Maloney, Prescott, and Crist as well.

Senator Kaine: Mr. Chair, just an inquiry.

The Chairman: Senator Kaine?

Senator Kaine: The FSO List, I have three on mine: PN-283-2, PN-587, PN-1129. Were those all part of the motion offered?

The Chairman: I think there are two: PN-283-2 and PN-1129. That is two lists.

Senator Kaine: Okay. Not PN-587? That one is not part --

The Chairman: That is not part of the list.

Senator Kaine: Okay. Thank you.

The Chairman: I think at this moment, we are ready to go on to S. 2003, the Rebuilding Economic Prosperity and Opportunity for Ukraine Act. Without objection, we will now consider S. 2003, the REPO for Ukraine -- Ukrainians Act. I am pleased that we have a manager's amendment that

incorporates a number of amendments that were filed. I believe the changes made here will make the bill stronger.

Let me just point out that this manager's package includes technical edits from an amendment that I filed that reflects a compromise on the G7 certifications. It would extend the reporting requirements for the Elie Wiesel Genocide and Atrocities Prevention Act. It would recognize Russia's action in Ukraine as constituting genocide, acknowledges that Russia's invasion of Ukraine dates back to 2014, and extends the Global Engagement Center. And I want to thank my colleagues who were responsible for these changes -- Senator Risch, Senator Shaheen, Senator Hagerty, and Senator Murphy -- along with other members of the Committee that helped us in regard to resolving some of the open issues.

Does any senator wish to be heard in regard to the manager's package? Senator Shaheen?

Senator Shaheen: Well, I want to thank you and Senator Risch for incorporating my amendments into the manager's package and also for all the good work that has been done to compromise in addressing some of the thorny issues that are in this legislation. I share the comments that both you and Senator Risch made, Mr. Chairman, about the importance of this legislation and the message that it sends. And so, I hope we will pass it out of committee today with a strong vote and that we can get it through the floor very soon.

The Chairman: I do also want to acknowledge that it includes the Forfeited Oligarchs Assets that Senator Risch introduced with Senator Manchin. I want to thank them in regard to that particular issue as well.

Senator Paul: Mr. Chairman?

The Chairman: Senator Paul.

Senator Paul: I just want to make a brief comment on the bill and on the manager's package. I think, you know, without question, the argument whether or not Russia deserves to be punished for instigating this war in violating another country is an easy argument. I mean, it is hard to argue against that. The same arguments could be made, you know, for many wars. World War I was the same. You know, Germany was responsible, Germany invaded, and there would not have been a war without Germany. And, at the conclusion, everybody agreed Germany should be punished, and then they were, and they were thoroughly punished in the Treaty of Versailles. Some say that was basically the beginning of World War II.

And so, when you punish people, it is not just about punishment. It is about thinking about what happens, you know. What will their response be to this? One of the responses that Russia has indicated is they are going to take foreign investments in their country and confiscate them. It is said that there is somewhere between $250 and $300 billion in foreign investments, not necessarily sovereign accounts. They are just going to take private accounts, too, but that is probably going to be their response to this.

There is a question whether or not we lose or those who will ultimately be negotiating peace lose their negotiating chip, too, here if we get to a point where there is a threat of this happening and it could be traded as part of a -- one of the negotiating items in a peace deal, that once you take this off the table, it is very difficult. Some people say that once the money is taken, well, some money could be given in a trade at a negotiating point.

As we have seen with Iran, the problem is that people confuse the situation and demagogue the situation. So, for example, we have taken money from Iran that they got for trading -- South Korea bought oil from Iran. South Korea's money was then confiscated, did not go to Iran, and when it is released back to Iran -- it was their money. When it is released back to them in negotiation for some sort of resolution of things, it is derided as, oh, you are giving Iran money, which, in reality, is not true. You are giving them back the money you took from them, and it was -- but it is mis-reported all the time, and that will happen here, too.

So, if you take Russia's money, and then at some point in time, you say, well, part in resolving this piece, Russia wants some of their money back and so we will give it to them, then people will howl to high Heaven and say, oh my goodness, you are giving money to the enemy, even though you are letting them get their money. So, there are dangers that this sort of blocks off exit ramps that could be possible in negotiations, and so, I worry what the ramifications will be to this, that it will satiate the desire to punish in some ways, in some ways may not be effective either since Belgium has got most of the money and

since Belgium will not -- you know, is not really interested in releasing the money at this point. We have a very small amount.

But there is also the overall pushing of all of our sort of adversaries into sort of a block of people who don't want to use the dollar or buy the dollar, and because this body spends an enormous amount -- more than we take in -- we have a debt that just costs more than we purchase. We actually do -- you know, if we eventually push so far that, you know, Russia does not buy as much, but China still has about a trillion dollars' worth of our debt, are we going to push so much, you know, disengaging from other countries and disengaging from the rest of the world that we have an adversarial relationship, but it, ultimately, is a being able to finance the debt.

So, for all of these reasons, I think this is a misguided effort, and it will satiate the desire to punish, but in the end, I think it may allow the war to go on longer and allow the carnage to go on longer, and I don't think anything about this bill brings the war to a quicker resolution. I think it will delay resolution and takes an offramp away from Russia as a possibility to end the war. Thank you.

The Chairman: Any other comments on the manager's package? Senator Murphy?

Senator Murphy: Thank you, Mr. Chairman. I want to thank you and Senator Risch for including in the manager's package an important extension of the Global Engagement Center. We have long complained about the fact that Russia engages in what we call asymmetric warfare, right? It is not just

their use of the military, but it is also their use of information warfare, bribery, graft, old-fashioned intimidation. We have just long decided to allow for that asymmetric warfare to continue. We fight often with one hand tied behind our back.

The Global Engagement Center is one of the most successful means that we have to work with our allies, in particular, Ukraine, to push against the kind of misinformation and propaganda that goes hand-in-hand with successful on-the-ground conventional military efforts. So obviously, this is something that has been a bipartisan effort here in the Senate over the course of the years, and I appreciate the extension being included in the manager's package.

The Chairman: I applaud your leadership on this issue and thank you for bringing that to our attention.

Senator Risch: Mr. Chair?

The Chairman: Senator Risch?

Senator Risch: Mr. Chairman, I would ask unanimous consent to be able to put a statement in the record regarding your amendment, Number 4, that I am going to vote "no" on, but I want an explanation.

The Chairman: I am not going to object as long as you let me write the statement.

[Laughter.]

Senator Risch: Well, we can do like we always do and negotiate.

The Chairman: Without objection.

[The information referred to is located at the end of this transcript.]

Senator Risch: Are you ready for a motion to adopt?

The Chairman: I think we are ready for a motion to adopt.

Senator Menendez: I will so move.

The Chairman: Is there a second?

Voices: Second.

The Chairman: All in favor, signify by saying aye.

[Chorus of ayes.]

Senator Risch: I would like a roll call vote, please, Mr. Chairman.

The Chairman: Certainly. The clerk will call the roll, and this on the substitute amendment, and then it will be amendments to the substitute, and then final resolution.

The Clerk: Mr. Menendez?

Senator Menendez: Aye.

The Clerk: Mrs. Shaheen?

Senator Shaheen: Aye.

The Clerk: Mr. Coons?

Senator Coons: Aye.

The Clerk: Mr. Murphy?

Senator Murphy: Aye.

The Clerk: Mr. Kaine?

Senator Kaine: Aye.

The Clerk: Mr. Merkley?

Senator Merkley: Aye.

The Clerk: Mr. Booker?

Senator Booker: Aye.

The Clerk: Mr. Schatz?

Senator Schatz: Aye.

The Clerk: Mr. Van Hollen?

Senator Van Hollen: Aye.

The Clerk: Ms. Duckworth?

Senator Duckworth: Aye.

The Clerk: Mr. Risch?

Senator Risch: Aye, with the exception of the --

The Chairman: It is not in there yet. You are --

Senator Risch: Oh. Aye.

The Clerk: Mr. Rubio?

Senator Risch: Aye by proxy.

The Clerk: Mr. Romney?

Senator Romney: Aye.

The Clerk: Mr. Ricketts?

Senator Ricketts: Aye.

The Clerk: Mr. Paul?

Senator Paul: No.

The Clerk: Mr. Young?

Senator Risch: Aye by proxy.

The Clerk: Mr. Barrasso?

Senator Risch: Aye by proxy.

The Clerk: Mr. Cruz?

Senator Risch: Aye by proxy.

The Clerk: Mr. Hagerty?

Senator Risch: Aye by proxy.

The Clerk: Mr. Scott?

Senator Risch: Aye by proxy.

The Clerk: Mr. Chairman?

The Chairman: Aye.

The Clerk: Mr. Chairman, the ayes are 20. The noes are 1.

The Chairman: The substitute is adopted.

Now, it is open to amendments to the substitute. Let me call up Cardin Number 4, which is what Senator Risch has been referring to.

Cardin Number 4 would establish an expedited process for any claims brought against the constitutionality of this bill. It is a friendly amendment. It allows for us to handle this as an expedited process. We cannot foreclose constitutional challenges. *Marbury* v. *Madison* said there is always a potential for a constitutional challenge to be raised. What this amendment does is expedite the process so that we can have it cleared quickly and more effectively in carrying out the statute itself. And second, it is a clear message to our European partners about a process that we are using here that is fair and

hopefully that will allow them more comfort in joining us in dealing with seizures of international finance assets of Russia.

Senator Risch: Mr. Chairman?

The Chairman: Senator Risch.

Senator Risch: I do not want any roll call vote, but I do want to be recorded "no" on this, and the reason I want to be recorded "no" is as the author of the bill, I want the record to reflect that I do not concede the fact that Russia has jurisdiction to raise constitutional questions in the United States -- district appeals or Supreme Court. And so, for that reason, I am voting "no" on this. Having said that, I understand the arguments for the expedited process.

The Chairman: And I appreciate your comments. Let me be clear. I do not concede that Russia has a constitutional claim either. I am not -- I do not want to --

Senator Risch: I hope you --

[Cross talking.]

The Chairman: -- give that record. I would move that amendment. Is there a second?

Senator Menendez: Second.

Senator Kaine: Second.

The Chairman: You are a second.

All in favor, signify by saying aye.

[A chorus of ayes.]

The Chairman: Opposed, nay?

[Chorus of noes.]

The Chairman: The ayes have it, and the amendment is adopted.

Are there any other amendments?

[No response.]

The Chairman: If not, is there a motion --

Senator Risch: I would move.

The Chairman: There is a motion that we report the bill favorably, as amended. Is there a second?

Senator Menendez: Second.

The Chairman: Do you want a roll call vote?

Senator Risch: Let's do a roll call vote.

The Chairman: The clerk -- Senator Shaheen --

Senator Shaheen: For the --

The Chairman: Are there any comments before we vote?

Senator Shaheen: Yes. I would like to be added as a co-sponsor.

The Chairman: Without objection. Senator Coons?

Senator Coons: I also would like to be added as a co-sponsor and simply state that this is an important step forward for this Committee. We have a number of nominees to serve as ambassadors to critical multinational organizations and to the country Burkina Faso, that I hope, having been reported, will get through the floor because we continue to be underrepresented in critical global settings.

The Chairman: The clerk will call the roll on the final passage.

The Clerk: Mr. Menendez?

Senator Menendez: Aye.

The Clerk: Mrs. Shaheen?

Senator Shaheen: Aye.

The Clerk: Mr. Coons?

Senator Coons: Aye.

The Clerk: Mr. Murphy?

Senator Murphy: Aye.

The Clerk: Mr. Kaine?

Senator Kaine: Aye.

The Clerk: Mr. Merkley?

Senator Merkley: Aye.

The Clerk: Mr. Booker?

Senator Booker: Aye.

The Clerk: Mr. Schatz?

Senator Schatz: Aye.

The Clerk: Mr. Van Hollen?

Senator Van Hollen: Aye.

The Clerk: Ms. Duckworth?

Senator Duckworth: Aye.

The Clerk: Mr. Risch?

Senator Risch: Aye.

The Clerk: Mr. Rubio?

Senator Risch: Aye by proxy.

The Clerk: Mr. Romney?

Senator Romney: Aye.

The Clerk: Mr. Ricketts?

Senator Ricketts: Aye.

The Clerk: Mr. Paul?

Senator Paul: No.

The Clerk: Mr. Young?

Senator Risch: Aye by proxy.

The Clerk: Mr. Barrasso?

Senator Risch: Aye by proxy.

The Clerk: Mr. Cruz?

Senator Risch: Aye by proxy.

The Clerk: Mr. Hagerty?

Senator Risch: Aye by proxy.

The Clerk: Mr. Scott?

Senator Risch: Aye by proxy.

The Clerk: Mr. Chairman?

The Chairman: Aye.

The Clerk: Mr. Chairman, the ayes are 20. The noes are 1.

Senator Romney: Mr. Chairman?

The Chairman: One second. With a majority of members present having voted in the affirmative, the legislation, as amended, is agreed to.

Senator Romney?

Senator Romney: Yeah. Mr. Chairman, I don't know whether I have a perspective on how to adjust this, but I am concerned about the process of us being educated on something as important as this. We did not have any hearings on this legislation, and we did not hear from Treasury to come in and describe -- some of the concerns that Senator Paul raised I think are legitimate concerns. What is the impact of this on the international monetary system, what does this do to countries deciding to buy American debt, what is going to happen to assets that are held by American enterprises in Russia, those kinds of considerations?

We have not heard about those, and I endeavored to study them as thoroughly as I could in the time that I had when this was brought forward. But it strikes me that as opposed to just staff -- majority and minority staff working on these things at great length, that members of the Committee ought to actually be educated and informed of these things so that when we vote, we have had that discussion. We never had a hearing on this. I mean, have not heard from the Administration, have not had a classified hearing, have not had a thorough discussion of the kinds of objections that Senator Paul raised.

And, you know, so I have one member of my staff who is helping me on foreign relations issues, and she has done a wonderful job bringing me up to speed, but my goodness, this is kind of an important topic with great significance. I understand there is a piece of legislation, for instance, on China that -- again, that the two leaders have been working on. Should we not have a

discussion about that and hearings to hear what the State Department thinks about it, as opposed to bringing it forward and having a markup?

So, I just am a little frustrated by the process. I got to "yes" last night on this, but I just wish that there was a more thorough evaluation of something so significant. Thank you, Mr. Chairman.

The Chairman: Let me respond. I think Senator Risch wants to respond. But first, let me ask unanimous consent that staff be authorized to make technical and conforming changes.

Without objection, so ordered.

The Chairman: Your comments are well taken. It is frustrating here when we try to get legislation ready, we want to give the members the maximum amount of time. I can assure you that we have already talked about that in regard to the potential China legislation that you are referring to. Both Senator Risch and I want to make sure that all of our members have an adequate opportunity to understand what is in the bill and opportunities to be able to offer amendments. So, we fully appreciate what you are saying.

I do think this bill has been debated quite a bit. I can tell you that our offices have -- well, I think all of our offices have been engaged in the REPO legislation. There have been numerous discussions that we have had with individual members as well as with the Administration and the National Security Council. This is basically language that gives the Administration an additional tool. They have the discretion to use this tool or not to use it, and we have instructed them to work with our allies in using the tool.

So, I recognize the points that you are raising, and in an ideal world, we would like to have hearings and more time in our Committee. With the circumstances on the ground in Ukraine and what is happening around the world, sometimes we do not have as much time as we would like to give our members, but I take your comments and agree with you that we have to do better. Thank you. Senator Risch?

Senator Risch: Well, first of all, I concur in Senator Romney's remarks. You know, I spent 28 years in the State Senate, I led it for 2 decades, and people always complain about their State legislature. And I tell them now, after spending 28 years and now 15 here, the State legislature runs like a fine-tuned Swiss watch --

[Laughter.]

Senator Risch: And in the State legislature, exactly what you say happens. The problems here that -- and when I first got here, I was as frustrated as you were. It seemed like we were always on the outside of this, and leadership was doing it, and what have you.

The difficulty here is our time is so short individually. I mean, we have all got so much stuff going on trying to -- even trying to set a hearing. When we have these hearings, it always amazes me how few people show up for our hearings on the things. And then to compensate for that, what I have done since I have been in -- as Chairman and now Ranking Member, is to engage our side. Now, I do not how the majority does it, but my staff, I have got them by the throat saying they have got to include your staffs step by step in what

we are doing. When we do that, we find various members will say, yeah, that is a good subject, I want blah, blah, blah. Others say, hey, guys, handle this, okay? But, we do not try to deal any cards off the bottom of the deck, especially on something like this.

But your remarks are well taken. I mean, look, on something like this, I mean, really, we have been involved in it for weeks and months of getting where we are. A lot of that should have been done in Committee where we go back and forth, what have you. We just did not have the time for it, but your remarks are well taken.

I can say this. I do not think I have ever worked on a piece of legislation that has had as much input from all members, and that is true on both sides of the -- of the aisle, and from the outside. We had a tremendous amount of help from NGOs and that sort of thing. So, we do have -- in fact, staff just reminded me. I would like to add one of the supporting materials we have from the outside groups about this, and a lot of it came from your staffs and came from your staffs and came from other conversations that were had. So, I agree a hundred percent. In a perfect world, it would sure be nice to do that.

Senator Romney: I think I may find a home, therefore, in the Idaho State Senate.

[Laughter.]

Senator Kaine: Mr. Chair? Mr. Chair?

Senator Risch: You said it. We understand your reputation in Idaho. I do not think you would have any trouble getting a seat --

[Laughter.]

The Chairman: Senator Kaine?

Senator Kaine: Not to prolong it but just to pick on Mitt's point. We could all get to comfort in our own space. So, I have a great staff, too, and I have concerns and I ask them, and they give me, you know, answers to my questions, and I get to my own comfort level. But, this is a really smart Committee, and the number of times I have been in hearings where, well, I asked the questions I needed to ask, and I thought I had all the answers that I needed, but then somebody else asks a question, and it is like, yeah, what is the answer to that question. So, the group process, it is one thing to get to a comfort level on your own, but sometimes, hearing what others' questions are open up dimensions to an issue that you had not really thought of, and that is why, you know, it is good to do this when we can.

Senator Risch: Senator Kaine, you are absolutely right on that, and the other thing that happens, though, too, is I had no idea when I uncorked this thing what a monumental thing this was going to be. And I think if I had, you could put it on a different track than the run-of-the-mill stuff that we do here. So, I think that is, again, excusing ourselves, I think that a lot of times we head down a track and we do not know really how big or how small really the thing is.

Senator Coons: If I might, Mr. Chairman, it is my hope that we will get back to the run-of-the-mill --

The Chairman: Senator Coons?

Senator Coons: -- usual things that we will have in other business meetings.

The Chairman: Without objection, members will be able to submit materials for the record with Senator Risch's request.

Senator Risch: Thank you.

The Chairman: I just want to somewhat give a different view than Senator Risch on attendance in our hearings. I am pleased by the number of members that attend our hearings. Some stay for a lengthy period of time. Thank you, Senator Ricketts.

Senator Risch: That is true.

The Chairman: You have set the -- for a new member -- the importance of the hearings themselves, and I agree with Senator Kaine. I learn a lot at these hearings, and I learn a lot from other people's questions. Normally, the questions I ask, you know, I am trying to get information, but I am also trying to make a point. When other members are asking questions, we all learn from that, so it is valuable, and Senator Risch is absolutely right. Our schedules are horrible here. We serve on too many committees. We have too much conflict with time here. It is not that we do not want to be on the Committee. It is other obligations that we have that take us from our Committee work.

So, Senator Romney, I am committed to working with every member of this Committee to get as much information in advance time when we take up materials. If there are particular bills you are interested in, please let us know because there are times that, like now, when we have an opportunity to move

legislation, and we try to attach other bills to it to get them moving. But your comments are right on target, and we will do our best to try to accommodate your reasonable needs, our committee's reasonable needs.

Senator Risch: Without dragging this out any further, the best example I can give for that -- Senator Rubio and I are the only two on Intel. Intel meets, I do not know, 2, 3 times a week.

The Chairman: Yeah. Yeah.

Senator Risch: And I go in there and I sit in there, and it is a tremendous commitment of time, but when you sit in those committee meetings and listen to those people, the Intel Committee -- the intel agencies that come through -- we have got 17 of them -- you just get this tremendous amount of information. But the time is just a killer as far as pulling away from the other committee assignments that I have.

The Chairman: Yeah.

Senator Risch: So it is it is just the nature of this job, I think, the overload of information we have. Without staff, this would really be impossible. It really would be.

The Chairman: And, of course, we have so many international guests that are here and ambassadors that want to meet with us all the time.

Senator Risch: Yeah.

The Chairman: So, managing our time is difficult.

If there is no further business, the Committee will stand adjourned.

[Whereupon, at 10:43 a.m., the committee was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Submitted for the Record by Senator Benjamin L. Cardin

Addition I

Some Tips for Congress on How to Seize Russian Assets

By Scott R. Anderson

Published by The Lawfare Institute in Cooperation with Brookings

Some Tips for Congress on How to Seize Russian Assets

Scott R. Anderson

Wednesday, January 24, 2024, 7:40 AM

Authorizing the seizure of Russian assets entails meaningful legal and policy risks. Here are some ways Congress can manage them.

Published by **The Lawfare Institute**
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BROOKINGS

Introduction

After nearly two years of deliberation, the tide in the United States appears to have shifted in favor of long-standing proposals to seize frozen Russian assets and provide them to Ukraine as compensation for Russia's unlawful invasion. Late last year, the Biden administration—in the midst of difficult negotiations over additional foreign assistance for Ukraine, which remains ongoing—reportedly came out in qualified support of the idea, despite lingering reservations by Treasury Secretary Janet Yellen and others about the possible economic ramifications. How best to go about it is now reportedly on the agenda for the upcoming Group of Seven (G7) meeting, where member states hope to take some initial steps toward a common approach. And later today, the Senate Foreign Relations Committee is scheduled to mark up its version of the Rebuilding Economic Prosperity and Opportunity for Ukrainians Act (or REPO for Ukrainians Act), the companion of which was already approved by the House Foreign Affairs Committee this past November. Both would authorize the president to seize Russian assets—including those of its central bank and other state-owned entities—and provide them to Ukraine as compensation, though each would do so in somewhat different ways.

The moral case for using frozen Russian assets to compensate Ukraine is undeniably compelling: Russia's brutal and unlawful war of aggression has done grievous harm to Ukraine, whose cost of reconstruction and recovery—if and when the war ends—is expected to be more than $400 billion. The

estimated $300 billion in Russian sovereign assets that the United States and its allies have frozen—most of which is believed to belong to Russia's central bank—could provide the Ukrainian government with much-needed financial support as it seeks to defend itself and rebuild. Nor is there much doubt that Russia owes Ukraine massive reparations as a matter of international law. The UN General Assembly has even acknowledged as much and helped to create an international registry to document Ukrainian claims. The G7, meanwhile, has already pledged to keep Russia's assets frozen until it adequately compensates Ukraine for its unlawful actions. But these measures will take time, something Ukraine may not have. Hence the enhanced interest in seizing Russia's assets, particularly as support for additional assistance for Ukraine has declined in the United States and elsewhere.

As I've written previously for *Lawfare*, the prospect of seizing Russia's frozen assets raises serious legal and policy questions. In the United States, there are few historical precedents for such action and no established case law. At the international level, it would almost certainly require some progressive development in how states traditionally approach certain fundamental legal doctrines, like countermeasures. And many economic policy experts worry that weakening the extensive legal protections that the United States usually provides to foreign sovereign (and especially central bank) assets could discourage other foreign governments from continuing to tie themselves so closely to the U.S. economy, contributing to a broader trend of "de-dollarization" that threatens to weaken the U.S. economy and undermine the future effectiveness of U.S. sanctions. None of these factors is necessarily prohibitive, but they warrant careful consideration as policymakers make the difficult decision about whether and how to proceed.

Toward that end, this piece outlines four recommendations for Congress on how—if and when it chooses to proceed with authorizing the seizure of Russia's frozen assets—it can do so in a manner that limits some of these risks. In focusing on such legislative measures, I am assuming (perhaps optimistically) that the United States will also be able to make a credible case for why seizure is consistent with international law, rooted in Ukraine's right to compensation for Russia's unlawful conduct—an argument that the Biden administration will be responsible for developing in coordination with foreign partners in the weeks to come that warrants separate discussion in a later piece.

While each recommendation is different, most share a common logic: that Congress should focus narrowly on the objective of seizing Russian assets while being very careful to minimize any disruption to the legal status quo

applicable to other foreign governments. Doing so will require some restraint on the part of Congress, in terms of both legislation and rhetoric. But it is necessary if Congress wishes to reassure the numerous foreign governments that keep substantial foreign reserves in the United States that the seizure of Russia's assets is not a sign of things to come for them.

Support Multilateral Action

In the United States, much of the policy debate has centered on whether President Biden or Congress can or should seize frozen Russian assets. But if the goal is to secure substantial enough compensation for Ukraine to meaningfully support its reconstruction, then this debate may well be a distraction to a much more fundamental question: What can the United States persuade its European allies to do?

Following its 2014 invasion of Crimea, Russia restructured its economy to insulate itself from the possible effects of Western economic sanctions and related measures. Unsurprisingly, a major part of this effort was to move most relevant assets beyond the reach of the United States. As a result, only a small portion of Russia's frozen assets—as little as $5 billion—is reportedly within the reach of the United States. Most of the frozen funds are instead in the custody of foreign banks, predominantly in Europe, with the lion's share held by Euroclear, a Belgium-based financial services company. This makes coordinated action with these governments essential if a meaningful portion of the $300 billion total in frozen Russian assets is going to be made available to Ukraine.

In theory, the United States might be able to compel foreign branches of U.S.-connected banks to deliver foreign-held Russian assets to the United States for seizure, a step that could increase the volume of assets within the United States' reach (though it's not clear by how much). The House version of the REPO for Ukrainians Act may hint at this possibility by expressly including foreign branches of U.S. banks within the scope of its seizure authority. That said, when the Justice Department explored this possibility in relation to Iranian assets during the Iran hostage crisis, it concluded that such a step may be more costly than it seems: Under the Supreme Court's 1952 decision in *Cities Service Co. v. McGrath*, any banks that complied and were found liable for damages in foreign courts could in turn bring Takings Clause claims against the U.S. government, putting much of the final bill on the U.S. taxpayer. In short, there is no easy end-run around multilateral cooperation where the relevant assets lie overseas.

At a minimum, proceeding unilaterally in a way that reticent European allies may well see as unlawful seems like a poor way to persuade them to follow suit. But a multilateral approach would also help protect the United States' own broader economic and policy interests. The greatest risk that comes with seizing Russian assets is that foreign governments will no longer see the United States as a safe jurisdiction in which to hold their own (particularly central bank) assets. Coordinating with other major market economies limits this risk by ensuring that the most plausible alternative jurisdictions for holding such assets embrace similar policies. There will still be some risk of accelerating de-dollarization, as some foreign states may see even a multilateral seizure effort as enough of a threat to warrant moving away from the U.S. economy (or G7 economies altogether) to alternatives being put forward by China and Russia. But the relative impact on the United States will be substantially less if it does not act alone.

Both the House and Senate versions of the REPO for Ukrainians Act wisely recognize the benefits of multilateral cooperation and urge the Biden administration to pursue it. But the Senate version, at least, still allows for the United States to act unilaterally in both seizing Russian assets and compensating Ukraine. Of course, even if this law were enacted, the executive branch could still decline to exercise the authority given to it by Congress to seize Russian assets until a multilateral approach is in place. But in practice, the Biden administration (and any successor) is likely to find itself under immense domestic political pressure to act unilaterally, particularly given the increasingly difficult political dynamics surrounding foreign and security assistance for Ukraine more generally.

A better approach would be for Congress to put its weight firmly behind a multilateral approach. One sensible way to do this would be a reported proposal to condition any seizure authority on the president certifying that the United States has reached agreement on a common approach to seizure with other major market economies, specifically the G7. The G7 is the most reasonable vehicle for such coordination, as its members have already jointly pledged to keep Russian assets frozen until it compensates Ukraine and are poised to actively debate possible seizure at an upcoming meeting. And while Belgium is not a member, its government has suggested that it may be willing to cooperate if the G7 can come to consensus on a way forward.

The recent suggestion that this sort of condition would create an unconstitutional constraint on the president is a questionable one: Economic sanctions and related measures (including asset seizure) are firmly within the constitutional competency of Congress, not the executive branch, and making

authorizations contingent on presidential certifications regarding the actions of foreign governments is common congressional practice and readily distinguishable from any sort of delegation to (or veto authority by) a foreign official. Perhaps more importantly, the Biden administration reportedly supports the measure, reducing any concern that it is an unwelcome intrusion on the president's prerogative.

Of course, negotiations in the G7 may eventually fail without producing a unified route forward. At that point, Congress will have to revisit and decide whether to rescind or amend the certification requirement. While this need for future congressional action may seem like a bug, it could well prove to be a feature. After all, working with allies to secure $300 billion in expedited compensation for Ukraine presents a very different balance of costs and benefits than acting alone in order to secure only $5 billion. Legislators may come to appreciate the opportunity to debate whether and how to pursue each possibility independently.

Rely on a Narrow Claim of Legal Authority

The most significant legal question raised by proposals to seize Russia's assets is to what extent Congress has the legal authority to authorize the executive branch to seize foreign government assets. While not entirely unprecedented, seizing a foreign government's assets is a step that Congress has rarely taken and that federal courts have not squarely addressed. In entering this unfamiliar legal terrain, Congress should be careful to rely on as narrow a claim of legal authority as possible. Not only will this contribute to a stronger legal case, but it will avoid the perception that Congress is ready and able to seize foreign state assets in other circumstances as well, which could unnecessarily contribute to the de-dollarization trend.

While there is ample case law supporting the proposition that Congress can authorize the president to seize foreign government assets, it applies only to a very particular set of circumstances: wartime. Chief Justice John Marshall first recognized this ability in his 1814 opinion in *Brown v. United States*, wherein he rooted it in both international law—which also allows for certain property seizures in wartime—and Congress's constitutional authority to "make Rules concerning Captures on Land and Water[.]" Subsequent decisions built on this precedent, to the point that, by 1921, the Supreme Court expressed "no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy" or its nationals. Further, the Court held that wartime seizures do not trigger a right to just compensation under the Takings Clause and are compatible with the Due Process Clause, so long as "adequate provision be made for a return in case of mistake[.]" The

Supreme Court has never, however, squarely addressed whether and under what conditions Congress's authority might extend to peacetime as well.

Congress has seized foreign government property during peacetime in the past. But to my knowledge, it has done so on only two occasions. The first occurred in 1958, when Congress—with the support of the Eisenhower administration—enacted a law directing the president to seize the proceeds of certain steel mill equipment that had been frozen by U.S. sanctions while en route to the Czechoslovakian government and distribute the proceeds among American claimants whose property had been expropriated following Czechoslovakia's turn to communism. Later, in 2000, Congress similarly directed the president—over the Clinton administration's objections—to seize certain frozen Cuban assets to pay compensatory damages to certain American plaintiffs who held U.S. judgments against Cuba for the expropriation of their property after the Cuban revolution. Neither appears to have been the subject of a legal challenge, explaining the lack of relevant case law.

There was also a period of time during which Congress appears to have authorized the seizure of foreign government assets outside of wartime, but the executive branch did not act on it. Early in the 20th century, Congress repeatedly amended the Trading with the Enemy Act (TWEA)—the antecedent of modern sanctions laws—in a way that ended up allowing for the vesting of assets during national emergencies outside of wartime. For its part, the executive branch does not appear to have used this authority for this purpose during peacetime. But the possibility proved controversial, contributing to the later congressional decision to limit TWEA to wartime and remove the ability to vest or seize assets from its successor statute for national emergency situations, the International Emergency Economic Powers Act (IEEPA) of 1977. As part of the aforementioned 2000 legislation relating to Cuban assets, Congress did "reaffir[m] the President's statutory authority to manage and, where appropriate and consistent with the national interest, vest foreign assets located in the United States for the purposes, among other things, of assisting and, where appropriate, making payments to victims of terrorism"—an apparent reference to TWEA, which the Cuban assets at issue had originally been frozen under and whose applicability to them was grandfathered in when IEEPA was adopted.

The key takeaway from this history is that seizing Russian assets is not well-trodden legal territory. Peacetime seizures of foreign government assets have been pursued only a few times, each for the very different purpose of compensating U.S. nationals for their expropriated property. And none of

these efforts has been subjected to meaningful judicial review. This does not mean that Congress lacks the authority to take such a step: Congress enjoys broad plenary authority to both regulate foreign commerce and make rules regarding "captures," among other relevant authorities, and the modern Supreme Court has expressed a strong inclination to defer to the political branches on matters of national security. But there are countervailing legal interests that, in light of the lack of clear precedent, may warrant some caution.

Among the latter is the Takings Clause, which generally requires that the United States provide compensation where it takes private property for public use. While *Brown* and its fellow wartime precedents are a recognized exception to this requirement, the Supreme Court has firmly held that it applies to foreign individuals and corporations during peacetime. When analyzing a possible peacetime seizure of Iranian assets in 1980, the Justice Department posited that the Takings Clause would not apply because foreign government property was not private property within the scope of its meaning. The Supreme Court has never considered the question, though it has not interpreted the Takings Clause quite so narrowly in subsequent cases. As discussed further below, however, several prominent federal appellate courts have also held that state-owned entities, including foreign central banks, should be treated as the equivalent of private foreign corporations where they are shown to be adequately independent from governmental control—a capacity that has extended to the ability to pursue Takings Clause claims in at least some cases.

Given this legal uncertainty, Congress's best strategy is to limit its actions to those that can be justified under either legal theory. Here that most likely means tying Congress's actions as closely as possible to wartime precedents while limiting their focus to the property of foreign states (namely Russia). The former is not an easy task, as there are very good policy reasons why neither Congress nor the Biden administration want to suggest that the United States is at war with Russia (which it is not). But Russia's invasion of Ukraine has undoubtedly triggered a major foreign policy crisis of the sort often associated with armed conflicts in the past. Given this, asserting the authority to seize foreign government assets in response—particularly where they will be used to address the crisis in a manner consistent with international law, as is the case with wartime seizures—would arguably be a limited expansion of *Brown* and related case law. At the same time, only seizing foreign state property—something not strictly required under *Brown*—will also allow Congress to argue in the alternative that the Takings Clause isn't applicable.

Importantly, framing Congress's actions in this narrow way also presents policy advantages. If Congress were to broadly assert the authority to seize any foreign state assets at any time, this could raise concerns with any number of foreign governments and amplify the risk of de-dollarization. But further limiting Congress's claim of seizure authority to situations where it is necessary to address an ongoing international crisis in a manner consistent with international law substantially narrows the universe of foreign states that might reasonably be concerned they will encounter similar treatment in the future.

Of course, all of these arguments will ultimately be for lawyers to make in court. But by keeping its actions within these confines—and avoiding language that suggests a broader claim of authority than is actually needed—Congress can make their job substantially easier while simultaneously signaling to other foreign governments that the authority it is claiming reaches only Russia and not much farther.

Tailor the Seizure Authority to Russia

Congress should apply a similar logic in how it structures its own authorization to the executive branch to seize Russia's frozen assets. The goal should be to provide the necessary authorization to accomplish the objective of seizing Russia's frozen assets while being minimally disruptive to the legal status quo as it applies to foreign states more generally. By contrast, providing a broader authorization than is necessary may in turn implicate the interests of more foreign states in ways they find concerning, increasing the incentive to disengage with the U.S. economy.

Unfortunately, the current House version of the REPO for Ukrainians Act falls prey to this temptation, as it authorizes the seizure of not just Russian assets, but those of any "affiliated aggressor state" determined by the president to have "provid[ed] significant material assistance to" Russia or Belarus. What this will mean in practice is anyone's guess. Will it apply to China, a backer of Russia's that is also a major investor in the United States? Or to India, Israel, or Turkey, allies of the United States that keep ties with Russia and haven't joined multilateral sanctions efforts? Or to any country that still pursues any trade with Russia, which includes most of Europe (as well as the United States itself)? If such a provision were enacted, all of these foreign governments would have substantially greater reason to fear that their assets might become subject to seizure and thus would have a strong incentive to move those assets out of the reach of the United States. Nor would acting on this authority be easy to square with international law. For these reasons

alone, such an open-ended provision should not be included in any authorizing legislation

Similar logic should apply to other aspects of Congress's authorizing legislation as well. For example, Congress may see it as prudent to expressly override lower court judicial precedents that give foreign state-owned entities the same constitutional status as private corporations—something that would arguably be in Congress's authority, if those rules are an expression of international comity as opposed to a firm constitutional requirement, as seems likely to be the case. Abolishing that standard of treatment for all foreign governments' state-owned entities not only would run counter to long-standing U.S. policy, which generally supports the independent treatment of state-owned entities as consistent with international law, but also would disrupt the legal status quo that other foreign governments have come to expect and perhaps even rely on. Instead, to the extent it is necessary, Congress should expressly override relevant judicial standards only as applied to Russia and leave the status quo in place for other states.

In certain circumstances, separate legislative efforts may also be a source of concern. Some sponsors of the REPO for Ukrainians Act have framed it is a model that should be extended to other states, including China, Iran, and North Korea. And at least one piece of legislation has been introduced to this effect, specifically relating to Iran. Suggesting that Russia is just the tip of the iceberg in this way risks amplifying the possible de-dollarization effects of legislation like the REPO for Ukrainians Act, even if the law itself is focused narrowly on Russia. Supporters should avoid such rhetoric and encourage their colleagues to do the same.

Don't Fight Judicial Review, Expedite It

Finally, both current versions of the REPO for Ukrainians Act take the unusual step of asserting that "[t]he confiscation of Russian sovereign assets … shall not be subject to judicial review[,]" except by "any private individual or entity … asserting due process claims[.]" The goal appears to be to avoid litigation challenges, particularly from Russia, its central bank, and other affected state-owned entities. No doubt this is intended to expedite seizure efforts by avoiding the delay and expense that litigation can entail. But it's far from clear that such a provision is likely to be effective. Instead of avoiding possible legal issues, Congress should aim to resolve them and clarify the applicable legal regime as quickly as possible—a goal it can better achieve by expediting judicial review instead of trying to avoid it altogether.

To be certain, Congress has broad legal authority to regulate the jurisdiction of the federal courts and is under no obligation to provide for the review of seizure decisions by statute. But insofar as this provision strips the federal courts of jurisdiction over potentially valid constitutional claims, it would "raise serious [constitutional] questions" of a sort that has sometimes led federal courts to effectively hear such challenges anyway.

While it's far from certain, there is a chance that at least some of the entities whose assets will be seized may be able to make such Due Process Clause claims. The Supreme Court has never ruled on whether foreign states like Russia have Due Process Clause rights. But in its 1992 decision in *Argentina v. Weltover*, the Court did "[a]ssum[e], without deciding" that a foreign state qualifies for protections under the Due Process Clause, while obliquely citing to another decision—*South Carolina v. Katzenbach*—that holds that the 50 states do not. Several federal appellate courts, including the D.C. Circuit and Second Circuit, have read this as a suggestion that foreign states warrant similar treatment as the 50 states and are not entitled to Due Process Clause protections. But the Supreme Court has never resolved the issue.

That said, it's not clear that such a holding would be dispositive in the case of Russia's frozen assets. As mentioned above, both the D.C. Circuit and the Second Circuit have also held that state-owned entities should generally be treated in the same manner as foreign private entities, including the ability to make Due Process Clause claims, unless they are shown to be an "alter ego" of their parent foreign government. Perhaps Russia's central bank, investment fund, and the other state-owned entities whose frozen assets are likely to be targeted for seizure qualify for this exception, as some have concluded. But reaching this conclusion requires a fact-intensive analysis, and the standard is a demanding one: In related contexts, even foreign central banks that coordinated closely with policy officials and frequently acted at their request were found not to qualify. In short, while the Russian entities whose assets are being seized may not be able to pursue Due Process Clause claims, it's far from certain.

There are also circumstances in which seizure could implicate the Due Process Clause and other constitutional rights of third parties—for example, if non-Russian assets were mistakenly seized. The REPO for Ukrainians Act appears to acknowledge this possibility in allowing for Due Process Clause claims by private individuals and corporations. But it's not clear why other public entities covered by the jurisdiction-stripping provision—such as other countries' foreign central banks or sovereign wealth funds—could not find themselves in a comparable position.

More fundamentally, it's also unclear why the sponsors of the REPO for Ukrainians Act feel that avoiding Due Process Clause requirements is necessary. In the context of wartime seizures, the Supreme Court has held that the Due Process Clause mainly requires that "adequate provision be made for a return in case of mistake," consisting of a process by which the owner of a given set of assets could present arguments that they were improperly targeted and potentially have the seizure reversed. A similar standard seems likely to apply to peacetime seizures as well. This seems like a prudent measure that policymakers would want to have in place regardless in order to ensure the efficacy and legitimacy of the program. This is especially true because such procedures might ease some of the concerns that seizure may raise with other foreign governments, softening incentives that might otherwise push them away from the U.S. economy.

Beyond the Due Process Clause context, the jurisdiction-stripping provision also seems intent on evading other possible legal challenges, whether brought by private or public entities. But the same limitations seem likely to apply if federal courts see the underlying claims as meritorious and they are rooted in the Constitution. Instead, the main thing it does is send an ominous message to other foreign governments and related entities that generally rely on the U.S. legal system to protect their U.S.-held assets.

If Congress does want to both streamline the seizure process and put it on more sound legal footing, a better approach would be to lean into judicial review and install expedited procedures for the consideration and resolution of any legal challenges (and perhaps related measures, like Takings Clause claims). These would likely consist of a fixed time window in which challenges could be brought as well as a directive to federal courts to resolve resulting matters on a specific time frame—or even a measure adjusting the usual appeals process to speed final consideration by the Supreme Court. With these procedures in place, the executive branch could then bring a test case or two with confidence that they would be resolved on a timely basis in line with the statute. Depending on the results, the executive branch could then adjust their relevant procedures—or seek supplemental legislation—to address any constitutional or other concerns the courts may raise before proceeding with the remainder. While this would take an initial investment of time, it would also clear the way for future seizures and put them on sounder legal footing. And in the event that there does end up being some fatal flaw in the legal regime supporting seizure, beginning with a few test cases will limit any potential risks to the United States, such as those presented by Takings Clause claims.

Russia is no stranger to foreign courtrooms and has reportedly made clear its intent to pursue aggressive legal action wherever frozen assets are seized. Congress can't wish away these legal challenges, particularly if the United States wants to maintain the confidence of other foreign governments that rely on the U.S. legal system to defend their own assets. After all, the rule of law is not only one of America's greatest virtues but also a major reason why so many foreign governments choose to keep their substantial foreign assets here. Congress should lean into it, not diminish it.

* * *

The time may well have come to seize Russia's frozen assets and provide them to Ukraine. But doing so will be a significant event with potentially wide-ranging ramifications. What exactly these will be is hard to predict and should be neither overhyped nor underestimated. For this reason, Congress should focus its efforts narrowly on Russia, at least until the consequences are more clear. And it should take care to reassure other foreign governments that the move against Russia reflects the extraordinary nature of the Ukraine crisis, not a sea change in U.S. policies regarding the seizure of foreign government assets.

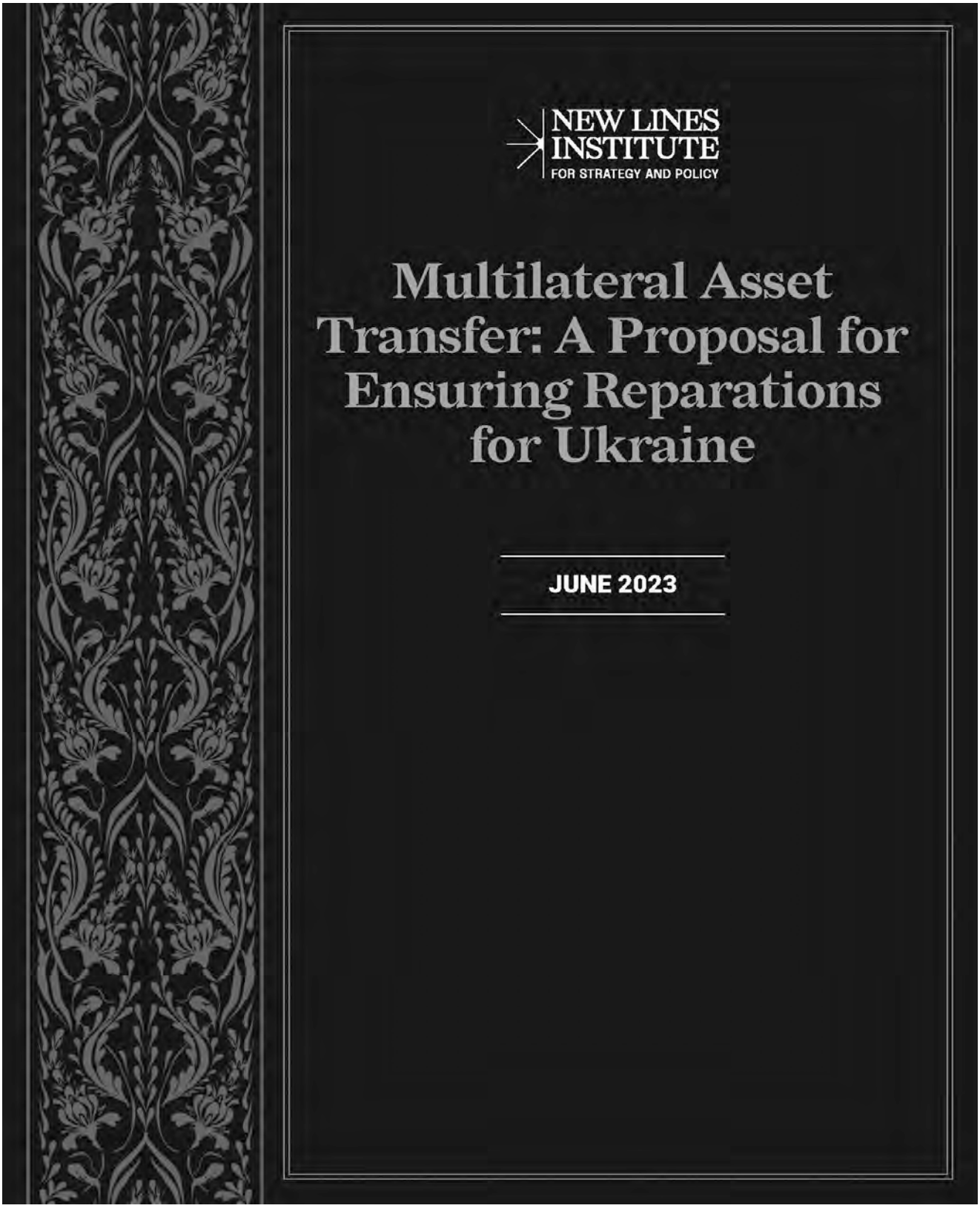
The recommendations outlined above should help with these tasks. Whether to take them, of course, is up to Congress.

Submitted for the Record by Senator James E. Risch

Addition II

Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine

New Lines Institute for Strategy and Policy, June 2023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Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine
JUNE 2023

NEW LINES INSTITUTE
FOR STRATEGY AND POLICY

Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine

Executive Summary

This report makes the case for a multilateral asset transfer that is an effective and legally sound framework for reparations, including compensation, for Russia's invasion of Ukraine, as well as for international partners that have assisted Ukraine in defending itself against Russia's attacks.

Since Russia expanded its aggression against Ukraine in 2022, there is no question that Russia bears responsibility under international law to compensate Ukraine in full for the grave injuries produced by its armed attacks. Both the United Nations and the International Court of Justice have found that Russia is in breach of peremptory norms of international law.[1] On November 14, 2022, the United Nations General Assembly formally recognized that Russia must "bear the legal consequences of all of its internationally wrongful acts, including *making reparation* for the injury, including any damage, caused by such acts."[2] The U.N. called for member states, in cooperation with Ukraine, to establish an international mechanism for reparations for damage, loss, or injury arising from the internationally wrongful acts of the Russian Federation.[3]

This proposal recommends that each state identify and transfer all Russian state assets within its jurisdiction to a central bank escrow account, trust, or analogous arrangement[4] for subsequent disposition in accordance with international agreements. While the Russian state assets are held in escrow, eventual allocation rules and procedures shall be promulgated according to multilateral agreements and in the most transparent way possible, in accordance with the goals of the November 2022 U.N. resolution. Once a global fund to hold and distribute the assets has been established, such as at the Bank for International Settlements in Switzerland, states may then consolidate the assets by transferring them to the global fund.

Because determining the exact allocation and distribution rules and procedures is premature at this stage, this report primarily discusses the initial step of the transfer of Russian state assets under international and domestic law, pending the establishment of allocation rules and procedures. Consolidating control over Russian assets accomplishes an immediate goal — maximizing leverage, which can influence the outcome of the war.

The approach recommended here relies on the established international law of state countermeasures, which provides that states may take countermeasures in response to the internationally wrongful act of another state, intended to induce the aggressor state to comply — voluntarily or involuntarily — with its legal obligations (such as making reparations

1 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order on Provisional Measures, 2022 I.C.J. 182, ¶ 81 (Mar. 16), *available at* https://www.icj-cij.org/public/files/case-related/182/182-20220316-SUM-01-00-EN.pdf; G.A. Res. A/RES/ES-11/5 (Nov. 14, 2022), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/693/55/PDF/N2269355.pdf.

2 G.A. Res. A/RES/ES-11/5, *supra* note 1, at ¶ 2 (emphasis added).

3 *Id.* at ¶ 3.

4 Throughout this report, the term "escrow" or "escrow account" is used as shorthand for "escrow account, a trust, or analogous arrangement," for ease of reference.

for the wrongful acts). Countermeasures are, by definition, state acts that would *ordinarily be unlawful*, and thus would attract international legal liability, if not taken in response to a wrongful act by the aggressor state in order to achieve a specific objective — namely, in this case, compensating Ukraine. By explicitly invoking the claim for compensation and recommendation for national and international action, the November 2022 U.N. resolution satisfied the specific procedural prerequisites of notice and opportunity for Russia to comply, thus enabling full state countermeasures under international law.

The countermeasures proposed here would suspend performance of customary international norms granting sovereign immunity to Russian state assets.[5] Observance of sovereign immunity can resume once Russia fulfills its legal obligations to cease its war of aggression and make reparations, including financial compensation, to injured states. Because Russia's conduct is a serious breach of peremptory norms of international law affecting all states, all states are entitled to address it. Russia's expanded invasion of Ukraine, accompanied by its war crimes and crimes against humanity on a scale not seen since World War II, calls for a decisive international response.

At the core of this proposal is the practical distinction between immunity from adjudication and immunity from executive action under states' domestic law. State countermeasures are an extrajudicial process under domestically lawful acts of state, with broad discretion for policy design. Unlike bilateral cases sometimes brought before the ICJ or other tribunals, there is no standard judicial or arbitral process for processing claims and awards. Under any state's legal system, countermeasures are non-judicial by nature — they are enacted under the domestic legal authority that enables the state's executive to act. By effectuating asset transfer using unilateral executive action, a state's domestic sovereign immunity laws do not come into effect because in most Western domestic legal systems, sovereign immunity is only triggered through judicial measures.

Thus, in a presidential and statutory system like the United States, existing executive power is sufficient under statutory and constitutional authority to adopt countermeasures effectuating the transfer of Russian assets. In states with parliamentary systems, such as Canada, the United Kingdom, or Belgium, the "act of state" may require a Cabinet or parliamentary decision, depending on relevant statutory or constitutional authority, but the act of state is fundamentally extrajudicial. Countermeasures, then, allow states flexibility and latitude in shaping essential policy-driven programs of reconstruction and recovery.

This paper first details an overview of the Multilateral Asset Transfer Proposal, which provides a potential framework for states to adopt in fashioning their individual domestic legal mechanisms for the transfer of Russian state assets. The analysis that follows provides legal authority for each

5 It is important to note that countermeasures are taken against states, and therefore apply to state immunity of the assets, and not the assets themselves.

piece of the Multilateral Asset Transfer Proposal, first through the framework of the international law of countermeasures. It articulates how the suspension of immunity for Russian state assets is a lawful countermeasure under these circumstances — including states' standing to invoke them, and their proportionality and reversibility — and is necessarily distinguishable from "sanctions." The paper further contends that U.N. Chapter VII powers and pending disputes in international courts and tribunals do not preclude the use of countermeasures to seek reparations from Russia, and that past state practice of countermeasures provides support for their use under these similarly historic circumstances.

Next, the paper turns to a discussion of whether the asset transfer would be lawful under state domestic law — or alternatively, how states can implement the legal authority necessary to effectuate the asset transfer. In doing so, the paper discusses the functional differences between presidential power and parliamentary systems, utilizing U.S. and Canadian domestic law as a respective case illustration of each. While each government considering adopting the proposal described in this report will necessarily have differing domestic laws and statutes, each should use the general principles of this proposal to identify analogous legal authority in its respective jurisdiction.

In sum, this paper identifies a lawful basis from which governments should pursue options for making Russia bear the financial costs of its aggression. This report is intended to serve as a starting point to assist governments in that pursuit.

Foreword

The November 2022 U.N. resolution formally recognized that Russia must bear the legal consequences for all its internationally wrongful acts, including making reparations for damages to Ukraine and her people as well as affirming the need for an international mechanism to bring about this compensation.

We face the concrete reality, however, of an unrepentant Russia, determined both to damage Ukraine as severely as possible and to shirk from its international obligations — a Russia that will use its veto power to block any conventional attempts at reparations.

This New Lines Institute proposal builds on past research to illuminate the legal power that nation-states can exercise through their own domestic law to effectuate more than just the freezing of Russian state assets. Instead, nations can legally take a step further and *transfer* the $350 billion assets to be held in escrow for reconstruction efforts. The international law of state countermeasures entitles states to do so.

By design, our model leads to the creation of a global fund that will serve as a reservoir for these assets — and fast enough to allow reconstruction efforts to begin this year. It secures funds for a devastated Ukraine and preserves Russian incentives to strategically reengage with the international order for the possibility of returning remaining funds to Russian state bank accounts and restoring Russian sovereign immunity.

The Multilateral Asset Transfer Proposal's power comes from its simplicity; it can be adapted to the specific legal context of each nation adopting it, enabling a unified yet flexible approach to enforcing accountability.

Our proposals and the detailed analysis that follows should serve as a guide and a beacon for nations grappling with the question of reparations. It urges swift action and unity. It is a step toward justice, toward rebuilding Ukraine, and toward a world that unequivocally condemns and deters acts of aggression.

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Introduction

Since February 2022, the U.S. and its allies have frozen approximately $300 billion in Russian state assets, according to the Russian Ministry of Finance.[6] Although no official breakdown is available of the amounts of Russian assets frozen across states, this sum is believed to represent approximately half of the Russian Central Bank's overall foreign currency reserves holdings.[7] As of June 2021, which is the last time Russia released detailed information about the locations of its foreign reserves, $38 billion in assets was held in the United States, with $71 billion in France, $58 billion in Germany, $55 billion in Japan, and $26 billion in the United Kingdom. As of May 2023, the European Union confirmed that $215 billion worth of Russian central bank assets are frozen just in EU member states.[8]

In December 2022, U.S. President Biden signed legislation that would allow certain private assets confiscated from Russian oligarchs to be used to "provide assistance to Ukraine to remediate the harms of Russian aggression towards Ukraine."[9] On February 3, 2023, CNN reported that the first transfer to Ukraine would take place in the amount of $5.4 million.[10] According to Andrew Adams, the Director of Task Force KleptoCapture, the total scale of the potential aid to Ukraine coming from confiscated oligarchs' assets is limited, in the "hundreds of millions of dollars."[11]

It may help to put these sums into perspective. Current fiscal support to keep the Ukrainian government operating is running at about $3 billion per month, or $100 million per day. The reported transfer of oligarch funds mentioned above would thus offset those costs for, perhaps, one hour. None of that includes the sums needed for reconstruction and recovery, which are currently estimated by the World Bank to require $411 billion over 10 years, without any allowance for the costs of rebuilding the Russian-occupied territories that Ukraine hopes to recover.[12]

Russia shows no indication that it will pay its obligations. In fact, its strategy for victory is increasingly a strategy of economic and social ruin, to keep Ukraine from ever offering an

6 Reuters Staff, *Sanctions have frozen around $300 bln of Russian reserves, FinMin says*, REUTERS (Mar. 13, 2022), https://www.reuters.com/article/ukraine-crisis-russia-reserves/sanctions-have-frozen-around-300-bln-of-russian-reserves-finmin-says-idUSL5N2VG0BU.

7 *See, e.g., Background Press Call by a Senior Administration Official on Imposing Additional Severe Costs on Russia*, THE WHITE HOUSE (Feb. 27, 2022), https://www.whitehouse.gov/briefing-room/press- briefings/2022/02/27/background-press-call-by-a-senior-administration-official-on-imposing-additional-severe-costs-on-russia/.

8 Monica Hersher & Joe Murphy, *Graphic: Russia stored large amounts of money with many countries. Hundreds of billions of it are now frozen*, NBC NEWS (Mar. 17, 2022), https://www.nbcnews.com/data-graphics/russian-bank-foreign-reserve-billions-frozen-sanctions-n1292153; Stephanie Bodoni & Alberto Nardelli, *EU Blocks More Than €200 Billion in Russian Central Bank Assets*, BLOOMBERG (May 25, 2023), https://www.bloomberg.com/news/articles/2023-05-25/eu-has-blocked-200-billion-in-russian-central-bank-assets?sref=Ja3awEaQ; *Press Release: Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth*, U.S. TREASURY DEPT. (Feb. 28, 2022) (concerning the "immobiliz[ation of] any assets of the Central Bank of the Russian Federation held in the United States or by U.S. persons"), https://home.treasury.gov/news/press-releases/jy0612.

9 Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. (2023).

10 Holmes Lybrand, *US attorney general says forfeited funds seized from Russian oligarch will go toward Ukrainian aid*, CNN (Feb. 3, 2023), https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-2-3-23/h_9eab4ff25eb9c91fac7f79b4cae49211.

11 Razom for Ukraine interview with Andrew Adams (Jan. 31, 2023). In order for this amount to be increased, the text of the statute would need to be amended to include oligarchs sanctioned under pre-2022 executive orders.

12 *Updated Ukraine Recovery and Reconstruction Needs Assessment*, WORLD BANK (Mar. 23, 2023), *available at* https://www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment. This report also summarizes the level of ongoing fiscal support.

appealing contrast to Russia. Therefore, any practical or moral answer to questions about who will pay, or who should pay, focuses more and more attention on the $300 billion in state assets. Russian aggression has inflicted catastrophic destruction and suffering in Ukraine. Missile and artillery strikes, aerial bombardment, and kamikaze drone attacks have devastated major cities, including Kharkiv, Kherson, Kyiv, Mariupol, and Severodonetsk, exacting an enormous material and human toll.[13] Thousands of Ukrainians have been killed, many as victims of Russian war crimes. Many more have suffered brutal abuse, including torture, at the hands of Russia's military. Given the scale and gravity of these harms and Ukraine's urgent need for financial assistance, it is imperative that the United States and its partners and allies cooperate to ensure Russia's compliance with the just and legal international obligation of payment of reparations and compensation to Ukraine.

For Russia to pay for injuries that it has caused is not merely an ethical and moral imperative, it is a legal obligation under the international law principle of state responsibility.[14] Action is legally justified to provide reparations, including compensation. It also serves a policy of deterrence. Any state considering a future war of aggression will see that Russia's egregious violation of international order carries a cost. Taking hold of Russian state assets is an in *extremis* remedy, but it responds to an extreme challenge to international peace. It protects the rules-based and pacific objectives of the international order, which are enshrined in Article 2(4) of the United Nations Charter.[15] In other words, violating international law carries a cost that the offending country must pay.

The reparations obligation can be enforced immediately. Ukraine and its economy will need to begin reconstruction as soon as possible. Enforcement cannot wait for a postwar treaty or resolution because it is unrealistic to plan for a compensation fund to be imposed on a defeated Russia, and it would be unwise to insist on such ambitious war aims. Russia's goal is not only Ukraine's physical destruction, but to erode the country's hope and resolve. Ukraine's economy is at risk of collapse, and governments must mobilize soon to counter Russia's strategy of attrition. A joint effort on a global scale can accomplish that, one that displays a positive objective to combat the destructive motivation underlying Russia's war.

13 *Id.*

14 Int'l L. Comm'n, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [hereinafter "ARSIWA"]. Under the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which codifies customary international law, Russia is obligated to cease and not repeat its acts of aggression (ARSIWA, art. 30) and make reparations (ARSIWA, art. 31) in the form of restitution (ARSIWA, art. 35) (to reestablish the situation that existed before the wrongful act was committed) and compensation (ARSIWA, art. 36) (to compensate for damages insofar as such is not made good by restitution).

15 U.N. Charter art. 2(4).

I. Overview of the Multilateral Asset Transfer Proposal

In light of the November 2022 U.N. resolution on reparations for Ukraine,[16] member states should act not only to freeze Russian state assets, but also to transfer them to support compensation for Ukraine. The November 2022 U.N. resolution formally recognized that Russia must bear the legal consequences of all of its internationally wrongful acts, including making reparations for the injury, as well as "the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss, or injury" caused by the invasion.[17] Because Russia's conduct is a serious breach of peremptory norms of international law affecting all states, all states are entitled to address it, including to ensure that Russia performs its duty to compensate injured states.[18]

This proposal recommends that each state shall identify and transfer all Russian state assets within its jurisdiction — specifically, Russian central bank assets and related holdings — to a central bank escrow account, trust, or analogous arrangement, for subsequent disposition in accordance with international agreements, as outlined in the U.N. resolution. Once a global fund to hold and distribute the assets has been established (pursuant to international mechanisms and agreements), states may then consolidate the assets by transferring them to the global fund. Importantly, however, the prior existence of a global fund is not necessary for an individual state to begin locating and transferring frozen Russian assets to an escrow account within its own jurisdiction.

Under the law of countermeasures,[19] states may temporarily suspend the sovereign immunity that these Russian state accounts otherwise enjoy. Observance of sovereign immunity can resume once Russia fulfills its legal obligations to cease its war of aggression and make reparations, including financial compensation, to injured states.

While the Russian state assets are held in escrow, each respective state shall analyze and consider the eventual allocation and disbursement of the assets. To ensure orderly and just distribution of assets and integrity of the process, rules and procedures must be promulgated according to multilateral agreements and in the most transparent way possible, in accordance with the goals of the November 2022 U.N. resolution.

16 G.A. Res. A/RES/ES-11/5. In accordance with the General Assembly's "Uniting for Peace" resolution of November 1950 [resolution 377(V)], if the Security Council fails to act, owing to the negative vote of a permanent member (inevitable in this case, as the Russian Federation holds a veto in the Security Council), then the General Assembly may act. This could happen, as here, in the case where there appears to be a threat to the peace, breach of the peace, or act of aggression by such a permanent member. The General Assembly can consider the matter with a view to making recommendations to members for collective measures to maintain or restore international peace and security.

17 G.A. Res. A/RES/ES-11/5, at ¶ 3.

18 *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), Judgment, 1970 I.C.J. 50 (Feb. 5).

19 The law of countermeasures is explored in depth in Section III, *infra*.

The allocation of assets could most likely address four general purposes:

1) Funds to compensate Ukraine and Ukrainians and initiate a major program of recovery and reconstruction;
2) Funds to compensate other injured states entitled to compensation;
3) Funds for a possible claims process to compensate others to whom courts and tribunals have granted compensatory awards; and
4) Funds remaining for possible return to Russian state bank accounts, if or when there is a diplomatic settlement and the immunity of these accounts is restored.

As previously noted, determining the exact allocation and distribution rules and procedures is premature at this stage. Given the scale of the task, the process will necessarily extend over a period of years. Even in the best case, it will take considerable time to establish the appropriate process to deploy funds and effectively execute disbursements. Thus, this report primarily discusses the initial step of the domestic transfer of Russian state assets into an escrow account, a trust, or analogous arrangement for holding purposes, pending the establishment of allocation rules and procedures.

In the more immediate sense, transferring Russia's state assets into escrow must be done as expeditiously as possible. Consolidating control over Russian reserves can maximize leverage while signaling a strategy of momentum and hope. It allows states to directly use diplomatic leverage, while such leverage can still influence the outcome of the war. Preemptively isolating the state funds into an escrow account gives states the flexibility to respond appropriately to any outcome that could arise later in the year — Ukrainian victory, short-term recovery, or even a diplomatic settlement. Additionally, immediate action to transfer its state funds would signal to Russia that it cannot, by delay, frustrate the rights of those it has harmed.

The analysis below provides legal authority for each piece of the Multilateral Asset Transfer Proposal through the framework of international law, followed by domestic legal frameworks in presidential power and parliamentary systems, utilizing U.S. and Canadian domestic law as a respective illustration of each. While each government considering adopting the proposal described in this report will necessarily have differing domestic laws and statutes, each should use the general principles of this proposal to identify analogous legal authority in its respective jurisdiction.

II. Russia's Legal Obligation for Reparations

States have an obligation under international law to make reparations for internationally wrongful acts. In *Factory at Chorzów*, the Permanent Court of International Justice (PCIJ) determined that "it is a principle of international law, and even a general conception of law, that any breach of an

engagement involves an obligation to make reparation."[20] As the PCIJ noted, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[21] This principle was later codified in Article 31 of the U.N. International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on the Responsibility of States"), which provides that "[t]he responsible State is under an obligation to make *full reparation* for the injury caused by the internationally wrongful act."[22] The legal obligation of the responsible state to make full reparations for the injury caused by its internationally wrongful act includes an obligation to make reparations for both material and moral damage.[23] Importantly, there is no requirement for the responsible state to consent before reparations, including compensation, are made.[24]

The case of Iraq's liability to compensate the victims of its aggression in Kuwait is a recent precedent for the international law requirement to make reparations for internationally wrongful acts. In 1991, U.N. Security Council Resolution 687 reaffirmed that Iraq "is liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."[25] It was widely accepted in 1991, and remains so today, that Iraq had breached fundamental peremptory norms of international law and that it was liable for the direct consequences of those wrongful acts.[26] This corresponded to the duty to make reparations under international law.[27] Having reaffirmed such liability, the U.N. resolution created the U.N. Compensation Commission (UNCC) to, among other functions, administer a fund whereby such claims for compensation might be satisfied.[28] There, the initial step was the same as the one described here: the movement of relevant aggressor state assets to a national escrow account, preparatory to a subsequent transfer to the compensation fund created by international agreement.

Since Russia expanded its aggression against Ukraine in 2022, there is no question that Russia bears responsibility under international law to compensate Ukraine in full for the grave injuries produced by its armed attacks.[29] Both the United Nations and the ICJ have found that Russia is in breach of peremptory norms of international law.[30] Additionally, since February 2022, Russia has faced multiple legal and political sanctions in response to its invasion of Ukraine, including

20 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).
21 Ger. v. Pol., 1928 P.C.I.J. at 47.
22 ARSIWA, art. 31 (emphasis added).
23 ARSIWA, art. 31(2).
24 *E.g.*, James Crawford, State Responsibility: The General Part 267–269 (2013).
25 S.C. Res. 687, ¶ 16 (Apr. 3, 1991).
26 David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EJIL 183, 186 (2002).
27 *See* Bernhard Graefrath & Manfred Mohr, *Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait*, 43 Austrian J. Int'l L. 109 (1992).
28 S.C. Res. 687, ¶ 18.
29 *See* G.A. Res. A/RES/ES-11/1 (Mar. 2, 2022), *available at* https://unwatch.org/wp-content/uploads/2022/05/A_RES_ES-11_1-EN.pdf (deploring "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter").
30 G.A. Res. A/RES/ES-11/5; Ukr. v. Russ. Fed'n, 2022 I.C.J., *supra* note 1.

expulsion from the Council of Europe,[31] European Union efforts to phase out importation of Russian crude oil, freezing the assets of Russia's central bank, and the seizures of assets of individuals and Russian businesses by dozens of states around the globe.[32]

On March 16, 2022, the ICJ granted urgent interim measures, by a vote of 13 to two (the Russian and Chinese judges dissenting) that Russia "shall immediately suspend the military operations that it commenced on 24 February,"[33] and later granted further interim measures addressing requests that individual Ukrainians have instituted against Russia. Although the orders in this case were provisional, they are binding. As the Court held, the orders "thus create international legal obligations" for Russia.[34] By continuing its military operations for more than a year since the ruling, Russia has defied those obligations and escalated its brutal aggression in Ukraine.

On November 14, 2022, the United Nations General Assembly adopted an emergency resolution on compensation for Ukraine and formally "recogniz[ed] that . . . [Russia] must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury" as well as "the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss, or injury" caused by the invasion.[35] It also recommended creation of an international register of damage to start recording claims.

Russia's expulsion from the Council of Europe, nonparticipation in international dispute settlement procedures, and noncompliance with international judgments and awards cast doubt on whether claims instituted at the European Court of Human Rights will result directly in implementation of reparations by Russia to Ukraine or to Ukrainians.[36] Ukraine's claims instituted at the ICJ,[37] under the U.N. Convention on the Law of the Sea[38] and under bilateral investment treaties,[39] for similar reasons are unlikely to result directly in the implementation of reparations. And since Russia is a permanent member of the Security Council, it may, and has, used its veto to block binding legal action against it in that principal United Nations organ. It is improbable that Russia will agree to make full reparations to Ukraine and others for the injuries that Russia's invasion has

31 Council Eur., Decision, Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe (Feb. 25, 2022), *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168*0a5a360*.

32 *What Sanctions Are Being Imposed on Russia over Ukraine Invasion?*, BBC (May 16, 2022), https://www.bbc.com/news/world-europe-60125659.

33 Ukr. v. Russ. Fed'n, 2022 I.C.J. at 86.

34 *Id.* at 84.

35 G.A. Res. A/RES/ES-11/5, at ¶¶ 2, 3.

36 *See* Anton Moiseienko & International Lawyers Project, *Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options 6* (June 2022) (noting the difficulty in implementing judgments and orders against Russia), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149158; *see also* Julia Crawford, *Ukraine vs Russia: What the European Court of Human Rights Can (and Can't) Do*, JUSTICEINFO.NET (Apr. 7, 2022), https://www.justiceinfo.net/en/90187-ukraine-russia-european-court-of-human-rights-can-do.html.

37 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Application Instituting Procedures, 2022 I.C.J. 182, ¶ 81 (Feb. 26); Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed'n), Application Instituting Procedures, 2017 I.C.J. 166 (Jan. 16).

38 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ. Fed'n), Case No. 2017-06, PCA/UNCLOS Annex VII (Perm. Ct. Arb. 2017); Case Concerning Detention of Three Ukrainian Naval Vessels and the Twenty-four Servicemen on Board (Ukr. v. Russ. Fed'n), Case No. 26, ITLOS (Apr. 16, 2019).

39 *E.g.*, PJSC CB PrivatBank and Finance Company Finilon LLC AS v. Russian Federation, Partial Award, Case No. 2015-21, PCA/UNCITRAL (Perm. Ct. Arb. 2019); *PCA Press Release*, Perm. Ct. Arb. (Mar. 30, 2016) (describing Russia's non-participation in the arbitration), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw7185.pdf.

caused. Therefore, states and intergovernmental organizations must take steps in the absence of Russia's consent in order to ensure that Ukraine, its citizens, and other injured parties receive full reparations. Transferring Russian state-owned assets to a fund such as that recommended by the General Assembly resolution is a way to forcibly require Russia to comply with obligations it has already incurred under international law.

By explicitly invoking the claim for compensation and recommendation for national and international action, the November 2022 U.N. resolution satisfied the specific procedural prerequisites of notice and opportunity for Russia to comply, thus strengthening the case for full state countermeasures under international law.

III. The International Law of Countermeasures

The approach recommended here relies on the established international law of state countermeasures for wrongful state action. In the absence of a centralized enforcement authority or a universal mechanism for dispute resolution, countermeasures provide a form of "self-help" for encouraging compliance with international law. Countermeasures derive from the 19th century doctrine of "reprisals," defined in the *Naulilaa* case as "acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends."[40] In modern times, "reprisals" are now used in the context of armed conflict, and the term "reprisals" is replaced by "countermeasures."[41]

In international law, a state may take countermeasures in response to the internationally wrongful act of another state, which is intended to induce the latter state to comply with its legal obligations.[42] Countermeasures are, by definition, state acts that would *ordinarily be unlawful*, and thus would attract international legal responsibility (liability), if not taken in response to an internationally wrongful act by the offending state in order to achieve a specific objective: namely, cessation and reparations.[43] They have a dual role: on the one hand, they act as a "sword" to elicit compliance; and on the other hand, countermeasures are a "shield" that provides a justification for the state adopting measures that would otherwise be unlawful.[44] Thus, the state taking the countermeasure is not liable even though the act is by itself unlawful.[45]

The concept of countermeasures finds justification in the need to restore the equality between sovereign states and to restore the balance that has been disturbed by the commission of the

40 Naulilaa Incident Arbitration (Port. v. Ger.), II R.I.A.A. 1012 (1928).
41 *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 57 (Sept. 25) (recognizing "entitlement to take countermeasures").
42 *Id.* (recognizing "entitlement to take countermeasures." Countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and [...] directed against that State").
43 Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10, art. 22 § 1 (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [ARSIWA with Commentaries]; *see also* Air Services Agreement of Mar. 27, 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, 443 ¶¶ 81-82 (Perm. Ct. Arb. 1978); Hung. v. Slovk., Judgment, 1997 I.C.J. 56, ¶ 87 (Sept. 25); Denis Alland, *The Definition of Countermeasures*, *in* L. OF INT'L RESP. 1127 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).
44 *See, e.g.*, U.S. v. Fr, 18 R.I.A.A., at 44–46 ("counter-measures ... are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed"); *see also* Hung. v. Slovk, 1997 I.C.J. at 56, ¶ 83.
45 ARSIWA, art. 22.

internationally wrongful act. Otherwise stated, countermeasures are "mechanisms of private justice that find their *raison d'être* in the failure of the institutions."[46] In fact, countermeasures are not only allowed under international law, they may be required in circumstances when a peremptory norm is at stake.[47]

A. Conditions for the Validity of Countermeasures

Countermeasures must comply with certain conditions to avoid being considered wrongful. The *Gabčíkovo-Nagymaros Project* case delineated the requisite conditions,[48] and the U.N. International Law Commission (ILC) further endorsed and elaborated on them in the Articles on Responsibility of States. The Articles provide that countermeasures:

(1) Must be in response to a previous wrongful act that has already occurred and must be directed at the state responsible for that previous violation.[49] It is enough that the state resorting to countermeasures determines whether an international wrongful act has occurred; no previous assessment by a court or special agreement between states is needed.[50]

(2) Must be undertaken to compel the offending state to cease the violation and/or make reparations; the object of the countermeasures cannot be to punish the offending state.[51]

(3) Shall, "as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[52] The countermeasures must be terminated as soon as the responsible state complies with its international obligations or the injured state determines that the responsible state has done all that is necessary to make reparations for the wrongful act.[53] Thus, countermeasures should be reversible and allow the state taking the countermeasure to continue to comply with its international obligations.

(4) Must be preceded by an opportunity for the offending state to cease or to repair before taking any countermeasure.[54] There is no specific timing for the notification; in fact, the state could theoretically notify and take countermeasures at the same time.[55]

46 Denis Alland, *Countermeasures of General Interest*, 13 EJIL 1221, 1226 (2002).
47 See discussion below.
48 Hung. v. Slovk., 1997 I.C.J. at 37.
49 ARSIWA, art. 49.
50 *See Fourth Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, II (1) Y.B. Int'l L. Comm'n, UN Doc A/CN.4/444 and Add.1-3, 6 ¶ 2 (1992), *available at* https://legal.un.org/ilc/documentation/english/a_cn4_444.pdf.
51 ARSIWA, art. 49(1); *see also* James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries 284 (2002).
52 ARSIWA, art. 49(3).
53 ARSIWA, art. 44.
54 ARSIWA, art. 52(1).
55 Crawford, *supra* note 51, at 298.

(5) Cannot be undertaken if there is a "dispute [...] pending before a court or tribunal which has the authority to make decisions binding on the parties."[56] The objective of this condition is to ensure that recourse to countermeasures does not weaken any dispute settlement.

(6) Must be proportionate to the harm suffered by the injured state as a result of the wrongful act.[57]

(7) Must not involve the use of force that is prohibited under international law.[58]

As discussed in detail below, the suspension of state immunity for the purpose of transferring Russian assets into escrow, followed by subsequent distribution according to international agreements — with immunity restored once Russia comes into compliance with its international obligations — fulfills the conditions for lawful countermeasures.

B. Standing to Invoke Countermeasures

There are two categories of states that can invoke Russia's responsibility for its internationally wrongful acts.

First, an injured state has the right to invoke the responsibility of the breaching state when the obligation breached is owed to it individually, and when it is owed to the international community as a whole but specially affects that state.[59] Ukraine can be considered an injured state under both scenarios. Other states, such as Poland, might qualify as specially affected states, though they would need to show that they were impacted in a way that goes beyond the general negative impact of Russia's war of aggression on all states. As the ILC notes, "[f]or a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."[60]

Second, states other than injured states are entitled to invoke the responsibility of the breaching state when "the obligation breached is owed to the international community as a whole" (i.e., an obligation *erga omnes*).[61] Commonly referred to as "collective countermeasures," these countermeasures are taken specifically in response to a breach of an obligation owed to the international community. The word "collective" does not imply that they must be taken by multiple states in concert. Instead, it refers to the fact that they are taken on behalf of a collective interest of the community.

The concept of international community interest is reflected in two concepts: *jus cogens* and obligations *erga omnes*. *Jus cogens* are peremptory norms of international law, which impose

56 ARSIWA, art. 52(3)(b).
57 ARSIWA, art. 51.
58 ARSIWA, art. 50.
59 ARSIWA, art. 42.
60 ARSIWA with Commentaries, art. 42 § 12.
61 ARSIWA, art. 48.

obligations that cannot be compromised, such as the prohibitions on the use of force, genocide, slavery, racial discrimination, and torture. *Jus cogens* are intended to protect the fundamental interests of the international community.

Article 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm as a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[62] The requirement that *jus cogens* must reflect the will of the "international community of states as a whole" distinguishes *jus cogens* as norms so fundamental to the community interest that no state or group of states may choose to override them.

While *jus cogens* is defined by the fundamental nature of the obligations it denotes, obligations *erga omnes* are defined by those to whom the obligations are owed. A breach of an obligation — particularly a non-derogable obligation — owed to the international community is a breach of an obligation to every member of that community.[63] The state that committed the wrongful act owes to the international community secondary obligations of cessation, guarantees and assurances of non-repetition, and appropriate reparations, and any state may use countermeasures to demand those secondary obligations be fulfilled.[64] This notion is sometimes referred to as "third-party countermeasures,"[65] but this is somewhat of a misnomer because, under obligations *erga omnes*, *all* states are owed the obligation of non-aggression, and therefore all are injured by a breach of peremptory norms.[66]

The U.N. Charter also supports the proposition that non-injured states can take countermeasures to protect an injured state from armed aggression. Article 51 of the U.N. Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or *collective* self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[67] Further, Article 1 of the Charter explains that "[t]he Purposes of the United Nations are: . . . to maintain international peace and security, *and to that end: to take effective collective measures* for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches

62 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969).

63 Belg. v. Spain, 1970 I.C.J. 32 ("[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. . . . [A]ll States can be held to have a legal interest in their protection; they are obligations *erga omnes*").

64 ARSIWA, art. 48(1)-(2); *e.g.*, Elizabeth Zoller, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 15 (1984); Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council*, 77 BRIT. Y.B. INT'L L. 333 (2007) (arguing that customary international law authorizes these "collective countermeasures"); Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269, 297–332 (2015) (explaining how states may apply countermeasures in the interests of foreign "beneficiaries").

65 *E.g.*, MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW (2018).

66 *See* Anton Moiseienko, *Sanctions, Confiscation, and the Rule of Law*, 4 REVUE EUROPEENNE DU DROIT 1 (Paris: Groupe d'études géopolitiques, Spring 2023).

67 U.N. Charter, art. 51 (emphasis added).

of the peace."[68] While cessation differs from reparations, in the case of invasion the concepts can overlap, such as when the primary goal is to cease the invasion and stop the use of force.

In addition to its original act of invasion, Russia's war crimes and crimes against humanity in Ukraine also violate obligations *erga omnes*.[69] Thus, international law entitles all states to demand that Russia cease its belligerent conduct and make reparations, including through the payment of compensation.[70]

C. *Countermeasures Versus Sanctions*

Sanctions — otherwise referred to as "retorsions" in international law — and countermeasures are both legal tools used in international law to address breaches of international obligations by states.[71] It is crucial, however, to distinguish countermeasures from the term "sanctions" (or "retorsions"), as the terms are distinct and should not be conflated.

As James Crawford, former judge of the ICJ and U.N. Special Rapporteur on State Responsibility, explained in his authoritative treatise on the international laws of state responsibility:

> There are important conceptual differences between the different categories of self-help measures. Retorsion [sanctions] is an 'unfriendly' but not unlawful act – severing diplomatic relations, for example. Countermeasures, by contrast, may be defined as an act of non-compliance by a state with an international obligation owed towards another state in response to a prior breach of international law by that other state.[72]

Sanctions are typically unilateral or multilateral measures taken by one or more states, or by international organizations, in response to a breach of international law. The purpose of sanctions is distinct from that of countermeasures, namely that sanctions are intended to: (i) coerce or change behavior; (ii) constrain access to resources needed to engage in certain activities, or (iii) signal and stigmatize.[73] Sanctions are designed to deter further violations of international law, and are used within and according to the *ordinary legal obligations of states*. They can include economic measures such as trade restrictions, financial sanctions, or the freezing of

68 U.N. Charter, art. 1 (emphasis added).

69 *See* Belg. v. Spain, 1970 I.C.J. at 32–34 (characterizing the prohibitions against aggression and genocide and "the principles and rules concerning the basic rights of the human person" as "obligations *erga omnes*").

70 *See* U.N. High Commissioner for Human Rights, *Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Including Recommendations Aimed at Ending Such Measures*, 7–8 ¶ 22, U.N. Doc. A/HRC/19/33 (Jan. 11, 2012), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33_en.pdf ("Where human rights or other obligations owed to the international community as a whole (obligations *erga omnes*) are concerned, any State may take lawful measures against the State that breached the said *erga omnes* obligation . . . "); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 245 (2008) ("[T]he weight of opinion supports the right of states to take countermeasures in cases of *erga omnes* obligations with a *jus cogens* character."); Christian J. Tams, *Standing to Take Countermeasures, in* ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 249–51 (2009) ("[I]ndividual States are entitled to take countermeasures in response to systematic or large-scale breaches of obligations *erga omnes*").

71 In international law, sanctions are referred to as "retorsions." However, since most audiences will be most familiar with the term "sanctions" in the context of Russian assets, for ease of reference, this report will use the term "sanctions" as synonymous with "retorsions."

72 CRAWFORD, *supra* note 24, at § 21.1.

73 Larissa van den Herik, *Peripheral Hegemony in the Quest to Ensure Security Council Accountability for Its Individualized UN Sanctions Regimes*, 19 JCSL 427, 433 (2014).

assets, as well as non-economic measures such as travel restrictions, diplomatic sanctions, and other political measures. In the sanctions construct, the sovereign immunity of state assets is not to be violated.

By contrast, countermeasures are specific measures taken by a state in response to a breach of international law by another state *that would be unlawful*, but the taking of which in these exceptional circumstances does not attract international legal responsibility (liability) to the state taking them. Where sanctions have the broad aim of maintaining or restoring international peace and security, countermeasures are a tool to enforce international obligations within a narrow frame. While sanctions are intended to be a deterrent, countermeasures are intended to restore justice and encompass the obligation for an offending state to pay reparations. In the countermeasures construct, non-observance of the sovereign immunity of state assets does not incur liability on the state taking the countermeasures.

For instance, the UNCC, which was created to compensate victims of Iraq's aggression, demonstrates the distinction between reparations and sanctions. The UNCC was a mechanism established to provide a measure of practical justice to those who suffered damage as a direct result of Iraq's invasion and occupation of Kuwait.[74] It was not created to punish Iraq or to encourage certain changes in its leadership, and was qualitatively different from the economic sanctions that had been in place on Iraq for over a decade.[75]

In short, sanctions — such as asset freezes — and countermeasures are two distinct actions, which are neither bound together nor mutually exclusive, with each having its distinct legal basis and policy rationale. The sanctions construct is appropriate for freezing Russian assets, which has accomplished the goals of constraining Russia's access to its financial resources and hampering its economic growth and ability to attract foreign capital. Yet sanctions alone have proven to be ineffective in persuading Russia to call off its war, much less to deliver reparations to Ukraine and other states for the moral and material damage it has caused. Thus, countermeasures is the appropriate paradigm under which to enforce Russia's compliance with its obligations of cessation and reparations, including compensation, for the injuries Russia's breaches of international law have caused.

IV. Suspension of Immunity for Russian State Assets as a State Countermeasure

Based on the sovereign equality of states under international law, state immunity protects sovereign states and their property from the jurisdiction of another state.[76] State immunity applies to administrative, civil, and criminal proceedings, and it acts as a procedural bar to

74 *See, e.g.*, Caron & Mohr, *supra* note 27, at 185.
75 *Id.* ("This difference is apparent in the fact, for example, that the work of the UNCC was not in any way tied to, or conditioned by, changes in the future behavior of Iraq's leadership").
76 Peter-Tobias Stoll, *State Immunity, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1, 4 (last updated Apr. 2011), *available at* https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106.

protect sovereign states from being made party to proceedings in another state's courts, or from enforcement of judgments by the forum state against the assets of the respondent state.[77]

It is important to conceptually differentiate between immunity from adjudication and immunity from executive action. Immunity from adjudication protects states from being sued in foreign courts, whereas immunity from execution shields state-owned property from attachment to satisfy claims.[78] In effect, Russia's state assets enjoy immunity from execution, while Russia cannot be sued in other states' domestic courts, subject to limited exceptions.[79] The conventional understanding of sovereign immunity is linked with judicial measures.[80] By contrast, the present proposal involves immunities as they apply to the transfer of sovereign state assets based solely on executive — or "extrajudicial" — actions of state.

The countermeasures would suspend performance of agreements or customary international norms granting sovereign immunity to Russian assets. As a result of Russia's breach of international law and norms, states are then not liable for their "violations" of Russia's customary rights. Under this construct, the Russian treaty or customary international legal rights for sovereign immunity of their assets do not cease to exist; rather, they are suspended — dormant — until Russia returns to compliance with international law and the necessity for countermeasures disappears.[81]

Construing non-observance of state immunity as a countermeasure provides the most suitable legal framework to allow the pursuit of reparations while preserving well-established principles of international law.[82] Under the framework proposed here, countermeasures provide for the non-observance of state immunity for the purpose of transferring Russian assets into escrow (or other arrangement), followed by subsequent distribution according to international agreements,

77 Thomas Grant, *Article 2(1)(a) and (b), in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 40–53 (Roger O'Keefe & Christian J. Tams eds., 2013).

78 *See* Chester Brown & Roger O'Keefe, *State Immunity from Measures of Constraint in Connection with Proceedings Before a Court, in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 290 (Roger O'Keefe & Christian J. Tams eds., 2013).

79 *See id.*

80 *See, e.g.*, Anton Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation: The Case of Central Bank Assets* (draft) (Apr. 17, 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4420459; Hersh Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951) (by contrast with the immunity from adjudication, Lauterpacht devoted little attention to the conceptual underpinnings of the immunity from execution); XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 6–32 (2012) (not touching on the immunity from execution in its survey of the origins and purposes of sovereign immunities); CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 125–166 (1988) (covering the immunity from execution in detail but not explaining its rationale); SOMPONG SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959) (limited reference to the immunity from execution throughout).

81 CRAWFORD, *supra note 24, at § 21.2.3.*

82 One of the most salient examples of this principle is the U.S. Foreign Sovereign Immunities Act (FSIA). The terrorism exception to sovereign immunity in the FSIA (28 USC §§ 1605(a)(7) and 1605A) can be cast as a countermeasure in the form of withdrawing immunity over foreign sovereigns and their assets (which would ordinarily be unlawful) in response to the international wrongful act of providing material support to terrorism. *See, e.g.*, Daniel Franchini, *State Immunity as a Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets*, VIR. J. INT'L L. (2019) (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449086. Once the state conforms to international practice and ceases providing support to terrorism, the immunity is reinstated. For example, the U.S. removed Iraq's and Libya's state terrorism designations after Saddam Hussein and Muammar Qaddafi, respectively, were overthrown. However, the reinstatement of immunity did not mean that Iraq and Libya were relieved from the obligation of the judgments that had been entered against them while the immunity was suspended. In fact, both countries paid those judgments through settlement agreements, resulting in the disbursement of funds through the U.S. Foreign Claims Settlement Commission.

with immunity (*not the assets*) restored once Russia comes into suitable compliance with its international obligations. The Articles on State Responsibility prohibit countermeasures with respect to certain obligations, such as those stemming from the prohibition on the use of force or human rights, but make no such provision for sovereign immunities.[83]

The Russian Federation would likely argue that any type of governmental action against its assets in another jurisdiction is barred because it benefits from state immunity as a matter of customary international law. While the scope of state immunity in international law is broad, it is not absolute. Some circumstances — such as under countermeasures in response to violations of obligations *erga omnes* — allow immunity to be abrogated. A nearly century-long trend in developed legal systems has moderated the effects of sovereign immunity and identified exceptions to what was once, but is no more, an absolute principle. The principle animating the countermeasures is that Russia, as the international outlaw, cannot stand on the law to claim immunity for its bank account while itself flagrantly violating international law by invading the sovereign territory of Ukraine.

The argument for judicial denial of sovereign immunity arose in the ICJ after the second world war. In the *Jurisdictional Immunities* case, Italian courts did not observe Germany's state immunity in cases of violations of Italian citizens' human rights and international humanitarian law during Germany's occupation of Italy during World War II.[84] Germany argued that when states recognized *jus cogens* as a special class of rules of international law, they did not implicitly waive their right to immunity.[85] The ICJ ruled in favor of Germany, holding that "[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State."[86] The Court concluded that Germany was entitled to jurisdictional immunity despite the serious violations of international law during World War II.[87] However, Italy did not invoke the countermeasures argument as a defense for its denial of Germany's sovereign immunity, and the Court did not address this issue.[88]

The *Jurisdictional Immunities* case is distinguishable on other grounds from the proposal of non-observance of immunity of state assets from executive action here. First, the case concerned immunity from *adjudication* and not immunity from *executive action*. As discussed above, immunity from judicial measures and immunity from executive action are independent of one another and subject to different legal and policy considerations. Second, the *Jurisdictional Immunities* case concerned a very different factual situation — i.e., Germany's violations of international law during World War II, for which significant reparations had already been made.

83 ARSIWA, art. 50.
84 Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Application Instituting Procedures, 2012 I.C.J. 143 (Dec. 23, 2008).
85 Ger. v. It.: Greece Intervening, Memorial of the Federal Republic of Germany, 2012 I.C.J. at 83 (Jun. 12, 2009).
86 Ger. v. It.: Greece Intervening, Judgment, 2012 I.C.J. at 93 (Feb. 3).
87 *Id.* at 95-97, 139.
88 *Id.* at 48.

To date, Iran is the only state that has made specific legal claims to challenge the U.S. freezing of its state assets based on sovereign immunities in the *Certain Iranian Assets* case, but the ICJ dismissed the claims regarding immunity for lack of jurisdiction.[89] As a result, the ICJ has never explicitly ruled out the possibility that denial of immunity to foreign state assets can be justified as a countermeasure. Thus, there is nothing in the nature of state immunity that prevents the potential of its non-observance as a countermeasure.

A. Notice and Consent for Use of Countermeasures

The Articles on State Responsibility provide that an aggressor state must be given notice and an opportunity to comply with its obligations, including its duty to compensate, before countermeasures are taken against it.[90] In other words, states preparing to take countermeasures are obligated to notify Russia of their decision to do so and offer to negotiate with Russia before they proceed.[91] The international community has fulfilled this obligation by providing Russia ample opportunity to negotiate, which it has continually rejected and shows no intent to do otherwise.[92] In addition to the sanctions phase of asset freezes, the November 2022 U.N. resolution and the ICJ judgment provided Russia with full notice of the claim for reparations and the intention of states to act. In response, Russia has not only denied its opportunity to comply, but also escalated its aggression.[93]

While Russia is being induced to comply with its duty to compensate, Russia's consent to compensate is not required for states to move forward with countermeasures.[94] For all practical purposes, Russia left the means to compensate in the jurisdictions of law-abiding states. Those states can act to place Russian assets into escrow so that, in effect, Russian assets will then be used to perform Russia's duty to compensate. In other words, Russia will be induced to compensate, voluntarily or involuntarily. Relying solely on voluntary compensation would effectively grant the aggressor veto power over the use of its funds for compensation. Such an interpretation would place the aggressor's rights over the rights of the victims. The general international legal view is that the victims are not required to obtain the aggressor's consent to compensation.[95] Waiting for Russia's voluntary compensation would upend this entire body of international law.

Arguably the most applicable countermeasures precedent is the transfer of Iraqi state funds during the Gulf War in 1992. After Iraq invaded Kuwait in 1990, former U.S. President George Bush

89 Certain Iranian Assets (Islamic Repub. Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. 164 (June 14); Islamic Repub. of Iran v. U.S., Judgment, 2016 I.C.J. at 80 (Feb. 13, 2019) (Court dismissing the claims regarding jurisdictional immunity).
90 ARSIWA, art. 43.
91 ARSIWA, art. 52(1).
92 *See, e.g., Russia Has Shown No Interest In Negotiations To End War Despite Putin's Words, U.S. Officials Say*, RADIOFREEEUROPE/RADIOLIBERTY (Dec. 23, 2022), https://www.rferl.org/a/russia-putin-war-negotiations/32190264.html.
93 Jack Guy, Yulia Kesaieva, Mick Krever, Jonny Hallam & Josh Pennington, *Top Ukrainian security official says Russia preparing for 'maximum escalation' in the war*, CNN (Feb. 1, 2023), https://www.cnn.com/2023/02/01/europe/russia-maximum-escalation-ukraine-intl/index.html.
94 *See* CRAWFORD, *supra* note 24, at 267–269.
95 *Id.*

issued an October 1992 executive order "directing and compelling" every U.S. bank holding Iraqi state funds to transfer them to the Federal Reserve Bank of New York in compliance with a U.N. resolution that called for compensation of the victims of that aggression.[96] The executive order "authorized, directed, and compelled" the Federal Reserve Bank of New York to receive these funds and to "hold, invest, or transfer" them to serve the purposes of the U.N. resolution.[97] The funds in the U.S. escrow account were then transferred to another escrow account controlled by the U.N. Secretary General, and used to satisfy claims made against Iraq under arrangements established in other international agreements.[98] Although the peace settlement imposed on Iraq forced it to acknowledge the principle of compensation when it obtained a ceasefire in 1991,[99] Iraq then refused to participate in, or consent to, any subsequent arrangements to carry out any compensation.[100] The immunity of the assets was suspended in order to effectuate the transfer and subsequent compensation. At no point did Iraq consent to the suspension of its sovereign immunity ordinarily enjoyed by its state-owned financial assets or state-owned petroleum products.[101]

B. Reversibility and Proportionality of the Proposed Countermeasures

Many experts emphasize the requirement that countermeasures be reversible.[102] The requisite "reversibility" of countermeasures stems from Article 49(3) of the Articles on State Responsibility, which provides that: "Countermeasures shall, as far as possible, be taken in such a way as to permit the *resumption of performance of the obligations* in question."[103] Here, the performance of the obligations in question is in respect to the observance of immunity of the foreign state's assets. Countermeasures apply to state immunity of the assets, and not the assets themselves. By definition, countermeasures are taken against a state and not, as it were, *in rem* against an asset. Thus, the "reversibility" does not apply to the assets themselves, but rather the suspension of immunity — which can be reinstated once Russia comes into compliance with its international obligations to make reparations.

The intent behind the law of countermeasures, as the ILC evinces in its commentary, is to induce compliance and achieve reparations, and, on the other hand, prevent states from imposing

96 Exec. Order No. 12817, 57 C.F.R. 48433 (Oct. 23, 1992).
97 *Id.*
98 S.C. Res. 706, UN SCOR, 47th Sess., 3046th mtg. at 6, UN Doc. S/RES/706 (Aug. 15, 1991); S.C. Res. 712, UN SCOR, 47th Sess., 3064th mtg. at 4, UN Doc. S/RES/712 (Sept. 19, 1991).
99 S.C. Res. 687, UN SCOR, 46th Sess., 2983rd mtg. at 3, UN Doc. S/RES/687 (Apr. 3, 1991).
100 Alfred B. Prados, *Iraqi Challenges and U.S. Responses: March 1991 through October 2002*, CONG. RSCH. SERV. REP. (Nov. 20, 2002), *available at* https://www.everycrsreport.com/reports/RL31641.html.
101 Some argue that Iraq's acceptance of the ceasefire resolution (Sec. Res. 687) shows that consent was required in that case. This view is incorrect for several reasons. First, the U.N. had already established Iraq's duty to compensate months before the ceasefire, without any agreement by Iraq. Second, under international law, "consent" cannot be attained at gunpoint (a standard illustration is the invalidity of Austria's 1938 "consent" to being annexed by Germany). Iraq's acceptance of Sec. Res. 687 was involuntary. Third, Iraq did not agree to any of the specific transfers of its state funds, nor did it agree to or participate in the subsequent processes of compensation, and indeed its government vehemently denounced them.
102 *See, e.g., Report: Proposals to Seize Russian Assets to Rebuild Ukraine: Session 22 of the Congressional Study Group*, BROOKINGS (Dec. 29, 2022), https://www.brookings.edu/research/proposals-to-seize-russian-assets-to-rebuild-ukraine/.
103 ARSIWA, art. 49(1).

further damage on the offending state once it resumes compliance with its obligations.[104] This conceptualization is reflected in the condition that countermeasures be proportionate to the harm caused.[105] In the present instance, Russia has committed grave atrocities against Ukraine (and the international community) for which it owes reparations, the amount of which is likely greater than the sum total of Russia's frozen assets. In these circumstances, it is difficult to argue that a proportionate, dollar-for-dollar transfer of Russia's state assets is incompatible with the principles of proportionality and reversibility underpinning the law of countermeasures.

Indeed, the effect of construing "reversibility" as applying to the assets themselves results in somewhat of a practical absurdity. This would mean allowing Russia to credit any compensation transferred from its funds to Ukraine as a credit against its liabilities, a sum that may eventually be fixed or adjudicated pursuant to other international agreements. However, considering the estimates of what it will cost to compensate Ukraine, rebuild the territories Russia has occupied, and compensate for injuries suffered by and in other states, Russian assets alone cannot cover all these costs.

C. Lawful Expropriation

Once Russia's sovereign immunity is suspended, the transfer of its state assets into escrow accounts, transfers that may require confiscations or seizures under the laws of some states, could be considered a lawful expropriation of Russia's property under international law. Ordinarily, Russia would be entitled to seek compensation for such an expropriation of its property.[106] However, Russia would not be entitled to compensation from the transferring states if done as a countermeasure for Russia's own grave breach of peremptory norms of international law. States would need to show that the countermeasure was proportionate, that it was commensurate with the damages, that it was not merely punitive, and that it did not violate the privileges of Russian diplomats, embassies, or consulates.

Also, the transferring states would not be taking Russian state assets for their own public use. By transferring the assets into national, and then international, escrow accounts, the actual beneficiaries are states or other entities entitled to compensation. Russia is unlikely to show, or even try to show, that these claims are unreasonable or unjustified.

D. Adjudication of Pending Disputes

Article 52 of the Articles on the Responsibility of States prohibits the use of countermeasures if "the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties."[107] On February 26, 2022, Ukraine filed an application at the ICJ to initiate

104 ARSIWA with Commentaries, art 22 § 4.
105 ARSIWA, art. 51 ("The countermeasures must be proportionate to the harm suffered by the injured State as a result of the wrongful act").
106 E.g., Amir Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 VILL. L. REV 199 (1969).
107 ARSIWA, art. 52.

proceedings against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide. On June 23, 2022, Ukraine also filed an application against Russia at the European Court of Human Rights (ECHR) concerning Russia's violations of the European Convention on Human Rights between the period of February 24 and April 7, 2022.[108] Although the ICJ issued an order on provisional measures,[109] a full decision on the merits in both cases is still pending.

The pending disputes before the courts do not preclude other states from using countermeasures to seek reparations from Russia. Any disposition that a court or tribunal adopts against Russia in any third-party dispute settlement procedure will necessarily address no more than the particular claim(s) that Ukraine instituted against Russia under that procedure. None of the cases at present *sub judice* (i.e., in progress before a court or tribunal) involve a request for reparations for all injuries — including to the international community at large — caused by Russia through its aggression against Ukraine. Instead, each case has a narrow *petitum* (subject matter of claim), and it is within the narrow confines of the *petitum* that each court or tribunal must fashion any award it adopts. Additionally, it is worth noting that Ukraine's bid in the ECHR is largely symbolic and has no chance of the judgments being enforced, given that on June 7, 2022, the Russian parliament approved two bills ending the ECHR's jurisdiction in Russia.[110]

Thus, states are not required to await adjudication of pending claims in order to engage in lawful countermeasures under these circumstances.

E. Countermeasures and the U.N. Security Council

State countermeasures can be, and usually are, employed outside of U.N. Chapter VII processes and U.N. Security Council action.[111] James Crawford,[112] the Special Rapporteur for the International Law Commission's much-acclaimed work on this subject that has been repeatedly endorsed by the U.N. General Assembly, provides authoritative insight on the non-mutually exclusive relationship between countermeasures and Chapter VII processes. He begins by noting that:

> All the categories of self-help measures ... share an emphasis on unilateral action; that is, they are taken by states acting alone (or alongside other like-minded states) to seek protection or performance of international legal rights and obligations. The measures

108 *Ukraine Submitted New Interstate Application to the European Court of Human Rights Against Russia*, MINISTRY OF JUSTICE OF UKRAINE (June 23, 2022), https://minjust.gov.ua/news/ministry/ukraine-submitted-new-interstate-application-to-the-european-court-of-human-rights-against-russia.

109 Ukr. v. Russ. Fed'n, 2022 I.C.J. 182.

110 *Russian parliament votes to break with European Court of Human Rights*, REUTERS (June 7, 2022), https://www.reuters.com/world/europe/russian-parliament-votes-exit-european-court-human-rights-2022-06-07/.

111 *Id.*

112 In writing Crawford's obituary, Philippe Sands called Crawford "the outstanding public international lawyer of our age." *See* Philippe Sands, *James Crawford obituary*, GUARDIAN (Jun. 13, 2021), https://www.theguardian.com/law/2021/jun/13/james-crawford-obituary/.

> are adopted as a consequence of the view of the reacting state that the target state has committed an internationally wrongful act.[113]

Quoting Denis Alland, Crawford emphasized that measures decided by the U.N. and other international organizations are quite different from the choices of reacting states.[114] Such institutions make decisions "within the framework of a system more or less centralized, which is precisely the element that justifies their being distinguished from countermeasures."[115] Crawford concluded:

> In other words, institutional sanctions [such as U.N. measures] create 'vertical' relationships of enforcement, whereas in the case of decentralized countermeasures, the relationships between the responsible and reacting states are horizontal.[116]

Crawford, therefore, specifically distinguished countermeasures from the usual scope of the U.N. Security Council, with its special powers to maintain international peace and security and make decisions that have binding force. To an unclear degree, the centralized U.N. powers to take nonviolent countermeasures can overlap with the decentralized power of states. However, as Crawford states:

> The jurisdiction *ratione materiae* [relation to the subject matter of the dispute] of the [Security] Council is limited, and its ability to respond to wrongful acts efficiently and effectively is frequently hampered by political disagreement and by the threat or use of the veto by one of the five permanent members. *It is precisely in situations when the Security Council fails to act or its actions are ineffective in enforcing serious illegalities, such as the large-scale human rights violations in Rwanda, Sudan, Syria, and so on, that the demand for a right of collective action by states is strongest.* ...
>
> While the Council's responsibility for the maintenance of international peace and security is 'primary', *it is not exclusive.* The General Assembly may also be required to take steps for the maintenance of international peace and security, for example in situations *where the Security Council is prevented by the veto from acting*, or has otherwise been ineffective [and the UNGA has acted in just this way in the Russia-Ukraine case]. In keeping with the established prohibition of forcible countermeasures by individual states, however, sanctions involving the use of force can only be adopted by the Security Council, acting in pursuance of its Chapter VII powers.[117]

The proposed countermeasures here neither involve the use of force, nor are they compulsory for (or enforced on) states. Moreover, under these circumstances, the Security Council is prevented

113 CRAWFORD, *supra* note 24, at § 21.3.
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*

from taking any action to address Russia's violations. Since Russia is a permanent member of the Security Council, it may, and has, used its veto to block binding legal action against it. Here, the U.N. Chapter VII powers and processes are not only unnecessary, but the aggressor state itself precludes them from being employed at all. Thus, state countermeasures can function to fulfill the purpose of Chapter VII powers where the Security Council is unable to act — such as in this precise situation.

F. The Flexibility of State Practice of Countermeasures

No state has ever expressly qualified its practice on state immunity as countermeasures.[118] While states do frequently adopt countermeasures in the conduct of international relations, they rarely do so in explicit terms.[119] A state explicitly adopting a countermeasure would essentially be conceding a breach of international law. Countermeasures are by definition violations of international obligations, and states are generally reluctant to admit being in breach of international obligations. As a result, identifying countermeasures frequently requires a certain degree of interpretation.

Nevertheless, the practice included the actions of the United States against Uganda for genocide in 1978; the measures taken by the U.S. and other Western states against Poland and the Soviet Union for human rights violations in 1981; the action of the European community, Australia, New Zealand, and Canada in reaction to Argentine aggression in the Falkland Islands; the suspension of the right of South African airlines to land in the U.S. as a response to apartheid; and the embargos imposed on Iraq after the invasion of Kuwait, prior to the Security Council resolution.[120] The ILC's commentary on Article 54 of the Articles on State Responsibility lists a number of other examples.[121] Russia's expanded invasion of Ukraine, accompanied by its war crimes and crimes against humanity on a scale not seen since World War II, justifies a similarly historic use of countermeasures.

This report proposes the next logical step: the commencement of state countermeasures supported by the November 2022 U.N. General Assembly resolution (which recommends such action but does not mandate it). The resolution definitively established the standing for collective countermeasures, and the participating states can — and should — now act to design the specific countermeasures. Participating governments are within their discretion to determine how best to help compensate Ukraine (and potentially other injured states), subject only to the conditions for valid countermeasures laid out by the Articles on State Responsibility, such as proportionality and the prohibition against merely punitive objectives.[122]

118 Franchini, *supra* note 82, at 464.
119 *See* Antonios Tzanakopoulos, Disobeying the Security Council 188 (2011). *See also* Dawidowicz, *supra* note 64, at 413 (noting the same attitude in relation to third-party countermeasures).
120 Crawford, *supra* note 51, at 302–304. For a systematic and comprehensive study on state practice of third-party countermeasures, *see also* Dawidowicz, *supra* note 65.
121 ARSIWA with Commentaries, art. 54 § 3
122 *See* Section III(A), *infra.*

For instance, one of the primary considerations for compensation should include a design for a claims process. In May 2023, Ukraine and others established a Register of Damage under the auspices of the Council of Europe to serve as a record of evidence and claims information on damage, loss, or injury caused by the Russian aggression against Ukraine, which paves the way toward a future international comprehensive compensation claims mechanism for the victims of the Russian aggression.[123] However, a claims process is inherently limited in its capacity to calculate the broad disruption to Ukraine's economy and society that might lie outside of the figures provided in the Register of Damage. Countermeasures, then, allow states wider flexibility and latitude in shaping essential policy-driven programs of reconstruction and recovery.

V. Domestic Legal Mechanisms of State Countermeasures

State countermeasures are an extrajudicial process under domestically lawful acts of state, with broad discretion for policy design. Unlike the bilateral cases sometimes brought before the ICJ or other tribunals, there is no standard judicial or arbitral process for processing claims and awards. Under any state's legal system, they are non-judicial by nature — they are enacted under the domestic legal authority that enables the state's executive to act.

A. Executive Acts of State Under International and Domestic Law

As noted above, at the core of this proposal is the practical distinction between immunity from adjudication and immunity from executive action (in other words, non-judicial, or "extrajudicial" acts of state), which this proposal envisions. Thus, it is necessary to conceptualize separately the questions of (a) whether sovereign immunities under international law apply to non-judicial (executive/legislative) action, and (b) justiciability under domestic law.

1. Sovereign Immunity as to Executive Acts of State Under International Law

Under international law, the boundaries of sovereign immunity are "uncertain and untested."[124] The law of sovereign immunities primarily concerns the prohibition of the courts of one state from exerting authority over another state.[125] It is unclear whether it extends to purely executive action.[126] However, the notion that extrajudicial action is exempt from sovereign immunities while judicial acts are precluded by the same immunities is somewhat paradoxical and counterintuitive. Indeed, the weight of scholarly opinion appears to be that executive acts are not exempt from

123 *Council of Europe Summit creates register of damage for Ukraine as first step towards an international compensation mechanism for victims of Russian aggression*, COUNCIL OF EUROPE (May 17, 2023), https://www.coe.int/en/web/portal/-/council-of-europe-summit-creates-register-of-damage-for-ukraine-as-first-step-towards-an-international-compensation-mechanism-for-victims-of-russian-aggression/.

124 Moiseienko, *supra* note 66, at 33.

125 U.N. Convention on Jurisdictional Immunities of States and Their Property, art. V; *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries*, II (2) Y.B. Int'l L. Comm'n, art. 1 (1991); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 27 (2015).

126 *See id.*

sovereign immunities,[127] although it is worth noting that no definitive legal precedent for this position exists.[128]

Even so, presuming that executive acts are indeed bound by the laws of sovereign immunity, states are nonetheless entitled under international law to take lawful countermeasures against an aggressor state, such as the suspension of sovereign immunity proposed here. Having established that suspension of sovereign immunity is a lawful countermeasure under international law, the separate question of justiciability and lawfulness under state domestic law then arises.

2. *Justiciability Under Domestic Law*

The parallel legal issue is whether the asset transfer would be lawful under a particular state's domestic law — or alternatively, how to implement the legal authority necessary to effectuate the asset transfer. By effectuating asset transfer using unilateral executive action, a state's domestic sovereign immunity laws do not come into effect because the matter is typically not justiciable under domestic law. "Justiciability" refers to the types of matters that a court can adjudicate. If a case is "non-justiciable," then the court cannot hear it.[129] The principle of non-justiciability of executive acts — particularly those concerning foreign policy — arose from the principle of separation of powers as a feature of modern constitutionalism.[130] Indeed, Western legal tradition has been built on the proposition that the public authorities performing executive functions and those performing judicial functions should be kept structurally distinct.[131] As a result, in most Western domestic legal systems, sovereign immunity is only triggered through judicial measures.

For instance, in the U.S. legal system, matters concerning foreign relations are largely within the purview of the executive and legislative branches, "exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[132] In particular, the U.S. Foreign Sovereign Immunities Act (FSIA) is only a bar to suits against states, not extrajudicial acts by the president or Congress.[133] Likewise, the Canadian State Immunity Act (SIA) explicitly implements and defines the rules of sovereign immunity, which arise only in proceedings before

127 Tom Ruys, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions*, *in* Tom Ruys, Nicolas Angelet & Luca Ferro, The Cambridge Handbook of Immunities and International Law (2019); Ingrid (Wuerth) Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, (forthcoming) 1 George Wash. L. Rev. 14–23 (2023); Philippa Webb, *Building Momentum: Next Steps Towards Justice for Ukraine*, Articles of War 2 (May 2022), *available at* https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/.

128 Although Timor-Leste made this argument in its litigation against Australia in the ICJ concerning the (executive) seizure by Australia of certain documents that belonged to Timor-Leste's government, Timor-Leste dropped its suit when Australia returned the documents. As such, the question was never fully adjudicated. *See* Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Memorial of Timor-Leste, 2014 I.C.J. ¶ 5.8 (Apr. 28).

129 *Justiciability*, Cornell Legal Information Institute, https://www.law.cornell.edu/wex/justiciability/.

130 *See* JS Martinez, *Horizontal Structuring*, *in* Michel Rosenfeld & András Sajó, Oxford Handbook of Comparative Constitutional Law 548-549 (2012); Christoph Moellers, The Three Branches 16 (2013).

131 *Id.*

132 *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

133 *Id.*; *see also Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 143 S. Ct. 940, 946 (2023) ("The FSIA prescribed a 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983)).

a court.[134] Similarly, in the English legal system, courts generally consider an issue of a policy or foreign affairs nature to be non-justiciable or virtually non-justiciable.[135] In the U.K. Supreme Court decision *Belhaj v. Straw*, the Court defined non-justiciability as a rule barring adjudication on certain sovereign acts performed in high-level interstate transactions, subject to specific exceptions.[136] The U.K. Court also identified the constitutional separation of powers as the rule's theoretical foundation.[137]

While the specific legislation and practices may differ in respective Western states, the underlying legal principle is consistent across states: executive acts of state are, generally speaking, exempt from domestic sovereign immunity laws. Thus, in a presidential and statutory system like the United States, the executive power is sufficient under statutory and constitutional authority to adopt countermeasures effectuating the transfer of Russian assets, as discussed in Part VI below. In states with parliamentary systems, such as Canada, the United Kingdom, or Belgium, the act of state may require a Cabinet or parliamentary decision, again depending on relevant statutory or constitutional authority — but the act of state is fundamentally extrajudicial. Part VII provides an example of countermeasures under the parliamentary system using Canadian domestic law.

VI. Presidential System Case Example: U.S. Domestic Law

As noted above, the general principle behind this proposal is unilateral executive action. The U.S. legal landscape serves as an illustrative example of presidential power to adopt countermeasures. Although additional legislation is likely necessary to authorize the U.S. president to *confiscate* Russian sovereign assets, existing presidential authority is sufficient to *transfer* the frozen assets.[138] Other governments have analogous authorities that have already enabled them to freeze Russian assets.

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134 State Immunity Act, R.S.C. 1985, c. S-18 [hereinafter SIA].

135 *Belhaj v. Straw*, [2017] 2 WLR 456 (UK).

136 *Id.*

137 *Id.*; *see also* Paul Daly, *Justiciability and the "Political Question" Doctrine*, PUBLIC LAW 160-178 (2010) (explaining that the English court is unwilling to substitute its judgment for that of a political body and so considers that the appropriate accountability is in the political rather than the legal sphere), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451971.

138 Note that while, as described here, vesting title to Russian assets in the United States is not required in order to direct the use of those assets toward the reconstruction of Ukraine, circumstances might allow such vesting under IEEPA. There may be an argument that the Russian Federation's malicious cyber activities aimed at the United States — particularly during the 2016 election, which triggered a declaration of national emergency and sanctions against Russian government entities and officials — might serve as the predicate for a determination that the United States "has been attacked by a foreign country," thus triggering IEEPA's confiscation and vesting authorities, 50 U.S.C. § 1702(a)(1)(C). *See* Exec. Order No. 13694, 80 Fed. Reg. 10877 (Apr. 1, 2015) (declaring a national emergency due to the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the "increasing prevalence and severity of malicious cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States"); Exec. Order No. 13757, 82 Fed. Reg. 1 (Dec. 28, 2016) (taking additional steps to implement the national emergency with respect to significant malicious cyber-enabled activities); *Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment*, OBAMA WHITE HOUSE (Dec. 28, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/statement-president-actions-response-russian-malicious-cyber-activity. So far, however, it appears that the United States has refrained from officially referring to these activities as an "attack," preferring instead to label them as "malicious cyber-enabled activities." *See* Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Russian Assets*, LAWFARE (May 26, 2022) ("characterizing Russia's actions to date, including its cyber activities, as amounting to 'armed hostilities' or an 'attack' on the United States would run counter to the administration's clear policy of limiting the risk of escalation by avoiding any suggestion that Russia and the United States are engaged in a direct armed conflict with each other."). It is also arguable whether vesting Russian assets in response to these malicious activities would be a proportional response under the international law of countermeasures outlined below.

It is important to note that the operative word for this proposal under U.S. law is "transfer." Under this proposal, the U.S. does not "vest title" to the assets to make them property of the government. To transfer foreign assets in its jurisdiction into escrow, the U.S. need not "vest" ownership of the assets or take any title to them. Vesting title to Russian state assets necessarily implicates a host of separate considerations and would likely require additional legislation to authorize their confiscation.[139] The crucial distinction is that this proposal involves control over the *movement* of the assets rather than *ownership* over them. Thus, transfer means that title does not change into the hands of the U.S. government.

The proposal to seize frozen Russian assets under existing presidential authority was first advanced by Laurence Tribe, a Harvard professor of constitutional law.[140] Commentators, experts, and government officials have responded that the U.S. government does not have the authority to confiscate Russian state assets, and therefore the assets must simply remain frozen.[141] These common misconceptions about presidential authority to transfer versus confiscate assets arise from the 2001 amendment to the International Emergency Economic Powers Act of 1977 (IEEPA). In 2001, Congress amended the IEEPA in response to the September 11 attacks, adding a narrow provision authorizing the president, "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals" to "*confiscate* foreign-owned property and to dispose of it as he sees fit."[142] Relatedly, the Trading With the Enemy Act of 1917 (TWEA) permits confiscation and vestiture of foreign-owned property, but only during "the time of war."[143] This amendment is in contrast to the original 1977 IEEPA, which explicitly granted the president authority to "nullify, void, prevent or prohibit, any acquisition, holding, withholding, use" of foreign-owned property within the jurisdiction of the United States.[144] The same provision also authorizes the president to "direct and compel . . . any . . . *transfer*, . . . with respect to" that property — even in the absence of wartime.[145] Thus, the 1977 IEEPA authority is sufficient to transfer the frozen Russian assets in the U.S. to a suitable escrow account, trust, or analogous arrangement account for future disposition.

In *Dames & Moore v. Regan*, the U.S. Supreme Court upheld the president's authority under IEEPA Section 1702(a)(1)(B) to "transfer" certain Iranian assets back to Iran, via the Federal Reserve

139 Moiseienko, *supra* note 36, at 9, 13 (discussing generally how freezing Russian assets has been identified as more straightforward than seizure or confiscation).

140 Laurence H. Tribe & Jeremy Lewin, *$100 billion. Russia's Treasure in the U.S. Should Be Turned Against Putin*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html; Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, LAWFARE (May 23, 2022), https://www.lawfareblog.com/does-american-law-currently-authorize-president-seize-sovereign-russian-assets/.

141 *E.g.*, David Lawder, *Yellen says legal obstacles remain on seizure of Russian assets to aid Ukraine*, REUTERS (Feb. 27, 2023), https://www.reuters.com/world/yellen-says-legal-obstacles-remain-seizure-russian-assets-aid-ukraine-2023-02-27/; Paul B. Stephan, *Giving Russian Assets to Ukraine – Freezing Is Not Seizing*, LAWFARE (Apr. 26, 2022), https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing; Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets.

142 50 U.S.C. § 1702(1)(C) (emphasis added).

143 50 U.S.C. §§ 4301–41; § 4305(b)(1)(B).

144 50 USC § 1702(a)(1)(B).

145 *Id.* (emphasis added).

Bank of New York and into an escrow account at the Bank of England, where the disposition of the funds was determined under the terms of separate international agreements.[146]

In January 1981, as part of a series of actions taken to effectuate the Algiers Accords, which resolved the Iranian hostage crisis, U.S. President Reagan directed all U.S. banks holding Iranian assets — which had been blocked under the authority of IEEPA since 1979[147] — to transfer those assets to the U.S. Federal Reserve Bank. The President then directed the Federal Reserve Bank to transfer all Iranian state gold and other assets to an escrow account at the Bank of England held on behalf of a third party, the Algerian Central Bank.[148] The assets in the escrow account would then be disposed of based on other diplomatic agreements. The petitioner in the case sued to challenge the executive orders and actions taken by the Secretary of the Treasury to implement the Algiers Accords, arguing that these actions nullified its right to attach Iranian assets in satisfaction of a judgment it had obtained against Iran in U.S. courts, and argued that IEEPA gave authority only to freeze, not to transfer. The Court disagreed and refused to "read out of IEEPA all meaning to the words 'transfer,' 'compel,' or 'nullify,' and limit the President's authority in this case only to continuing the freeze."[149] The Court recognized that the congressional purpose in authorizing blocking orders is to "put control of foreign assets in the hands of the President,"[150] and, from the moment they are blocked, the assets become "'bargaining chip[s]' to be used by the President"[151] and are "at his disposal" when dealing with a hostile country.[152]

Generally, the Supreme Court has considered matters concerning foreign relations to be largely within the purview of Congress and the president, "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[153] According to the Court in *Bank Markazi v. Peterson*, "In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States."[154] In the same vein, *Dames & Moore* held that the political branches' authority to "exercise control over claims against foreign states and the disposition of foreign-state property in the United States" was "extensive" and that the president had that power based on a combination of statutory authorization, congressional acquiescence, and inherent Executive power."[155] Thus, the Supreme Court has recognized that, in order for the United States to

146 *Dames & Moore v. Regan*, 453 U.S. 654 (1981).
147 Exec. Order No. 12170 (Nov. 14, 1979), *available at* https://www.presidency.ucsb.edu/documents/executive-order-12170-blocking-iranian-government-property/.
148 Exec. Order Nos. 12277–12285, 46 Fed. Reg. 7913–7932 (Jan. 19, 1981), *available at* https://www.presidency.ucsb.edu/documents/executive-order-12277-united-states-iran-agreement-release-the-american-hostages/.
149 *Dames & Moore*, 453 U.S. at 655.
150 *Id.* at 673.
151 *Id.*
152 *Id.*; *see also* Ofc. of Legal Counsel, U.S. Dept. of Justice, *Legality of International Agreement with Iran and Its Implementing Executive Orders* (Jan. 19, 1981), at 309 ("the President has power under IEEPA to direct the transfer of funds of Iran"), available at https://www.justice.gov/file/22421/download/.
153 *Haviside*, 342 U.S. at 589.
154 *Bank Markazi v. Peterson*, 578 U.S. 212, 235 (2016) (citing *Dames & Moore*, 453 U.S. at 673–674, 679–681 (describing this history)).
155 *Dames & Moore*, 453 U.S. at 674–675.

contribute effectively to the enforcement of international norms, U.S. jurisprudence must preserve flexibility for the president to exert meaningful pressure against those financial, commercial, or other interests of the foreign state over which the United States has some control.

On March 1, 2023, U.S. President Joe Biden signed an executive order prolonging a "national emergency" in the U.S. with regard to the war in Ukraine, and invoked the presidential IEEPA authorities.[156] The currently invoked IEEPA authorities are sufficient for the transfer of frozen Russian state assets to a suitable escrow account for future disposition, according to international agreements. U.S. presidents have used IEEPA on other occasions to compel the transfer of foreign assets, much to the same effect as this proposal recommends, such as the transfer of Iraqi state assets during the Gulf War in 1992. In issuing the 1992 executive order "directing and compelling" every U.S. bank holding Iraqi state funds to transfer them to the Federal Reserve Bank of New York in compliance with a U.N. resolution that called for compensation of the victims of that aggression, President Bush invoked the same emergency powers under the 1977 IEEPA that President Biden invoked in the present crisis.[157]

The authority to direct or compel the transfer or use of blocked assets under IEEPA is not contingent on the United States confiscating the assets or taking title to the assets through vesting. Vesting the assets of a foreign sovereign (i.e., confiscating the assets and taking title to them) is authorized under IEEPA when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals. In such a case, IEEPA authorizes the president to "confiscate any property, subject to the jurisdiction of the United States, of any ... foreign country" that engaged in hostilities or the attack, and directs that "all right, title, and interest in any property so confiscated shall vest when, as, and upon the terms directed by the President."[158] IEEPA further requires that any funds so vested shall be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."[159] When the vesting power is exercised, the assets cease to be the assets of the foreign person and instead become assets of the United States, a permanent change of not just possession, but also title.[160]

156 President Biden has already recognized a national emergency stemming from the Ukraine crisis, continuing a declaration that has been in effect since 2014 (declared by President Obama upon Russia's assertion of control over Crimea), which is sufficient to invoke IEEPA authority. *See* 88 Fed. Reg. 13285 (Mar. 3, 2023) (continuing for one year the national emergency declared in Exec. Order No. 13660, 79 Fed. Reg. 13491 (Mar. 6, 2014), which was expanded in scope in Exec. Order No. 13661, 79 Fed. Reg. 15533 (Mar. 16, 2014), Exec. Order No. 13662, 79 Fed. Reg. 16167 (Mar. 20, 2014); and Exec. Order No. 14065, 87 Fed. Reg. 10293 (Feb. 21, 2022), and under which additional steps were taken in Exec. Order No. 13685, 79 Fed. Reg. 77357 (Dec. 19, 2014) and Exec. Order No. 13849, Fed. Reg. Doc. 2018-20816 (Sept. 20, 2018)).

157 Exec. Order No. 12817, 57 FR 48433 (Oct. 23, 1992).

158 50 U.S.C. § 1702(a)(1)(*C*).

159 *Id.*

160 *See Smith ex rel. Est. of Smith v. Fed. Rsrv. Bank of New York*, 346 F.3d 264, 272 (2d Cir. 2003) ("By the time Plaintiffs obtained a final judgment, the President had vested title in the confiscated assets in the United States Department of the Treasury and there simply were no more "blocked assets" [of Iraq] in the Federal Reserve Bank's custody against which Plaintiffs could execute."); *accord Acree v. Snow*, 78 Fed. Appx. 133 (D.C. Cir. 2003) (affirming substantially similar opinion by the U.S. District Court for the District of Columbia, *Acree v. Snow*, 276 F. Supp. 2d 31 (D.D.C. 2003), "for the reasons stated in *Smith*[, *supra*]).

The vesting authority was most recently used with regard to Iraqi assets in 2003, but that vesting occurred in very unique circumstances. At the time the assets were vested and title transferred to the United States, on March 31, 2003, major combat operations had just begun in Iraq; Saddam Hussein was not overthrown until April, and the Coalition Provisional Authority, which became the de facto government of Iraq, was not established until May. The vested assets were liquidated to cash and sent in pallets of dollar bills by airlift to Iraq for the Department of Defense to disburse to pay for immediate needs, such as civil servant salaries (which had not been paid since combat began). The United States needed direct control over those assets due to the situation on the ground, and there was no other mechanism available to allow for their immediate disbursement.[161] The situation here is quite different and is closer to the asset transfers that were done with respect to Iran in 1981, Iraq in 1992, and Afghanistan in 2022, where assets were consolidated and transferred, first to the Federal Reserve and then to established accounts abroad, for use pursuant to international agreements.[162]

In any event, the Supreme Court has made clear that exercising the *vesting* power (which at the time of the *Dames & Moore* opinion was available only under the TWEA, but is now also available under IEEPA in limited circumstances) is not required in order for the United States to exercise the *transfer* power. In *Dames & Moore*, the petitioner argued that "under the TWEA, the President was given two powers: (1) the power temporarily to freeze or block the transfer of foreign-owned assets; and (2) the power summarily to seize and permanently vest title to foreign-owned assets," and that "only the 'vesting' provisions of the TWEA gave the President the power permanently to dispose of assets, and when Congress enacted the IEEPA in 1977 it purposefully did not grant the President this power."[163] The Supreme Court disagreed with this argument:

> Although it is true the IEEPA [prior to its 2001 amendment] does not give the President the power to "vest" or to take title to the assets, it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here. Petitioner errs in assuming that the only power granted by the language used in both § 1702 and § 5(b) of the TWEA is the power temporarily to freeze assets. As noted above, the plain language of the statute defines such a holding. Section 1702 authorizes the President to "direct and compel" the "transfer, withdrawal, transportation, ... or exportation of ... any property in which any foreign country ... has any interest."[164]

161 *See* Jeremy Pelofsky, *U.S. Sent Pallets of Cash to Baghdad*, REUTERS (Feb. 6, 2007), https://www.reuters.com/article/us-iraq-usa-cash/u-s-sent-pallets-of-cash-to-baghdad-idUSN0631295120070207.

162 *See* Exec. Order No. 14064, 87 FR 8391 (Feb. 15, 2022) (authorizing the consolidation and transfer of the funds to the Federal Reserve Bank of New York).

163 *Dames & Moore*, 453 U.S. at 672.

164 *Id.* at 672, n.5. In light of this holding by the Supreme Court in 1981, it also cannot be argued that when Congress added the vesting power to IEEPA in 2001, it somehow intended to alter the nature of the "transfer" power. In other words, Congress was aware that, 20 years earlier, the Court had found that TWEA (and by derivation, the substantially similar language in IEEPA) authorized the United States to transfer assets of a foreign sovereign without the need for vesting, and, yet, it made no change to the IEEPA provision that contained that authorization.

A. Constitutional Concerns

This proposal will likely raise constitutional concerns among experts and policymakers. Proposals to "seize" Russian state property have already drawn misgivings from opponents, often citing constitutional obstacles presented by the Fifth Amendment's Due Process Clause and the Takings Clause.[165] While it is unlikely that even asset seizure or confiscation faces constitutional barriers in U.S. law, at the outset, this proposal to *transfer* is necessarily distinguishable in its analysis because it does not involve the U.S. government vesting title to the funds.

1. Due Process

The Due Process Clause of the Fifth Amendment states that "No person shall . . . be deprived of life, liberty, or property, without due process of law."[166] However, case law overwhelmingly supports the proposition that foreign states are not "persons" for Due Process Clause purposes.[167] The Supreme Court, in *Republic of Argentina v. Weltover*, left this question open, but suggested that a parallel might be drawn between foreign states and the 50 states of the U.S., which do not receive Due Process Clause protections under Supreme Court precedent.[168] The Second Circuit Court of Appeals and the U.S. Court of Appeals for the D.C. Circuit followed suit, holding that foreign states are not protected by the Due Process Clause.[169]

2. Takings Clause

Like due process, the Takings Clause of the Fifth Amendment, which prohibits "private property [from] be[ing] taken for public use . . . without just compensation,"[170] presents no barrier to transferring Russian state assets into escrow. At the outset, there is an argument to be made

165 *See, e.g.*, Anderson and Keitner & Stephan, *supra* note 141; Andrew Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable*, JUST SECURITY (Apr. 18, 2022), https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian- central-bank-assets-are-legally-unavailable; Paul Stephan, *Seizing Russian Assets*, 17(3) CAPITAL MARKETS L. J. 276 (2022).

166 U.S. CONST. amend. V.

167 *See infra* note 168. *But see:* Professor Ingrid Wuerth argues that foreign states should be treated as "persons" for purposes of the Due Process Clause, based on a sophisticated separation of powers argument. But in her article, she concedes that federal case law has "uniformly" held to the contrary since 1992. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 647 (2019) (stating that the Second Circuit held that foreign states were persons for due process clause purposes in *Texas Trading v. Federal Republic*, 647 F.2d 300 (2d Cir. 1981), but conceding that based on the dicta in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992), "lower courts have since uniformly held that foreign states are not 'persons' protected by the Fifth Amendment Due Process Clause.").

168 *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) ("Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause, *cf. South Carolina v. Katzenbach*, 383 U.S. 301, 323-324 (1966) (States of the Union are not 'persons' for purposes of the Due Process Clause)).

169 *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002); *Estate of Hirshfeld v. Islamic Republic of Iran*, 330 F. Supp. 3d 107, 137 (D.D.C. 2018) ("foreign states are not 'persons' protected by the Fifth Amendment."); *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 56–57 (D.D.C. 2010) ("Foreign states are not 'persons' protected by the Fifth Amendment, and so may not claim the protections of the Due Process Clause."); *see also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012) ("Other circuits have confronted the issue and have held that foreign states are not 'persons' entitled to rights under the Due Process Clause. We agree.").

170 U.S. CONST. amend. V.

that foreign sovereign property is not "private property" for Takings Clause purposes.[171] However, the U.S. Supreme Court has held that property belonging to the U.S. states and municipalities constitutes "private property" for purposes of the Takings Clause.[172] Accepting the analogy between foreign states and U.S. states that the Court put forth in *Republic of Argentina v. Weltover* (described above), there is a colorable argument that foreign states could also qualify for Takings Clause protections. Even so, it is improbable for the "transfer" of assets to constitute a "taking" if the government does not, at any point, vest title in them or claim that the assets are now U.S. property. In this way, the transfer of assets to an escrow account is more analogous in nature to the freezing or blocking of assets, where the foreign state still retains title but cannot access them.

Courts are clear that there is no "taking" when the U.S. freezes foreign assets to use as leverage in negotiations with a hostile nation. Federal courts have consistently expressed the same conclusion as the D.C. District Court, citing the Ninth Circuit Court of Appeals, stated in *Holy Land Foundation for Relief and Development v. Ashcroft*: "The case law is clear that blockings under Executive Orders [...] that do not vest the assets in the Government [...] do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context."[173] Furthermore, the Supreme Court in *Dames & Moore v. Regan* unequivocally held that where "the President's action in nullifying the attachments and ordering the transfer of assets was taken pursuant to specific congressional authorization, it is 'supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'"[174] In the present instance, the president derives congressional authorization from the IEEPA, and thus, the Fifth Amendment does not present a constitutional barrier for the executive transfer of frozen Russian assets into escrow and for future disposition according to international agreements.

171 John M. Harmon, "Vesting of Iranian Assets," *Memorandum for the Attorney General of the United States* (Mar. 12, 1980) ("We do not think that any domestic constitutional issue arises in the taking of Iranian government property. The Fifth Amendment by its terms applies only to the taking of 'private property' without just compensation. Thus, on its face the Just Compensation Clause does not apply. The role of the Constitution in domestic law, as well as the text, supports this conclusion. Constitutional protections limit the power of the United States to act upon persons who are subject to its power by virtue of their presence in this country or their activities here. The United States asserts its power with respect to foreign nations because as a sovereign among equals it enjoys powers and privileges under international law and not because of its domestic authority." (Citing (as a *cf. United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-18 (1936) (holding that the United States is a sovereign and exclusively holds U.S. powers in international relations)), *available at* https://www.justice.gov/file/22356/download. *See also* Lori F. Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 489 (1987) (arguing that foreign states' "constitutional claims against the actions of the federal political branches must fail on the merits because of the relationship of foreign states to the federal structure").

172 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (noting that state and local governments are entitled to the same protections as private property owners under the Takings Clause); *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984) ("The reference to 'private property' in the Takings Clause of the Fifth Amendment encompasses the property of state and local governments when it is condemned by the United States.").

173 *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d at 57, 78 (D.D.C. 2002) (citing *Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9th Cir. 1981) (rejecting takings claim because blocking under TWEA is not equivalent to vesting). *See also Tole S.A. v. Miller*, 530 F. Supp. 999 (S.D.N.Y. 1981) (Takings Clause-based attacks "on the government's freezing of assets has been rejected by every court that has previously considered this issue."); *Zarmach Oil Services Inc. v. U.S. Dept. of Treas. Office of Foreign Assets Control*, Civil Action No. 09-2164 (ESH), Slip Op. at 14 (D.D.C. 2010) ("It is well-established that the blocking of assets pursuant to an executive order is not a taking within the meaning of the Fifth Amendment."); *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 51 (D.D.C. 2005).

174 *Dames & Moore*, 453 U.S. at 655 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)).

B. Sovereign Immunity Under U.S. Law

The U.S. Foreign Sovereign Immunities Act (FSIA) grants immunity to foreign states and their agencies and instrumentalities from the jurisdiction of U.S. courts, subject to certain enumerated exceptions in the statute.[175] The FSIA is only a bar to claims by private litigants, not state action.[176] Thus, the present proposal does not trigger FSIA protections because it calls for the unilateral transfer of foreign state assets by the president, without the involvement of the courts.

VII. Parliamentary System Case Example: Canadian Domestic Law

In Canada, the federal government has constitutional authority over foreign affairs matters. The government has used the Special Economic Measures Act (SEMA),[177] and more recently the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law),[178] to impose sanctions in situations where international organizations such as the United Nations have requested that it do so, or where international security crises, grave breaches of human rights, or corruption by foreign state officials prompted such a move by the federal Cabinet.[179] SEMA, in particular, had previously provided for the property[180] of designated foreign states or their nationals to be "seized, frozen or sequestered" by way of an order issued by the federal Cabinet.[181]

In spring 2022, the Canadian government introduced new confiscatory measures, primarily in response to Russia's invasion of Ukraine and the government's evident desire to strengthen its economic sanctions regime in response to the worsening situation. In June 2022, the Canadian Parliament passed the new law as part of Bill C-19 (the government's budget bill),[182] as amendments to the existing SEMA[183] and the Magnitsky Law.[184]

The June 2022 law achieved two important outcomes. First, it reworded the order power to permit the assets to be "seized or restrained in the manner set out in the order."[185]

Second, it added a set of provisions that created the ability for the government to obtain *forfeiture* of either state or private assets, not only in situations of gross human rights violations, but also in a broader range of circumstances where sanctions are invoked — particularly where the government has determined that "grave breach[es] of international peace and security" have

175 28 U.S.C.A. § 1604.
176 *See supra* note 133.
177 Special Economic Measures Act, S.C. 1992, c. 17 [hereinafter SEMA].
178 Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c. 21.
179 SEMA § 4(1.1).
180 "Property" is broadly defined in SEMA § 2 to include "any type of property, whether real or personal or immovable or movable, or tangible or intangible or corporeal or incorporeal, and includes money, funds, currency, digital assets and virtual currency."
181 SEMA § 4(1)(b) (prior to the 2022 amendments).
182 Budget Implementation Act, S.C. 2022, c. 10.
183 SEMA, as amended.
184 Sergei Magnitsky Law, as amended. The measures built on those originally championed by the World Refugee and Migration Council. *See Repurposing Frozen Assets to Assist the Forcibly Displaced – Research Paper*, World Refugee & Migration Council (Sept. 14, 2020), https://wrmcouncil.org/publications/research-paper/repurposing-frozen-assets-to-assist-the-forcibly-displaced.
185 SEMA § 4(1)(b).

occurred.[186] Under the new forfeiture provisions, Canada's Minister of Foreign Affairs (or another minister designated to do so) can apply to a court in the Canadian province in which the assets are located for a court order that the assets be forfeited to the federal government.[187] The asset owner, whether an individual or state, is entitled to notice and may make submissions to the court during the forfeiture hearing.[188] Once the assets are disposed of, the minister may pay amounts out of the proceeds of the disposition for the following purposes:

(a) The reconstruction of a foreign state adversely affected by a grave breach of international peace and security;
(b) The restoration of international peace and security; and
(c) The compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations, or acts of significant corruption.[189]

The June 2022 law also provides that the Minister of Foreign Affairs may enter into agreements with foreign states that allow those states to use the funds for any of the above-listed purposes.[190] The transfer of funds to Ukraine for rebuilding, and to other states affected by the refugee and displacement crisis caused by the war, conform to these purposes.

A. Sovereign Immunity Under Canadian Law

In Canada, customary international law is automatically incorporated into Canada's common law.[191] It follows that Canada may take lawful countermeasures with respect to suspending sovereign immunity of Russian state assets, provided that doing so does not violate domestic law.

Like the United States, Canada has legislation that explicitly implements and defines the rules of sovereign immunity, called the State Immunity Act (SIA),[192] which allows for the orderly litigation of sovereign immunity claims.[193] But, as in the United States with its FSIA, Canada's SIA is directed at judicial proceedings against property of foreign states, and the immunities provided are extensive. Given these provisions of the SIA, if the Canadian government were to commence judicial proceedings to forfeit Russian state assets as envisioned under SEMA, Russia would likely claim its immunity to the proceeding, which it may do without attorning to the jurisdiction of the Canadian court.[194]

186 SEMA § 4(1.1).
187 SEMA § 5.4(1).
188 SEMA § 5.4(2) and (3). Though, notably, the person is not entitled to contest the Governor-in-Council's initial order seizing or restraining the assets (§ 5.1(1)).
189 SEMA § 5.6.
190 SEMA § 7.1.
191 *R v. Hape*, S.C.C. 26 ¶ 36 (2007).
192 R.S.C. 1985, c. S-18.
193 Phillip M. Saunders & Robert J Currie, Kindred's International Law: Chiefly as Interpreted and Applied in Canada 386 (9th ed. 2019).
194 SIA § 4(3)(a).

But, as noted above, SEMA allows the Canadian government to move directly to seize Russian state assets, as the government suspends Russia's sovereign immunity. The state assets are presumptively immune from court action, but they arguably are not immune from the Cabinet action authorized under SEMA. Seizure is the necessary prerequisite for the state to order that the assets be transferred into an escrow account.

The Canadian government's seizure and transfer of Russian assets would thus not be a forfeiture case of the kind authorized by the new amendment to SEMA, a provision mainly aimed at the private property of oligarchs. In this proposed approach, the role of the courts in supervising such forfeitures does not come into play.

One potential solution, in other words, is that the forfeiture provisions would be applied only to private assets, while the forfeiture of state assets could be carried out by executive action. The SIA is explicitly aimed at creating sovereign immunity from the jurisdiction of courts — therefore, the SIA arguably does not restrain the executive action, i.e., the Cabinet order. As such, it follows that under Canadian domestic law, state assets are immune only from the adjudicative process of courts, and not from executive action.[195] Therefore, in order to effectuate liquidation and repurposing, the Cabinet's power to execute "seizure or restraint in the manner set out in the order"[196] could be interpreted to include some form of disposal of the assets, or SEMA could be amended to this specific effect.

Alternatively, the Canadian government may transfer the assets via executive order outside of the SEMA scheme, such as by order-in-council. Under each of these options, the government could then transfer the assets to a Canadian state escrow account, from which the assets could eventually be paid out as part of an internationally coordinated remedy for Russia's aggression.

Conclusion

This report establishes an innovative and legally sound system for reparations, including compensation, for Ukraine and its international partners that have assisted Ukraine in defending itself against Russia's invasion. It describes the legal mechanisms and justifications already in place that allow the United States and its partners to take action. With estimates that it will take $1 trillion or more to rebuild Ukraine after the destruction that Russia has inflicted, and Russia showing no indication that it will pay its obligations, it is imperative that the international community cooperate to ensure Russia's performance of its legal obligation to make reparations, including compensation, to Ukraine.

195 To the extent there exists any doubt about this proposition, the government could amend the SIA to expressly suspend immunity vis-à-vis Russian state assets, which would also amount to a domestic implementation of the countermeasure.
196 SEMA § 4(1)(b).

Afterword

As Ukrainians stake their lives battling for national survival, other countries that hope to defeat aggression can prepare a counteroffensive of their own. Their counteroffensive would be nonviolent, but it can secure a more lasting victory. They should plan a massive program of reconstruction and recovery, to begin operation by next year. To give that plan credibility, they should prepare to use frozen Russian assets to help fund it. This report explains the legal approach.

Russia's main military strategy now is to be a wrecker,[197] to ruin Ukraine, outlast it in a war of attrition, and be sure a free and growing Ukraine will not show up Putin's increasingly isolated and corrupt dictatorial society. The free world's strategy would sustain Ukraine in a more secure Europe, recall the ambition of the Marshall Plan that once revived Western Europe, brighten the future of the entire surrounding region, and revitalize the European project itself. That would be a true victory against Russia's effort to plunge Europe back into a darker age.

Ukraine's friends have not countered Russia's strategy of wreckage, a strategy spotlighted again in the catastrophic destruction of the Kakhovka Dam. Ukraine lost 29 percent of its GDP in 2022 and more than 13 million of its people remain displaced. Its private sector has been profoundly deranged by the war. Inflation runs at 27 percent. Outside fiscal support from the U.S. and EU countries to keep Ukraine's government functioning runs at about $3 billion a month — $100 million a day. Ukraine cannot afford more debt. Beyond those enormous costs, the World Bank estimates that at least another $14 billion in financial support is needed this year for the most urgent reconstruction needs.[198] And this sum is only a fraction of the more than $400 billion estimate for recovery and reconstruction over the next 10 years. None of those numbers include costs of rebuilding in Ukrainian territories currently occupied by Russia.

While much of the needed help could come over time from private investment, private money will only follow or be secured by very large infusions of public funds. Many of the needs, from infrastructure to clearing explosives, will not be addressed by private investment at all. Who will pay? Who should pay?

It is a circumstance unique in history that, as it launched the largest-scale international aggression in generations, Russia left the means to compensate its victims in the jurisdiction of law-abiding states. This report explains how to take the first step by developing a workable, legal approach.

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197 Marnix Provoost & Pieter Balcaen, *What Is Russia's Strategy In Ukraine?*, Modern War Institute (Jun. 5, 2023), https://mwi.usma.edu/what-is-russias-strategy-in-ukraine/.
198 *Updated Ukraine Recovery and Reconstruction Needs Assessment*, *supra* note 12.

Appendix A: Author and Contributor Biographies

This report has been produced with the contributions of, and upon consultation with, numerous independent experts, including the following who have agreed to be identified publicly:

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Dr. Philip D. Zelikow (Principal Adviser) is the White Burkett Miller Professor of History at the University of Virginia and in Fall 2023 will transition to Stanford University as a Distinguished Visiting Fellow at the Hoover Institution. An attorney and former career diplomat who has served at all levels of American government, his federal service includes work in the five administrations from Presidents Reagan through Obama. He has also led three bipartisan national commissions: the 2001 Carter-Ford commission on federal election reform, the 9/11 Commission in 2003-04, and the Covid Crisis Group, whose acclaimed report, "Lessons from the Covid War," was published in April 2023. His historical scholarship focuses on critical episodes in American and world history, including most recently "The Road Less Traveled: The Secret Turning Point of the Great War, 1916-17."

Dr. Anton Moiseienko (Author) is a Lecturer in Law at the Australian National University. His work focuses on transnational crime, economic crime, and cybercrime, as well as legal and policy aspects of targeted sanctions. He is the author of "Corruption and Targeted Sanctions" (Brill, 2019), a monograph on the legal and policy implications of Magnitsky laws. Anton was previously a Research Fellow at the Centre for Financial Crime and Security Studies of the Royal United Services Institute (RUSI), a U.K. defense and security think tank.

Professor Robert J. Currie KC (Author) is Distinguished Research Professor at the Schulich School of Law at Dalhousie University. His scholarship focuses primarily on crime that crosses borders and the legal regimes that seek to suppress it, and his published work has been cited by many courts, including the Supreme Court of Canada. Professor Currie regularly acts as a consultant and adviser to government and private clients in criminal matters with transnational aspects and is also a regular contributor to judicial education on public international law and criminal law. He is a member of the Canadian Task Force Against Global Corruption and a founding co-editor of the Transnational Criminal Law Review.

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leaders on policy development and was ranked as a Top 100 Global Thinker by the European Social Think Tank in 2010 and a Young Global Leader by the World Economic Forum. Dr. Ibrahim is the author of "The Rohingyas: Inside Myanmar's Hidden Genocide" (Hurst & OUP) and "Radical Origins: Why We Are Losing The Battle Against Islamic Extremism" (Pegasus New York).

Dr. Lloyd Axworthy is Chair of the World Refugee Council and previously served as President and Vice-Chancellor of the University of Winnipeg. Dr. Axworthy served in the Manitoba Legislative Assembly and Canada's Federal Parliament for 21 years. He has held several Cabinet positions including Minister of Employment and Immigraiton, Minister of Transport, and Minister of Foreign Affairs. Dr. Axworthy became internationally known for his advancement of the Ottawa Treaty, a landmark global treaty banning anti-personnel landmines.

The Right Honorable Sir Tony Baldry KC served as the UK government's former Parliamentary Under-Secreatry of State for Foreign, Commonwealth, and Development Affairs. He was knighted by Queen Elizabeth II in 2012, appointed to the HM Privy Council in 2014, and became a Lay Canon of Oxford's Christ Church Cathedral in 2015. His ministerial posts included Minister of State, Minster of Agriculture, Fisheries and Food, Parliamentary Under-Secretary of State Department of Energy and Parliamentary Under-Secretary of State Department of the Environment.

Dr. Monika Brzozowska-Pasieka is an attorney at law, academic lecturer, and author of numerous books and articles on human rights, compensation for victims of armed conflicts, personal right law, and intellectual property law (including digital, GDPR, and press law). She is a lecturer for judges and prosecutors at the National School of Judiciary and Public Prosecution. She conducts training courses on discrimination, human rights, personality rights, and special/general damages for lawyers from the Visegrad Group. In 2019, she was awarded the title of Council of Europe tutor/expert in the program HELP. She received her Ph.D. in Law from The University of Silesia and is a graduate of the Maria Curie-Skłodowska University's Faculty of Law and Administration and Faculty of Political Sciences. She deals with proceedings where plaintiffs seek compensation for World War II property losses.

Irwin Cotler is the International Chair of the Raoul Wallenberg Centre for Human Rights, Emeritus Professor of Law at McGill University, former Minister of Justice and Attorney General of Canada and longtime Member of Parliament, and an international human rights lawyer. A constitutional and comparative law scholar, Professor Cotler is the author of numerous publications and seminal legal articles and has written upon and intervened in landmark Charter of Rights cases in the areas of free speech, freedom of religion, minority rights, peace law and war crimes justice.

Ambassador Kelley Currie is a human rights lawyer who has served as U.S. Ambassador-at-Large for Global Women's Issues and U.S. Representative to the United Nations Economic and Social Council. Throughout her career in foreign policy, Ambassador Currie has specialized in human rights, political reform, development, and humanitarian issues. She is currently an Adjunct Senior Fellow at the Center for New American Security and Senior Nonresident Fellow at the New Lines Institute for Strategy and Policy.

Dr. Thomas Grant has been a Fellow of Wolfson College in the University of Oxford and Fellow of the Lauterpacht Centre for International Law in the University of Cambridge since 2002. Dr. Grant has acted as legal adviser and advocate to governments for over 20 years on international law matters, including in cases before the International Court of Justice, Law of the Sea Convention system, and before ICSID, SCC, and ICC arbitral tribunals. He served as Senior Advisor for Strategic Planning in the Bureau of International Security and Nonproliferation at the U.S. Department of State.

Ambassador John Herbst is the Senior Director of the Atlantic Council's Eurasia Center and served 31 years as a Foreign Service Officer at the U.S. Department of State, retiring at the rank of Career Minister. Herbst previously served as U.S. Ambassador to Ukraine; U.S. Ambassador to Uzbekistan; U.S. Consul General in Jerusalem; Principal Deputy to the Ambassador-at-Large for Newly Independent States; Director of the Office of Independent States and Commonwealth Affairs; Director of Regional Affairs in the Near East Bureau; and at the U.S. embassies in Tel Aviv, Moscow, and Saudi Arabia.

Brooks Newmark is a businessman, philanthropist, politician, and social reform campaigner. He was the Member of Parliament for Braintree. He served in the Coalition Government as Minister for Civil Society, with responsibility for charities, the voluntary sector and youth, having previously served on the Treasury Select Committee and as a Government Whip and Lord Commissioner of the Treasury.

Jerzy Pasieka is an experienced attorney at law dealing with cases concerning human rights, compensation for victims of armed conflicts, and personal right law. He is an author of legal books and comments on his area of expertise. Throughout more than three decades of practice, he has specialized in civil law and he has acted as a representative of Polish former prisoners of German concentration camps and former soldiers of the Home Army seeking compensation for them before Polish courts including the Supreme Court. He has provided legal training for lawyers on civil law.

Ambassador Allan Rock is President Emeritus and Professor of Law at the University of Ottawa. He practiced for 20 years as a trial lawyer in Toronto before his election to Parliament, where he held multiple Cabinet posts. He later served as Canadian Ambassador to the United Nations in New York, where he led the successful Canadian effort to secure the unanimous adoption by U.N. member states of The Responsibility to Protect.

Robert Tyler is a Senior Policy Advisor at New Direction Foundation, a Brussels-based think tank founded by Margaret Thatcher in 2009 as the official foundation of the European Conservative Movement. Prior to working for New Direction, he worked as policy adviser in the European Parliament, focused on foreign policy and counterterrorism.

Robert Zoellick is Senior Counsel at Brunswick Group Geopolitical and an Adjunct Professor and Senior Fellow at Harvard University's Kennedy School of Government. Zoellick served as President of the World Bank Group from 2007 to 2012. Previously he served in several Presidential Administrations as U.S. Trade Representative, Deputy Secretary of State, Counselor to the Secretary of the Treasury, Under Secretary of State and White House Deputy Chief of Staff.

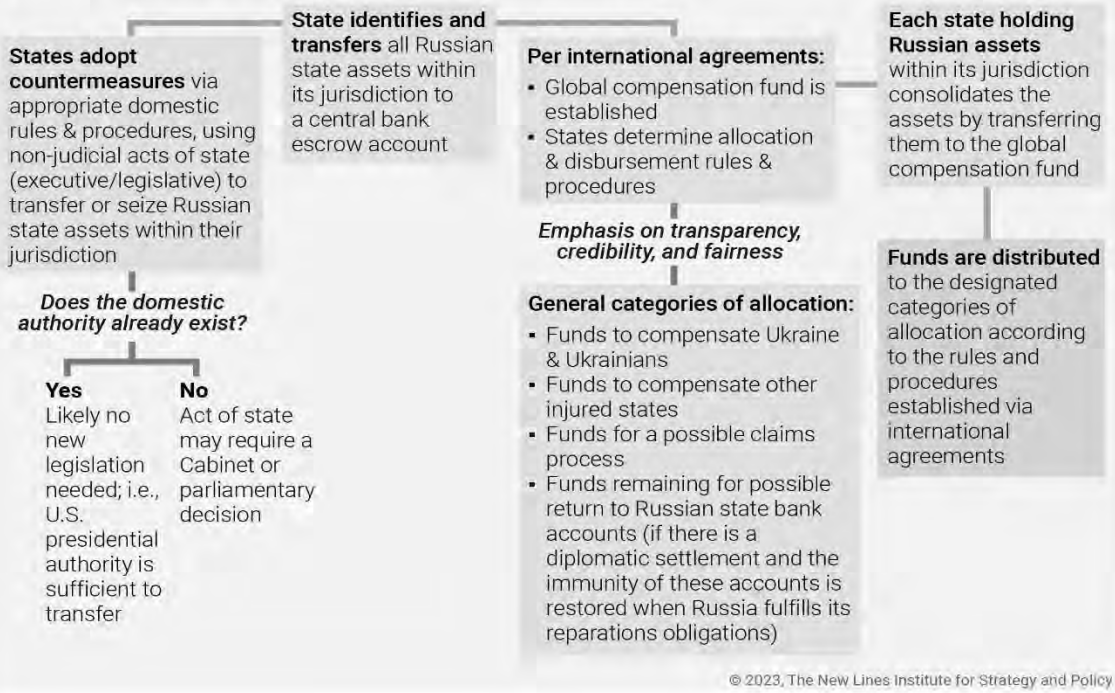
Multilateral Action Framework for Transferring State Assets

Why transfer Russian state assets?

- Accountability for Russia's egregious violations of international law
- Legal obligation under international law for Russia to bear the costs
- Justified and lawful under international and domestic laws
- UNSC unlikely to mandate reparations

November 2022 U.N. Resolution:

- Russia must "bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts."
- Member states must establish an international mechanism of reparation
- The reparations obligation can and must be enforced immediately



Addition III

Legal Memorandum on Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine

LEGAL MEMORANDUM

20 November 2023

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Subj: On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine

Issue: This Memorandum addresses whether international law permits States that have frozen Russian State assets, held by their public or private financial institutions, to transfer those assets in order to provide compensation for the damage inflicted by Russia during its unprovoked war of aggression against Ukraine, which continues to this day with no end in sight.

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I. SUMMARY

1. For the reasons set out below, the authors of this Memorandum – experienced public international lawyers and practitioners from Belgium, Germany, Japan, the Netherlands, Nigeria, the United Kingdom, and the United States – having given their most serious consideration to this issue, conclude that it would be lawful, under international law, for States which have frozen Russian State assets to take additional countermeasures against Russia, given its ongoing breach of the most fundamental rules of international law, in the form of transfers of Russian State assets as compensation for the damage resulting directly from Russia's unlawful conduct. Only Russian State assets would be affected. No new measures would be imposed on assets that are genuinely privately owned. In coming to these conclusions, none of us are acting on behalf of sponsors or clients.

2. Our recommendation, set forth below, is that the compensation be provided through an international mechanism, to which the States concerned would transfer the Russian State assets currently under their control. This mechanism could support urgent programs to efficiently and effectively mitigate further damages and aid Ukraine's recovery, while it could also be given the authority and capacity to receive and review claims from Ukraine and other injured parties – public and private – and distribute appropriate compensation in line with internationally-agreed standards and procedures. The total amount of compensation would not exceed the amount owed by Russia for the damage it has caused. In the unlikely event that the Russian State assets transferred to the mechanism are found to exceed the amount of damage suffered by Ukraine and other injured States and entities, the excess would be returned to the Russian accounts from which the assets were transferred.

3. There is no doubt about the illegality of Russia's invasion of Ukraine, occupation of Ukrainian territory or annexation of large parts of it. By these actions, Russia has violated the most fundamental rules of international law, enshrined, *inter alia*, in the United Nations Charter, Article 2, paragraph 4, which prohibits the use or threat of force against the territorial integrity or political independence of another State. The principle is embodied in UN General Assembly ("UNGA") resolution 2625 (1970), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which reflects customary international law and declares unlawful and inadmissible the acquisition

of another State's territory by force. This rule is widely recognized as a cornerstone of the post-World War II international legal order; indeed, it is an indispensable element of the foundation upon which the entire rules-based order is built.

4. Based on its violation of these fundamental principles, Russia's invasion of Ukraine has been condemned three times in resolutions adopted by the UNGA, which collectively call upon Russia to immediately cease its armed intervention in Ukraine, withdraw its forces from Ukrainian territory, and compensate Ukraine for the damage it has inflicted. On 16 March 2022, the International Court of Justice ("ICJ") ordered provisional measures against Russia, calling on it to immediately end its military activities against Ukraine. Russia has ignored the UNGA's resolutions and the ICJ's Order on Provisional Measures.

5. In the face of such a blatant violation of a State's international legal obligations, international law permits other States to respond with "countermeasures". Lawful countermeasures are measures that would be unlawful if imposed against an innocent State, that is, one that has not violated its international obligations, but are permitted if they are taken against an offending State and are intended to induce the offending State to cease its unlawful conduct, or to comply with its obligation to compensate States that have been injured by that conduct.

6. Third States, that is, States that have not been directly injured by the offending State's conduct, are permitted by international law to take collective countermeasures against the offending State, in this case Russia, for grave breaches of its obligations under peremptory norms of international law that have an *erga omnes* character, as here.

7. Moreover, States that have been specially affected by Russia's unlawful acts, or damaged indirectly by the threats, costs or disruptions these acts have caused, can join in countermeasures employed by other States on these grounds, as well.

8. As an early response to Russia's unlawful invasion of Ukraine, several States where Russian State assets are located took action to freeze those assets so that they would not be available to finance Russia's war of aggression, and these assets remain frozen today. Whether labelled as such or not, these were lawful countermeasures under international law. And they remain so, since Russia's unlawful conduct, to which they were a response, has not ceased. Absent Russia's offending conduct, it would have been unlawful for any State to freeze its assets.

9. In light of the enormous level of damage and destruction Russia has inflicted on Ukraine during nearly two years of war, and the immense cost of reconstruction, some of which has

been borne by States holding Russian State assets, calls have arisen for those States to use the frozen assets – an estimated $300 billion spread across several States – as compensation to Ukraine and other injured parties since, under international law, Russia is obligated to compensate them for all the damage it has caused.[1] Under this approach, any assets transferred to Ukraine or other injured parties would be credited to Russia as an offset against its total liability.

II. RELEVANT FACTS

10. On 24 February 2022, Russia declared a "*special military operation*" in Ukraine. In reality, the operation constituted an unprovoked full-scale military invasion of Ukrainian sovereign territory, following upon Russia's involvement in the occupation of Ukrainian territory that began in 2014.[2] The apparent aim of the "*special military operation*" was the destruction of the Ukrainian State, with an initial objective of quickly bringing down Ukraine's democratically elected government in Kyiv.[3] Although Russia has thus far failed to achieve these goals, it has managed to seize and occupy a significant portion of Ukrainian territory, and it has illegally taken measures to annex large parts of four Ukrainian provinces, integrating them into the Russian Federation. It is currently waging a war of attrition, hoping that, with a far

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[1] See, e.g., Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine' (*Lawfare*, 2 May 2022) <https://www.lawfaremedia.org/article/legal-approach-transfer-russian-assets-rebuild-ukraine>; 'Lawrence Summers, Philip Zelikow and Robert Zoellick on why Russian reserves should be used to help Ukraine' *The Economist* (London, 27 July 2023) <https://www.economist.com/by-invitation/2023/07/27/lawrence-summers-philip-zelikow-and-robert-zoellick-on-why-russian-reserves-should-be-used-to-help-ukraine>; Oleksandr Vodiannikov, 'Compensation Mechanisms for Ukraine: An Option for Multilateral Action' (*OpinioJuris*, 13 May 2022), <http://opiniojuris.org/2022/05/13/compensation-mechanism-for-ukraine-an-option-for-multilateral-action/>; Laurence Tribe, Raymond Tolentino, Kate Harris, Jackson Erpenbach, and Jeremy Lewin, 'The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine' (*Renew Democracy Initiative*, 17 Sept. 2023) <https://rdi.org/wp-content/uploads/2023/10/RDI-Making-Putin-Pay-Report-September-2023_compressed-1.pdf>; Yuliya Ziskina, et al, 'Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine' (*New Lines Institute*, 14 Jun. 2023) <https://newlinesinstitute.org/rules-based-international-order/multilateral-asset-transfer-a-proposal-for-ensuring-reparations-for-ukraine/>; Kristina Hook and Yonah Diamond, 'The case for seizing Putin regime assets' (*Atlantic Council*, 23 August 2023) <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/the-case-for-seizing-russian-assets-of-aggression/>

[2] See *Ukraine and the Netherlands v. Russian Federation* App nos 8019/16, 43800/14 & 28525/20 (ECtHR, 25 Jan. 2023).

[3] 'Russian invasion of Ukraine: A timeline of key events' (*CNN*, 23 Feb. 2023) <https://edition.cnn.com/interactive/2023/02/europe/russia-ukraine-war-timeline/index.html>; 'Russia has invaded Ukraine: what we know so far' *The Guardian* (London, 24 Feb. 2023) <https://www.theguardian.com/world/2022/feb/24/russia-has-invaded-ukraine-what-we-know-so-far>.

greater population and considerably more military resources than Ukraine, it will eventually outlast Ukraine, ultimately forcing an acceptance of its demands.

11. Russia's aggression has caused massive loss of life and destruction in Ukraine. Its major cities and many smaller towns have, for more than one and half years, repeatedly faced extensive aerial bombardment and missile strikes aimed at population centres and civilian infrastructure unrelated to any military activity. As of 24 September 2023, the UN Office of the High Commissioner for Human Rights recorded 27,449 civilian casualties in Ukraine, including 9,701 fatalities, but noted that the real figures are likely considerably higher.[4] These numbers do not include the tens if not hundreds of thousands of Ukrainian military casualties – dead and wounded – caused by Russia; or the damage Russia has brought about by forcing more than seven million Ukrainians to flee the country. In February 2023, the World Bank estimated that the reconstruction and recovery of Ukraine would require funding of USD $411 billion over 10 years.[5] That number is likely to have increased considerably since the estimate was made. For as long as Russia's aggression goes on, the scale of destruction to Ukraine's civilian population, its armed forces, its national infrastructure and the public and private property of its people will continue to grow. Left unremedied, there is a danger that the Ukrainian State and economy could collapse, which is the apparent intention of Russia's current warfare, which includes the disruption of all of Ukraine's maritime commerce and its civil aviation, as well as broad attacks on vital infrastructure.

12. The unlawfulness of Russia's military campaign in Ukraine, and its responsibility for the immense damage it has caused, are beyond reasonable dispute. The waging of an aggressive war to conquer another State's territory or remove its government is a flagrant violation of Article 2, paragraph 4, of the UN Charter, as well as customary international law. An aggressive war breaches a peremptory norm of international law – the prohibition of aggression – which is non-derogable and admits of no exceptions. Also beyond dispute is Russia's obligation in international law to make reparation to Ukraine for the damage caused

[4] UNOHCHR, 'Ukraine: civilian casualty update 24 September 2023' (OHCHR, 26 Sept. 2023) <https://www.ohchr.org/en/news/2023/09/ukraine-civilian-casualty-update-24-september-2023>.

[5] World Bank Group, 'Ukraine: Rapid Damage and Needs Assessment, February 2022-February 2023' (World Bank, Mar. 2023) <https://documents1.worldbank.org/curated/en/099184503212328877/pdf/P1801740d1177f03c0ab180057556615497.pdf>

by its unlawful conduct. The law of State responsibility makes Russia liable for the consequences of its breaches of its international obligations.

13. This is the view of the vast majority of States, as reflected in the UNGA resolution adopted shortly after Russia's invasion (ES-11/1), by which an overwhelming majority of Member States (141 in total):

    a. deplored "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter";

    b. demanded that Russia immediately "cease its use of force" against Ukraine and "immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders";

    c. deplored the Russian decision of 21 February 2022 "related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter"; and

    d. called upon Russia "to abide by the principles set forth in the Charter and the Declaration on Friendly Relations" and urged "immediate peaceful resolution of the conflict between the Russian Federation and Ukraine through political dialogue, negotiations, mediation and other peaceful means".[6]

14. Russia has failed, and continues to fail, to abide by the terms of resolution ES11/1.

15. On 24 March 2022, the UNGA adopted another resolution, ES-11/2, deploring Russia's attacks on civilian targets in Ukraine (including educational institutions, water and sanitation systems and medical facilities, and besiegement, shelling and air strikes in densely populated cities in Ukraine).[7] Again, by that resolution, an overwhelming majority of UN Member States demanded the immediate cessation of hostilities by Russia against Ukraine, in particular "any attacks against civilians and civilian objects", and called for the protection of civilians.

[6] UNGA Res ES-11/1 (2 Mar. 2022) UN Doc A/RES/ES-11/1. Only five Member States voted against the resolution: Russia, Belarus, Democratic People's Republic of Korea, Eritrea and Syria.

[7] UNGA Res. ES-11/2 (24 Mar. 2022) UN Doc A/RES/ES-11/2.

16. In addition to UNGA resolutions ES-11/1 and ES-11/2, on 14 November 2022, the UNGA adopted resolution ES-11/5 titled "Furtherance of remedy and reparation for aggression against Ukraine".[8] The resolution (*inter alia*):

    a. recognises that Russia "must be held to account for any violations of international law in or against Ukraine" and that it "must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts"; and

    b. encourages Member States to establish, in cooperation with Ukraine "an international mechanism for reparation and damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine."

17. Resolution ES-11/5 thus specifically calls for the establishment of an international mechanism to enforce Russia's obligation to pay reparations for any injury arising from its war of aggression against Ukraine.[9]

18. On 23 February 2023, the General Assembly adopted resolution ES-11/6, which stresses the need for a comprehensive, just and lasting peace in Ukraine, consistent with the UN Charter, including the principles of sovereign equality and territorial integrity, and repeats the demand for the immediate, complete and unconditional withdrawal of all Russian troops from Ukraine, and the cessation of hostilities. The resolution also emphasizes the need for accountability for Russia's most serious breaches of international law.[10]

19. Although no international mechanism to enforce Russia's obligation to pay reparations to Ukraine has yet been established, many States have responded to Russia's aggression and the UNGA's resolutions by imposing coordinated economic sanctions. The freezing of Russian State assets has been a key element of this package of measures.

20. In February 2023, officials from Australia, Canada, the European Commission, France, Germany, Italy, Japan, the United Kingdom, and the United States established the multilateral "Russian Elites, Proxies and Oligarchs" task force ("REPO"). In May 2023, the task force was asked to map the location of Russian sovereign assets. In September 2023,

[8] UNGA Res. ES-11/5 (14 Nov. 2022) UN Doc A/RES/ES-11/5.

[9] Ibid.

[10] UNGA Res. ES-11/6 (23 Feb. 2023) UN Doc A/RES/ES-11/6

the task force announced that at least 280 billion dollars worth of such assets had been located, the majority of which is in the European Union.[11] The freezing of Russian sovereign assets means that the Russian government cannot access, liquidate, or earn proceeds on them. In May 2023, G7 leaders committed to keeping Russia's sovereign assets immobilized until Russia pays for the damage it has caused to Ukraine.[12]

21. In October 2023, the European Union said it would consider proposals to at least utilize income that central securities depositories, like Euroclear in Belgium, had earned from their reinvestment of frozen Russian assets that had matured into cash. Under one legal theory, this money belongs to the depository and not to Russia. Under this theory, a government like Belgium could treat such income as a taxable windfall profit to the company, tax practically all of it for public use, and avoid any international legal responsibility to Russia.[13] While this might be a viable approach for some States, it would significantly limit the volume of assets available for Ukraine. In contrast, this Memorandum concludes that all of the currently frozen Russian State assets could be subjected to lawful countermeasures that would enable their transfer to an international mechanism that would be able to provide compensation (the aspect of reparations relevant here), if the States where the assets are located are willing to transfer them.

III. LEGAL ANALYSIS

A. Countermeasures and the Law of State Responsibility

22. The law on countermeasures is part of the law on State responsibility, which is reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA") produced by the International Law Commission ("ILC"). The ILC was established by the UNGA in 1947 to encourage the progressive development and codification of international law. The ILC has worked on codification of the law on State responsibility since 1955. Over subsequent decades, the ILC developed what has ultimately

[11] See, e.g., U.S. Treasury Department, 'Readout: Russian Elites, Proxies, and Oligarchs Deputies Meeting' (7 Sept. 2023) <https://home.treasury.gov/news/press-releases/jy1716>.

[12] The White House, 'G7 Leaders' Statement on Ukraine' (19 May 2023) <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/>. REPO members have committed to fully and accurately mapping all the Russian sovereign assets immobilised in REPO member jurisdictions. In a statement on 7 September 2023, the U.S .Treasury reported that REPO expected that effort to be completed by the end of 2023. See Treasury, 'Readout' (n. 11).

[13] See Laura Dubois & Niko Asgari, 'Euroclear earns €3bn from Russian assets frozen by West' *Financial Times* (London, 26 Oct. 2023) <https://www.ft.com/content/88ff88c4-6efe-40b7-b635-80eb6bd73c2c>.

become ARSIWA, through a series of reports.[14] ARSIWA generally reflects the rules of international law concerning the responsibility of States for internationally wrongful acts, including the legal consequences following from a wrongful act, and whether it is a violation of an obligation owed to one or several States, an individual or a group, or the international community as a whole.

23. On 9 August 2001, at its 270th meeting, the ILC produced a report in which it recommended that the UNGA take note of ARSIWA and annex it to a resolution (the "ILC Report").[15] In response, on 28 January 2002, resolution 56/83 was adopted by which the UNGA, in paragraph 3, recorded that it had considered the ILC Report, noted its recommendations, annexed the articles to the resolution, and commended them to the attention of Member States.[16] Although ARSIWA has not been incorporated into a draft convention opened for signature, it represents the most authoritative statement of customary international law on State responsibility, and is frequently cited as such in the Judgments of the ICJ and other international tribunals.[17]

24. ARSIWA is composed of four Parts. Part One is on 'The Internationally Wrongful Act of a State', and it consists of five Chapters: I. General Principles; II. Attribution of Conduct to a State; III. Breach of an International Obligation; IV. Responsibility of a State in Connection with the Act of Another State; and V. Circumstances Precluding Wrongfulness. Part Two addresses the 'Content of the International Responsibility of a State.' It has three Chapters: I. General Principles; II. Reparation for Injury; and III. Serious Breaches of Obligations under Peremptory Norms of General International Law. Part Three is entitled 'The Implementation of the International Responsibility of a State.' It is especially pertinent to

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[14] ILC, *Yearbook of the International Law Commission 2001*, vol 2 pt 2 (UN, 2007) paras 30-73. In 1980, the ILC provisionally adopted Part One of the draft ARSIWA. In 1996 (following a UNGA resolution specifically requesting the ILC to resume work on the draft articles), the ILC completed a first reading of Part Two and Part Three of the draft articles, and submitted these for comments and observations. In 1997, the ILC established a Working Group on State responsibility to address a second reading of the draft articles. In early 2001, the ILC finalised the second reading of the draft articles, and sought further comment and observations.

[15] Ibid. paras 72-73.

[16] UNGA Res 56/83 (adopted without a vote) UN Doc A/RES/56/83.

[17] See, e.g., *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 38 para 47; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Reparations, Judgment) [2022], ICJ Rep paras 382, 388-389 & 397; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 95, at para 177; *Responsibilities and Obligations of States with respect to activities in the Area* (Advisory Opinion of 1 Feb. 2011) ITLOS Reports 2011, 10, paras 66-67, 112, 169, 178-182, 194-196 & 210.

the matters addressed in this Memorandum. Its two Chapters cover: I. Invocation of the Responsibility of a State; and II. Countermeasures. Part Four addresses 'General Provisions.'

25. The first basic statement of principle underlying ARSIWA is that: "Every internationally wrongful act of a State entails the international responsibility of that State" (Article 1).[18] The ILC's commentary to Article 1 explains that an internationally wrongful act may give rise to "obligations of restitution or compensation, or also give the injured State the possibility of responding by way of countermeasures."

26. Countermeasures by the injured State are first addressed in Part One, Chapter V (Circumstances Precluding Wrongfulness), Article 22, which provides that they may include acts that would otherwise be wrongful, but are permissible as a response to a wrongful act by another State:

> "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three."

27. The wrongfulness of a countermeasure is thus precluded if it is taken in accordance with Chapter II of Part 3 of ARSIWA on Countermeasures, which consists of six Articles, from Article 49 through Article 54. Article 49, entitled 'Objects and Limits of Countermeasures,' states:

> "1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
>
> 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
>
> 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."

28. Article 51, entitled Proportionality, imposes another condition on the use of countermeasures:

[18] Conduct is attributed to a State where it is that of a State organ (Article 4); where persons or entities exercise elements of governmental authority (Article 5); when it is an organ of another State placed at the disposal of the State in question when acting in the exercise of elements of governmental authority of the latter (Article 6) (in all these cases, regardless of whether the organ, entity or person exceeds authority or contravenes instructions (Article 7)); where the conduct is by person or group of persons directed or controlled by the State (Article 8); or when it is acknowledged or adopted by the State (Article 11).

> "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

29. Taking these four requirements one at a time and beginning with paragraph 1 of Article 49, ARSIWA requires that the countermeasures be taken to induce the wrongdoing State "to comply with its obligations under part two". The obligations under Part 2 include the duties to cease ongoing wrongful conduct and to make reparation for an internationally wrongful act. As set out in Articles 30 and 31 of Part 2:

> Article 30: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; [...]
>
> Article 31 (1): "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> Article 31(2): "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

30. Therefore, when a wrongdoing State breaches its obligations under Articles 30 and 31 of ARSIWA, that is, when it does not cease its internationally wrongful conduct or does not make full reparation for injury caused by that conduct, the injured State may adopt countermeasures to induce the wrongdoer to comply with the duties of cessation and/or reparation. The word "induce" means "to persuade someone to do something, or to cause something to happen."[19]

31. In this case, by transferring assets to an international compensation mechanism, States would cause Russia to comply with its obligation to "make full reparation" to Ukraine. The same measure would also serve as an inducement or incentive to Russia to cease its wrongful conduct and bring itself into compliance with the peremptory norms it has been violating. On both of these bases, the transfer of assets would constitute a lawful countermeasure because, as described by the ILC, the transfer would be "an instrument for achieving compliance with the obligations of the responsible State under Part Two".[20]

32. Under the second requirement of Article 49, countermeasures must have a temporal aspect: they can only suspend "for the time being" the obligations of the injured State to the offending State such that, for that time period, the wrongfulness of a measure in breach of such an obligation would be precluded. Although no time period is specified, it can be

[19] "Induce" in *Cambridge Dictionary* <https://dictionary.cambridge.org/us/dictionary/english/induce>.

[20] See the commentary to Article 49 of ARSIWA, at para 1.

presumed that the measure would be lawful for as long as the wrongful conduct continues, but no longer. This would be consistent with the third requirement of Article 49, set forth in paragraph 3: that the countermeasure must be taken in such a way as to permit both the offending and the injured State to resume performance of their mutual obligations. To the same end, Article 53, entitled "Termination of Countermeasures" provides that:

> "Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act."

33. Under the third requirement of Article 49, countermeasures must be reversible, that is, "taken in such a way to permit the resumption of performance of the obligations in question." As explained in the Judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project,* since the "purpose [of a countermeasure] must be to induce the wrongdoing State to comply with its obligations under international law," "the measure must therefore be reversible."[21] The requirement that countermeasures be reversible is not intended to impose strict temporal limits on their operation. As explained by the International Law Commission, it is meant to ensure that a State is in a position to resume performance of its obligations when the unlawful conduct has ceased and the countermeasures have been terminated: "Paragraph 3 of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible."[22]

34. All three conditions of Article 49, therefore, demonstrate that countermeasures are intended to induce the offending State to comply with its legal obligations, and thus to eventually restore normal legal relations between the parties. The countermeasures proposed herein would, in effect, suspend the performance of certain international obligations, including obligations of reciprocal regard between sovereigns for the financial assets each might deposit in the other's jurisdiction, or obligations in agreements about the treatment of such investments.

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[21] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 56–57, para 87.

[22] See the commentary to Article 49 of ARSIWA, at para 9.

35. There is no "immunity" between sovereigns in respect of breaches of international obligations. Instead, there is State responsibility. Ordinarily, Russia could seek compensation if another sovereign appropriated its property. In this case, the unlawfulness of any transfer of State assets is precluded because of Russia's ongoing wrongful conduct.[23] Once Russia has complied with its legal obligations, its normal legal relations will be restored. Its future or remaining deposits will again be entitled to respect. But Russia would not be entitled to regain any money that has been lawfully transferred to compensate Ukraine. It could only ask that these transfers not exceed its liability, and be credited as an offset against such liability.

36. Also, as the words "as far as possible" in section 3 of Article 49 demonstrate, "the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased."[24] The damage Russia has done to Ukraine and others has to be addressed as quickly as possible for the remedies to be effective. Otherwise, the scale of damage only grows much larger or the damage becomes irremediable.

37. The countermeasure proposed herein – the transfer of frozen Russian States assets to an international compensation mechanism that would disburse compensation on Russia's behalf to Ukraine or other injured parties in satisfaction of Russia's legal obligation – would fully satisfy the condition of reversibility as understood by the ILC. The prior legal relations would be restored.

38. Also, the relevant assets are fungible. Nothing precludes States from reversing the interference with them if and when the reason for the countermeasure no longer applies. The ILC further noted that States ought to refrain from taking countermeasures that inflict any "irreparable damage", and, if given "a choice between a number of lawful and effective countermeasures, ... should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures."[25] To illustrate, when transferring frozen assets, States could recognise that the assets would be transferred back should Russia comply with its obligations of cessation and reparation. Or, alternatively, the rules and

[23] ARSIWA, Article 22, quoted above.

[24] Ibid.

[25] See the commentary to Article 49 ofARSIWA, at para 9.

regulations governing the compensation mechanism could stipulate that Russia would be credited with any reparations actually paid by the mechanism, and its remaining obligation (if any) would be correspondingly reduced. In the event the value of its transferred assets were to exceed the amount of reparations owed, the excess could be transferred back to Russia. On either approach, the transfer would not impose upon Russia any irreparable damages.

39. Finally, to satisfy the proportionality requirement set out in Article 51, the countermeasures would have to be "commensurate" with the injury suffered by the injured State and the gravity of the offending State's internationally wrongful conduct. And to satisfy Article 53, they would have to be terminated as soon as the offending State has resumed compliance with its international obligations.

40. In these ways, countermeasures are instrumental (rather than punitive) in character.[26] Provided the conditions are met, the law on countermeasures justifies measures which would otherwise be unlawful, where those measures are: (i) in response to a State's unlawful conduct, (ii) for the purposes of procuring from that State cessation of the unlawful conduct, or effecting compliance with its obligation to pay compensation for it, (iii) proportionate to the gravity of the unlawful conduct and the injury caused, (iv) in effect only for such time as required to obtain compliance by the offending State, at which point they are (v) reversible, as normal legal relations resume. It is for each State taking countermeasures to satisfy itself that these conditions are met.[27] The authority to take countermeasures resides with individual sovereign States and, in this sense, is a decentralized and voluntary obligation.[28]

41. In the case of Ukraine and Russia, this means that Ukraine (and other States, as described below) can take countermeasures against Russia, including measures that would otherwise

[26] See the commentary to Chapter II of ARSIWA, in particular para 3.

[27] If their assessment of that breach turns out to be incorrect, their countermeasures will not have been justified and they will be liable for their unlawful conduct. However, in the present case this is a remote risk, in view of the overwhelming view that Russia's war in Ukraine is internationally unlawful.

[28] In his treatise on State responsibility, James Crawford, the ILC's rapporteur for ARSIWA, observed that, "All the categories of self-help discussed in this chapter [on countermeasures] share an emphasis on unilateral action; that is, they are taken by states acting alone (or alongside other like-minded states) to seek protection or performance of international legal rights and obligations. The measures are adopted as a consequence of the view of the reacting state that the target state has committed an internationally wrongful act ... In other words, institutional sanctions create 'vertical' relationships of enforcement, whereas in the case of decentralized countermeasures the relationships between the responsible and reacting state are horizontal." In this case a group of like-minded States could choose to join in taking the countermeasures against the target State. Compulsory mandates from international organizations are unnecessary and superfluous. Crawford, *State Responsibility: The General Part* (CUP, 2013) sec. 21.3.

be in breach of its obligations to Russia, in order to induce Russia's compliance with its international obligations to Ukraine by ceasing all its military activities in and against Ukraine, and by withdrawing its military forces and other personnel from Ukrainian territory, or, to enforce Russia's obligation to pay reparation to Ukraine by fully compensating it (and other injured parties) for all the damage caused by its internationally wrongful conduct. The countermeasures could include seizure of Russian State assets to satisfy Russia's obligation to pay reparations for the injuries it has caused, provided the value of the assets transferred is commensurate with the injuries, and therefore satisfies the requirement of proportionality.

42. We now turn to the standing of a group of States, beyond Ukraine, to invoke Russia's responsibility and take countermeasures.

B. Countermeasures by States Beyond Ukraine

43. States beyond Ukraine have two potential grounds for invoking Russia's responsibility for its internationally wrongful acts and joining the group of States taking countermeasures. First, under Article 42 of ARSIWA, other States are entitled to invoke Russia's responsibility if the obligations were owed to the international community as a whole or if the breach of the obligation specially affected those States. Under Article 31 of ARSIWA, "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

44. This Article's reference to States that are "specially affected" borrows its language from the Vienna Convention on the Law of Treaties. Like that Convention, there is no set definition of the special impact that constitutes the injury. "This will," the commentary observes, "have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way that distinguishes it from the generality of other States to which the obligation is owed."[29]

45. Russia's war has displaced millions of refugees, imposing costs on all the countries that have helped resettle and support them. In addition, Russia's war and purposeful disruptions of

[29] Article 42 of ARSIWA, Comment 12.

Ukraine's transportation routes and commerce have harmed States that depended on that commerce for their economic well-being. Further, Russia has responded to the lawful freezing of its assets by declaring, in a presidential decree, that all States participating in such asset freezes are "unfriendly" and that private property owned by people or firms domiciled in such States can be confiscated by Russia. Russia has begun these confiscations, which are unlawful.[30] Thus, Russia has compounded its original unlawful conduct with further acts that widen the circle of those specially affected. Russia's war has also created a grave threat to the security and stability of Europe, requiring costly responses by all member States of NATO and the European Union to stop the aggression and shore up their own defenses.

46. Second, even if it has not been specially affected, any State is entitled to invoke Russia's responsibility in this case, because Russia's actions have threatened the core of the international legal system as a whole, violating obligations under peremptory norms of international law on a systematic scale. Under Article 54 of ARSIWA, the responsibility of a State for its internationally wrongful conduct may be invoked either by an "injured State" or, in certain circumstances, by other States which are not directly injured by that conduct:

> "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."

47. As explained in the Commentary:

> "[I]njured States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group."

48. The ICJ has long recognised that certain legal obligations are owed to the international community as a whole: obligations *erga omnes*. These obligations are by definition collective:

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[30] In April 2023, Russia enacted presidential decree 302, which allowed the government to take over assets associated with "unfriendly" states. It has already applied this decree to take over several private companies and turn them over to friends of the government. President Putin extended this decree in July with presidential decree 520 and confiscated more companies. See, e.g., Yulia Solomakhina, Chase Kaniecki & Polina Lyadnova, 'Nationalization of Russian Assets of Investors from Unfriendly States Continues' (*Cleary Foreign Investment and International Trade Watch*, 24 July 2023) <https://www.clearytradewatch.com/2023/07/nationalization-of-russian-assets-of-investors-from-unfriendly-states-continues>.

they protect the interests of the international community itself.[31] They would include, for example, the obligation to prevent and punish genocide. The Court has held, in particular, that breaches of such an obligation violates peremptory (i.e non-derogable) norms of international law affecting all States, such that even States not directly affected by the wrongful conduct have standing to sue the offending State on their own behalves, as well as to obtain relief for the victims of the prohibited conduct.[32]

49. The obligation of non-aggression is another peremptory norm of international law, which has been recognized as an obligation *erga omnes*.[33] As such, it affects all States, not only the direct victim of the aggression. A war of aggression therefore entitles any State, or any group of States, to invoke the responsibility of the aggressor and seek redress, just as any State may invoke the responsibility of a State that has committed genocide.

50. This is recognised in Article 48 of ARSIWA, which provides an entitlement and a mechanism for third-party States to invoke the responsibility of a wrongdoing State.[34] Article 48 provides:

> "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) The obligation breached is owed to the international community as a whole.
>
> 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
>
> (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
>
> (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached."

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[31] *Barcelona Traction Case (Belgium v. Spain)* (Judgment) [1970] ICJ Rep at para 33.

[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Judgment on Preliminary Objections) [2022] ICJ Rep at paras 107-08.

[33] As recognised by the ICJ in the *Barcelona Traction* case (n. 31) at para 33.

[34] See further, ARSIWA, Chapter I, commentary at para. 3.

51. Accordingly, third-party States, not specially affected by Russia's unlawful acts, are also entitled to invoke Russia's responsibility for its violation of *erga omnes* obligations. They, too, can demand, *inter alia*, the cessation of its unlawful conduct and the payment of reparations to any directly injured State for the injuries Russia has caused.

52. This broad standing under Article 48 includes taking countermeasures to achieve those ends. ARSIWA does not state this in express terms despite a "significant level of approval"[35] for third-party countermeasures. Instead, anticipating the evolution of such a customary norm, the ILC adopted "a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law."[36] That clause is part of Article 54, quoted above, which expressly "does not prejudice the right of *any* State" to invoke Article 48 and take countermeasures against an offending State "to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." The ILC Report explained that:

> "By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches."[37]

53. As one member of the ILC commented:

> "The real question was whether, where an exceptionally serious breach such as genocide—which affected the international community as a whole and which thus concerned all States individually—had been committed, any State of the international community was entitled to react individually, even when not directly injured by the breach. In his view, the answer was emphatically in the affirmative."[38]

This conclusion may be said to apply equally in relation to a use of force that is in manifest violation of the Charter of the United Nations, such as to amount to an act of aggression.

54. As of 2001, the ILC Report referred to State practice under Article 48 as "limited and rather embryonic", but nevertheless, even then it identified a number of occasions when "States

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[35] M. Dawidowicz, 'Third-party countermeasures: A progressive development in international law?' (2016) 4 QIL 29.

[36] *Yearbook of the ILC 2001* (n. 14) 139, para. 6 of the commentary to Article 54

[37] Ibid., 137, commentary to Article 54.

[38] ILC, *Yearbook of the International Law Commission 2000*, vol 1 (UN, 2005) 338.

have reacted against what are alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured", including by imposing economic sanctions.[39] The examples identified by the ILC included (amongst others):

a. "United States-Uganda (1978). In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda. The legislation recited that '[t]he Government of Uganda ... has committed genocide against Ugandans' and that the 'United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide'."[40]

b. "Collective measures against Iraq (1990). On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion, and ordered the imposition of a comprehensive trade embargo and a cut-off of financial relations to induce Iraq to put an end to its unlawful occupation and purported annexation of Kuwait.[41] European Community Member States and the United States adopted trade embargoes and froze Iraqi assets. This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait."[42] Subsequently, the United Nations Compensations Commission ("the UNCC") processed claims and paid compensation for loss and damage caused by the invasion to the victims, partially from frozen assets.[43]

c. "Collective measures against the Federal Republic of Yugoslavia (1998). In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and immediate flight ban."[44]

55. State practice on the freezing of assets also included the United States' freezing of Iranian assets following the Iran hostage crisis in 1979, which led to the establishment of another claims tribunal. In response to the taking of hostages at the US Embassy in Tehran, on 14 November 1979 U.S. President Jimmy Carter ordered the freezing of all Iranian government

[39] *Yearbook of the ILC 2001* (n. 14) 137, commentary to Article 54.

[40] Ibid., 138 (footnotes omitted).

[41] UNSC Res. 661 (6 Aug. 1990) UN Doc S/RES/661.

[42] *Yearbook of the ILC 2001* (n. 14) 137, commentary to Article 54 (footnotes omitted).

[43] Under the auspices of Security Council resolutions 687 (1991) and 778 (1992). The U.S. government transferred Iraqi state assets to an appropriate escrow account. U.S. Executive Order 12817 (23 Oct. 1992), 57 F.R. 48433. In February 2022 the Governing Council of the UNCC adopted its final decision 277 (2022), declaring that the Government of Iraq has fulfilled its international obligations to compensate all claimants awarded compensation by the Commission for losses and damages suffered as a direct result of Iraq's invasion of Kuwait.

[44] *Yearbook of the ILC 2001* (n. 14) 137, commentary to Article 54 (footnotes omitted).

assets held in the U.S.[45] In the Algiers Accords of 19 January 1981, the United States and Iran entered into an agreement to resolve the crisis, one critical element of which was the establishment of the Iran-United States Claims Tribunal ("the IUSCT"), which was empowered, *inter alia,* to order payment of compensation from the transferred Iranian assets.[46]

56. State practice in relation to countermeasures by third-party States has evolved materially since 2001, as the ILC envisioned, lending strong weight to Article 48 as a valid statement of current international law. Instances of their application have proliferated. Recognizing this, in 2005 the *Institut de Droit International* adopted a resolution on "Obligations *Erga Omnes* in International Law" which included the following provision (Article 5):

> "Should a widely acknowledged grave breach of an erga omnes obligation occur, all the States to which the obligation is owed:
>
> (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;
>
> (b) shall not recognize as lawful a situation created by the breach;
>
> (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach."[47]

57. The freezing of an offending State's assets and other economic sanctions, in particular, have been regularly employed over the past two decades, including by States not directly injured, in response to breaches by the offending State of obligations owed to the international community as a whole. For example:

a. In response to brutal repression of the civilian population in Libya, in February 2011 Switzerland and the US froze the assets of Colonel Muammar Gaddafi and the Libyan Central Bank.[48] These measures were taken before any

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[45] U.S. Executive Order 12170 (14 Nov. 1979), 44 F.R. 65729.

[46] Iranian assets were transferred into a domestic escrow account, then to an international escrow account. U.S. Executive Order 12277 (23 Jan. 1981), 46 F.R. 7915. The founding documents of the IUSCT area available on its website: https://iusct.com/foundingdocuments-2/

[47] For the full text of the Resolution, see Institut de Droit International, Fifth Commission, 'Obligations and rights *erga omnes* in international law' (Krakow session, 27 Aug. 2005) <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf>.

[48] Swiss Federal Council, 'Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la Libye' (21 February 2011) RS 946.231.149.82; US Executive Order 13566 (25 February 2011).

enforcement measures were adopted by the UN Security Council pursuant to Chapter VII of the UN Charter.[49]

b. In May 2011, EU Member States imposed measures against Syria, including freezing the assets of President Al-Assad and the Central Bank of Syria.[50] A further 10 States have undertaken to ensure the implementation of the EU sanctions regime: Albania, Croatia, Georgia, Iceland, Lichtenstein, Macedonia, Moldova, Montenegro, Norway and Serbia. Australia, Canada, Japan, Switzerland and the U.S. took "*similar action*" against Syria.[51] French President Sarkozy established the "*Group of Friends of the Syrian People*", made up of 83 States and international organizations, which welcomed the sanctions adopted by the EU and others, including the freezing of Syrian State assets.[52]

c. In March 2014, EU Member States, Australia, Canada, Japan, Liechtenstein, Switzerland and the U.S. imposed various measures against Russia for its role in the destabilisation of Ukraine.[53] These included, *inter alia,* denying Russian financial institutions access to European capital markets, and export embargoes.

d. Since Russia's unlawful invasion of Ukraine in February 2022, EU Member States and at least 14 other States and Taiwan[54] have adopted a wide range of measures against Russia including: economic, financial and banking sanctions, asset freezes and property seizures, export controls, blocking of access to the SWIFT payment system, banning Russian aircraft and vessels, and suspending distribution of "disinformation outlets" such as *Russia Today*.[55]

e. There are numerous other examples, including measures adopted by the European Union and numerous other States against Myanmar (from 2000 to present), Zimbabwe (from 2002 to present) and Belarus (2004 to present).[56]

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[49] UNSC Res 1970 (26 February 2011); UNSC Res 1973 (17 March 2011). See further: Dawidowicz, 'Third-party countermeasures' (n. 35).

[50] Council Implementing Decision 2011/302/CFSP (23 May 2011); Council Decision 2012/122/CFSP (27 February 2012); Council Decision 2015/837/CFSP (28 May 2015).

[51] See further: Dawidowicz, 'Third-party countermeasures' (n. 35) at 7 and Martin Dawidowicz, *Third-party countermeasures in international law* (CUP 2017).

[52] See: https://carnegie-mec.org/syriancrisis/?fa=48418 and https://www.mfa.gov.tr/the-friends-group-reaffirmed-its-determination-to-support-the-just-cause-of-the-syrian-people.en.mfa

[53] For the EU, see Council Decision 2014/145/CFSP (7 March 2014); Council Regulation 269/2014 (17 March 2014); Council Implementing Decision 2014/151/CFSP (21 March 2014).

[54] Australia, Bahamas, Canada, Iceland, Japan, Liechtenstein, Monaco, New Zealand, Norway, Republic of Korea, Singapore, Switzerland, United Kingdom and the United States.

[55] See Minami Funakoshi, Hugh Lawson, and Kannaki Deka, 'Tracking Sanctions against Russia' (*Reuters*, 6 Jul6 2022) <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>.

[56] See *e.g.* Elena Katselli Proukaki, *The Problem of Enforcement in International Law. Countermeasures, the Non-injured State and the Idea of International Community* (Routledge 2010) 201-202; A Pellet, A Miron, 'Sanctions' (2011) *Encyclopaedia of*

58. These measures include some that would not have been lawful if they had been taken in the absence of internationally wrongful conduct by the State against which they were directed. Instead, they would have been breaches of obligations owed to that State. Under ARSIWA, their wrongfulness can only have been precluded by their imposition as countermeasures in response to wrongful conduct by the targeted State. The measures adopted by States not directly injured were therefore justified as lawful countermeasures within the meaning of Part 2, Chapter II of ARSIWA.

59. In terms of the lawfulness of a countermeasure, there is no material difference between a measure freezing another State's assets, and one which transfers them to the victim of the wrongful conduct as reparations for the injuries it has suffered. To be sure, transfer of the assets would be a step beyond freezing them. But both measures would be lawful if taken in response to a breach of obligations under a peremptory norm of international law with an *erga omnes* character; intended to induce the cessation of the wrongful conduct or to repair the damage caused to the injured State; if they were proportionate, that is, commensurate with the injuries caused; and designed to terminate upon the wrongdoer's compliance with its legal obligations, including the obligation to pay reparation for such injuries; and if they were reversible.

60. In 1996, the United States transferred frozen Cuban State assets to the families of two US citizens whose planes were shot down by Cuban aircraft. President Bill Clinton provided, by executive order, compensation to the victims' families, paid out of Cuban frozen assets. Subsequently, the U.S. Congress enacted legislation to permit the families of the victims to make further claims against those assets,[57] and the President signed an executive order authorising additional funds to be transferred. Subsequently, the Congress adopted legislation allowing the transfer of frozen Iranian assets to the family of a U.S. citizen killed by a suicide bomber, allegedly linked to Iran, and the President approved the transfer.[58]

Public International Law, at para 58; Christian Tams, *Enforcing Obligations Erga Omnes* (CUP 2005, reissued 2010), 198-251.

[57] The U.S. Congress amended Section 221 of the Antiterrorism and Effective Death Penalty Act (AEDPA), to waive sovereign immunity of foreign States that were designated as state sponsors of terrorism by the State Department and had "caused personal injury or death" of U.S. nationals through some "act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources". The Congress also amended the Omnibus Consolidated Appropriations Act for 1997 to establish a cause of action against the agencies of States whose sovereign immunity had been waived under AEDPA.

[58] The Cuba and Iran transfer stories are recounted in Saraphin Dhanani, 'A Cautionary Tale: What Iran and Cuba Can Teach Us About Designating Russia a State Sponsor of Terrorism' (Lawfare, 20 Jan. 2023)

Since 2011, frozen assets of Iraq have been transferred by the U.S. government to victims of abuses found to have been inflicted by the Saddam Hussein regime after they obtained court judgments against that State.[59]

61. In 2022, Canada adopted Bill C-19,[60] Division 31 of which amended the Special Economic Measures Act. The newly introduced Section 5.6 of the Act provides:

> "After consulting with the Minister of Finance and the Minister of Foreign Affairs, the Minister [responsible for the administration of an order of seizure] may — at the times and in the manner, and on any terms and conditions, that the Minister considers appropriate — pay out of the Proceeds Account, as defined in section 2 of the Seized Property Management Act, amounts not exceeding the net proceeds from the disposition of property forfeited under section 5.4, but only for any of the following purposes:
>
> (a) the reconstruction of a foreign state adversely affected by a grave breach of international peace and security;
>
> (b) the restoration of international peace and security; and
>
> (c) the compensation of victims of a grave breach of international peace and security,
>
> (d) gross and systematic human rights violations or acts of significant corruption."

62. Neither the United States nor Canada expressly justified their resort to asset seizures and transfers as countermeasures. However, if the United States and Canada may lawfully transfer, or allow the transfer of, frozen State assets to their own citizens as compensation for the internationally wrongful acts of another State, then there is no persuasive legal argument against the transfer of such assets to injured parties in other States, especially if this is undertaken to induce the offending State to fulfil its legal obligations to the injured parties, including its obligation to provide reparations for the injuries it has inflicted. If these actions had been undertaken as countermeasures, they would have been justifiable under ARSIWA.

<www.lawfaremedia.org/article/cautionary-tale-what-iran-and-cuba-can-teach-us-about-designating-russia-state-sponsor-terrorism> The legislation allowing the Iranian transfer was Section 2002 of the Victims of Trafficking and Violence Against Women Act of 2000.

[59] See Congressional Research Service, 'Justice for United States Victims of State-Sponsored Terrorism Act: Eligibility and Funding' (*CRS*, 11 April 2023) <https://crsreports.congress.gov/product/pdf/IF/IF10341>.

[60] Statutes of Canada 2022, Bill C-19 (Royal Assent) [23 June 2022].

63. In sum, States can join in countermeasures either because they suffered particular injury from Russia's breach of obligations it owed to them (ARSIWA Article 42), or States can assert their collective standing to respond to a serious breach of obligations owed to the international community as a whole (Article 48). These two Articles are not mutually exclusive, as the Commentary to them points out. "Situations may well arise in which one State is 'injured' in the sense of Article 42, and other States are entitled to invoke responsibility under article 48."[61] In both cases, they can join together in collective countermeasures.

C. Substantive Limits on Countermeasures

64. ARSIWA lays out the substantive and procedural limits of permissible countermeasures. In particular, Article 50(1) provides that countermeasures cannot suspend inviolable obligations such as the prohibition against the use of force or obligations for the protection of fundamental human rights. And Article 50(2) provides that countermeasures cannot be relied upon to infringe upon a State's consular or diplomatic agents and property. None of these substantive limitations on countermeasures would apply to the transfer of frozen Russian State assets to compensate those damaged by Russia's internationally wrongful acts.

65. Article 51 sets out another substantive limitation on countermeasures. It requires that they must be proportionate to the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. The seizure and transfer of frozen Russian sovereign assets to Ukraine and other injured parties plainly satisfies this requirement. As expressly set out in Article 51, an assessment of proportionality takes account of both: (i) the gravity of the internationally unlawful acts; and (ii) the rights in question. The gravity of Russia's internationally unlawful acts cannot be overstated. They breach not only obligations arising under a peremptory norm of an *erga omnes* character, but a foundational principle of the rules-based international order that prohibits wars of aggression and the acquisition of territory by force. It is thus no surprise that the General Assembly "[*d*]*eplore*[*d*] *in the strongest terms* the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter".[62] Nor can Ukraine's rights be overstated:

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[61] ARSIWA, Comment 3 on Part Three, Chapter One

[62] UNGA Res ES-11/1, para. 2; UNGA Res ES-11/6, preamble ("*Reaffirming* that no territorial acquisition resulting from the threat or use of force shall be recognized as legal.").

they are no less than its rights to sovereignty, to territorial integrity and to political independence – and to reparations for the violation of those existential rights inherent in every sovereign State.

66. The countermeasures addressed herein would not be disproportionate, therefore, to the violations or the rights at issue. Any sums transferred to Ukraine or other injured parties would be credited to Russia in the form of a reduction in the amount of its liability. As such, the countermeasures would be compensatory, not punitive. They would enable Ukraine to begin the urgent process of mitigating its injuries and recovering from them. Since the authoritative estimates of the financial costs of such a recovery are far greater than the total amount of frozen Russian State assets, there is no risk that the proposed measures would involve transfers of assets in excess of Russia's ultimate liability, which extends to States and other possible claimants beyond Ukraine.[63]

67. A first countermeasure –the freezing of Russian State assets – has already been taken by various States. But the actions of those States, both in freezing assets and imposing a broad package of economic and commercial sanctions, have not succeeded in influencing Russia to cease its unlawful aggression against Ukraine. Nor have they, thus far, induced Russia to provide reparation for the enormous injury suffered by Ukraine and others as a result of its internationally unlawful conduct, neither persuading nor causing such compensation to happen. The freezing of Russia's assets and the other sanctions have thus been largely ineffective; they have accomplished neither of the objectives that lawful countermeasures are intended to achieve. Nor are they likely to do so in the foreseeable future. In the circumstances, further countermeasures are justified. If Russia cannot be persuaded to cease its unlawful conduct, and to provide compensation for the injuries it has caused, new and additional measures are warranted to provide at least some compensation to Ukraine and other affected parties in partial fulfilment of Russia's legal obligations under international law. To the extent that the frozen Russian assets can be transferred to the international compensation mechanism for ultimate distribution to Ukraine and other injured parties, the countermeasures will be effective in providing some measure of the reparations to which they are lawfully entitled.

[63] Russia is required under Article 31 of ARSIWA to make "full reparation" for the injury caused by its unlawful aggression. One aspect of reparation can be compensation.

68. Indeed, the purpose of the international compensation mechanism would be to ensure the effectiveness of the transfer of funds in compensating Ukraine and others for the injuries they have suffered. Such a mechanism could combine urgent programs to limit damage and support recovery with claims processes modeled on similar mechanisms employed in other conflict or post-conflict situations despite the absence of Russia's agreement, and would provide assurance to the States transferring the Russian State assets, to Ukraine and the other parties that ultimately receive them, and even to Russia, that the compensation system is transparent, evidence-based and equitable to all interested parties.

69. Although not expressly stated in ARSIWA, a further limitation on the countermeasures that could be taken against Russia is that they target only assets of the Russian State. That is, they would not be directed against the property of any private Russian entities or nationals. It is, after all, the State that is in breach of its *erga omnes* obligations under international law, not any Russian companies or individuals (although they might be complicit in or contribute to the State's unlawful conduct), and it is therefore the State against which any lawful countermeasures must be taken.

70. In this way, the proposed countermeasures would be distinguished from, and could not be invoked to justify, the unlawful measures that Russia has taken against private companies from States opposed to its war against Ukraine. Limiting the countermeasures to Russian State property also avoids potential difficulties such as those encountered in *Al-Dulimi and Montana Management Inc v. Switzerland*.[64] That case arose over concerns that the designation of particular individuals or entities on a sanctions list might have arbitrarily swept up people or companies unrelated to the sanctioned State (Iraq). If private assets were transferred to Ukraine, it could lead to litigation by affected individuals against those States that engaged in such transfers, or against Ukraine.

71. In contrast, litigation by Russia to challenge the transfer of its State assets is extremely unlikely, and all but certain to fail given the lawfulness of the countermeasures herein proposed. [65]

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[64] App no 5809/08 (ECtHR, 21 June 2016).

[65] Moreover, there is no international court that would presently have jurisdiction over a challenge to these countermeasures, since Russia does not accept the jurisdiction of the ICJ, the European Court of Human Rights or any other international court that would have competence over a dispute challenging the lawfulness of any measures imposed against it in these circumstances, and is unlikely to suddenly submit itself to the jurisdiction or any of these courts or tribunals.

72. Nor could Russia viably argue that its State assets are protected from seizure or transfer by another State under the doctrine of sovereign immunity. Sovereign immunity is a concept that prevents the national courts of one State from sitting in judgment of the governmental acts of another State, or from executing upon the other State's assets. The countermeasures addressed herein would not be judicially imposed. They would be adopted and implemented strictly by the executive branch of government, by legislation, or by cabinet decisions in parliamentary systems. They would be acts of state which are not ordinarily regarded as justiciable. To be sure, sovereign equality obligates States to protect another State's assets within their jurisdiction in normal circumstances. But that protection (or immunity) is lost when the offending State breaches obligations owed to an injured State or the international community as a whole, and thus subjects itself to the lawful imposition of countermeasures which might be unlawful absent the breach.

73. Accordingly, even if Russia were to complain about the lawfulness of the countermeasures: (i) its complaint would be without merit under international law; and (ii) it would not be able to find a forum to adjudicate its claim, let alone to provide its assets with immunity from seizure or transfer.

D. Procedural Requirements for Countermeasures

74. As indicated, in addition to the substantive requirements for imposition of countermeasures, there are also procedural requirements. These are listed in Article 52 of ARSIWA:

> "1. Before taking countermeasures, an injured State shall:
>
> (a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
>
> (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

Nor is there any international convention whose dispute resolution clause Russia could invoke to challenge the proposed countermeasures. The closest Russia could come would be to institute arbitration under a bilateral investment treaty against a State imposing these countermeasures, if such a treaty exists, but it would not get very far with such a proceeding because the deposits of its Central Bank in financial institutions located in other States would not constitute "investments" that are protected under those treaties, and the Central Bank itself would not be an "investor" entitled to such protection. "The Central Bank of the Russian Federation qualifies without a doubt as a State organ": *Privatbank v. Russia* (2019) PCA Cases No. 2015-21 (Partial Award) para. 237.

Even if a central bank were to be considered as a State-owned enterprise, it would not qualify as investor where it is discharging an essentially governmental function. *Beijing Urban Construction Group v. Yemen* (2017) ICSID Case No. ARB/14/30, Decision on Jurisdiction, paras. 33, 44.

2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights."

75. Although Article 52 identifies the requirements for an "injured State" to take countermeasures, the same requirements would apply to other States contemplating countermeasures. Accordingly, before a State can impose countermeasures on Russia for its internationally unlawful aggression against Ukraine, the State must call, or must have called, upon Russia to fulfil its international legal obligations – by, in this case, ceasing its aggression, withdrawing its forces and personnel from Ukrainian territory, and compensating Ukraine and other parties for the injuries caused by its wrongful conduct. It must also notify Russia of its decision to take countermeasures, and offer to negotiate with Russia over the fulfilment of its obligations. It could be argued that all these requirements already have been met in the context of adoption of the three UNGA resolutions discussed above, given the contents of the resolutions and the statements made in support of them; but it would not be difficult to satisfy them independently. It should also be noted that Ukraine has publicly asked the international community to use Russian frozen assets to fund compensation for the war's victims.[66]

76. Article 52 further provides that:

"3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith."

77. Article 52 poses no impediment to the countermeasures addressed herein. Russia's internationally wrongful conduct has not ceased; nor has Russia given any indication that it intends to cease such conduct or otherwise fulfil its international legal obligations. Although Ukraine has initiated proceedings against Russia before the ICJ, the subject matter of the dispute does not fully cover Russia's aggression against Ukraine or the injuries it has caused. In any event, paragraph 4 of Article 52 would apply because Russia, in ignoring and refusing to comply with the ICJ's Order on Provisional Measures, has failed "to implement the

[66] Chris Giles and Max Seddon, 'Volodymyr Zelensky calls for global plan to rebuild Ukraine after war,' *Financial Times* (London 23 May 2022) <https://www.ft.com/content/f625893a-4377-44f1-b100-47ee07b794ef>.

dispute settlement procedures in good faith". The commentary to Article 52 in the ILC Report recognises that where the responsible State is not cooperating with the procedure of a court or tribunal which has jurisdiction to hear the dispute and authority to issue provisional measures, countermeasures remain available.[67]

IV. CONCLUSION

78. Russia has used force against Ukraine in manifest violation of the Charter of the United Nations, as found by the UNGA and the ICJ (in a provisional measures phase). It has done so in circumstances that amount to an act of aggression. For the reasons stated above, the transfer of frozen Russian State assets to an international compensation mechanism to be used to compensate Ukraine and other parties for the injuries caused by Russia's internationally unlawful war of aggression would be a lawful, proportionate, reversible and justified countermeasure, which all States are entitled to participate in, given the *erga omnes* character of Russia's wrongful conduct.

79. It cannot be emphasized enough that Russia's aim of military conquest and annexation of all or part of Ukraine gives rise to a generational and fundamental challenge for international law: a war of aggression that strikes at the heart of the international legal order. If Russia is allowed to succeed, it would suggest the impotence of that legal order to prevent or punish even the most egregious violations of its basic rules.

80. There is no apparent likelihood that Russia will cease its wrongful conduct until it has accomplished its objective, accepts defeat, or experiences a change in government that results in a radical change of policy. In the meantime, it remains defiant in the face of condemnation by most of the international community, refusing to comply with resolutions by the UNGA to cease its military operations against Ukraine and withdraw from Ukrainian territory, and it is unmoved by the sanctions imposed upon it to date, including the freezing of its assets in various States.

81. In these circumstances, international law permits not only Ukraine but also other specially affected states and third-party States to take countermeasures against Russia, including measures that would be unlawful in ordinary circumstances, but which are justifiable and entirely lawful when employed against a State that is flagrantly violating the fundamental

[67] See para 2 of the commentary to Article 52 of ARSIWA.

rules of international law, and when they are taken to persuade that State to cease its unlawful conduct, or to provide reparations owed to an injured State.

82. These countermeasures could lawfully include the seizure and transfer of Russian State assets to Ukraine and other injured parties, provided Russia's liability is reduced by the amount of funds transferred to them. The compensation could be best provided through an international mechanism, to which the States concerned would transfer the Russian State assets currently under their control. This mechanism, the need for the establishment of which is recognized by General Assembly resolution ES-11/5, could support urgent policy programs to efficiently and effectively mitigate further damages and aid recovery by distributing appropriate compensation in an independent, impartial and transparent manner.

Addition IV

Remarks by Hon. James E. Risch, U.S. Senator from Idaho

Hudson Institute, November 16, 2023

Senator Jim Risch's Remarks at Hudson Institute on REPO for Ukrainians Act

November 16, 2023

Thank you very much, it's good to be back here again. Let me say that the remarks I made in April about why victory in Ukraine is critically important to American national security interests, actually for the planet's national security interests. Nothing has changed since then other than there is even a clearer understanding that it is important, that there be a victory there, and that Putin is defeated and that he is restrained from further ambitions on the planet.

Today marks the 631st day since the illegal Russian invasion of Ukraine. Over the last year and a half, Putin has single-handedly brought war back to Europe. We've seen Russian troops commit unspeakable crimes against the Ukrainian people, including indiscriminate targeting of civilian areas, indeed at times deliberate targeting of civilian areas, and infrastructure, mass graves, sexual violence, kidnappings, and countless other horrors.

Putin is making every effort to eliminate the Ukrainian people by committing atrocities that amount to serious war crimes, including genocide. Russia has to pay for the devastation it has caused, and that is what we are here to talk about today. Indeed, it is rare I get the chance to stand up here and tell you that the effort that we are making here is an effort that is bipartisan, it is bicameral, and we occasionally see issues like that. But more importantly, there is enthusiasm for this particular issue on all parts. So in that regard, it's fun to be doing one of these instead of fighting over something.

In Kyiv and Irpin last year, I saw firsthand some of the destruction that Russia has rained down on Ukrainian infrastructure, homes, schools, businesses, and manufacturing. The scale of the damage, as you all know, is immense. This devastation has decimated Ukraine's economy, with experts placing current estimates to rebuild at over $400 billion dollars. That number will only increase more the longer this war drags on.

This harsh reality presents the United States and its allies with a problem. How do we hold

Russia – a major economy with significant resources and veto powers at major international institutions – accountable for its invasion of Ukraine, the destruction it has created, and the lives it has cost? And how can we best help Ukraine rebuild its country, save its economy, and become integrated more into the West?

This really is a simple process, a simple matter. Russia broke it, they ought to pay for it. That's really, really simple. We understand it, the world understands that.

The international community has overwhelmingly condemned Russia for its war of aggression. Indeed, the International Court of Justice ruled that Russia's invasion has violated international law, and the UN General Assembly adopted a resolution establishing Russia's duty to provide reparations to Ukraine. The G7 has also issued multiple statements asserting that Russia must pay for Ukraine's reconstruction. That's what we are talking about today, and that's what this effort that we are pursuing here is very clearly targeted at.

The problem, of course, is that Russia has ignored all of this – why? Because it can. Putin has refused to discuss compensation for damages of course, let alone agree to pay for the reconstruction of Ukraine, and worse, inflicts continual destruction. Russia also continues to use its veto powers at the UN and other international institutions which house traditional mechanisms for compensation, effectively rendering these mechanisms useless.

So, we knew we need to do more. Thus, the REPO Act.

Meanwhile, public reporting indicates there is more than $300 billion in Russian sovereign assets currently frozen around the world, with most of that held in Europe. We have some here in the United States. While like-minded countries agree that Russia should pay to rebuild Ukraine, no country has yet been willing to take a first step to make that happen. As with all key decision points on assistance to Ukraine thus far, U.S. leadership is absolutely essential. We're here to provide that leadership.

European countries have hidden behind traditional, theoretical principles that protect sovereign state assets. However, Ukraine's situation is not a theoretical one. It is very real, and has very real

consequences.

Sadly, the truth is that Russia will never agree to its obligations to compensate Ukraine, and Russia's veto powers have taken international compensation mechanisms off the table. Thus, the need for REPO.

Given this reality, the international community is left with a choice: will law abiding nations stand by and allow Russia to skirt its international obligations? Or will we acknowledge that both domestic and international law must evolve in order to meet this relatively new problem, and unique problem? Make no mistake – this situation presents the international legal system with one of its greatest test since World War II.

The entire international system is based on the premise of international peace and security through respect of territorial sovereignty. If international law cannot evolve and hold Russia accountable for violating not only a foundational principal of the UN but also this most basic tenet of the international system in the modern age, we stand no chance of deterring China from invading Taiwan, or other authoritarian countries from future aggression.

The stakes are simply too high for us to let arcane legal theories keep us from doing what needs to be done. Over the course of this conflict, we have seen that U.S. leadership on key assistance to Ukraine – from critical munitions, to tanks, to fighter aircraft and fighter pilot training, to long range missiles – almost invariably led other countries to follow suit. This multiplies the amount of assistance many times over.

Now I do not want to, in any way, denigrate or take away from what the Europeans have done. They have stepped up, we have pushed and shoved back in forth arguing about who has done more, it's not particularly relevant. The fact is that both sides of the Atlantic are working on this issue, and should, and it's really been a thing that's brought our partnerships on NATO together and our NATO countries together—and stronger, more so than it's ever been in years.
If Russia refuses to honor its moral and legal obligations to compensate Ukraine to help them rebuild, other countries can – and should – seize Russia's sovereign assets and transfer them to Ukraine. Additionally, the United States can and should lead on this issue by passing legislation

granting domestic legal authority to seize and transfer Russian sovereign assets to Ukraine and work with our allies to do the same.

We are going through a legal process, a lawful process and a due process.

That is why I introduced the Rebuilding Economic Prosperity and Opportunity for Ukrainians Act. The REPO Act is actually a pretty simple piece of legislation. It does 4 things:

First and foremost, the REPO Act grants the president authority to seize Russian sovereign assets frozen in the United States. It also gives the president the authority to transfer those assets to Ukraine for reconstruction.

Under current U.S. law, there is no clear-cut way to seize sovereign assets of another country unless the United States is effectively at war with that country. The bill also makes clear that this would be a one-time authority that applies only to Russia in this unique circumstance.

Second, because the president may not transfer all of Russia's frozen assets, the bill creates a prohibition that the president cannot return any Russian frozen assets until Russia has withdrawn its troops from Ukraine and agreed to fully compensate the Ukrainians. The bill also provides congressional oversight over any proposal to return Russia's assets to ensure that conditions have, in fact, been met.

Third, the bill ensures these funds can get to Ukraine quickly by limiting Russia's ability to challenge a seizure in U.S. courts. Ukraine needs this money now if it has a hope of beginning to rebuild before the damage to its economy becomes irreparable.

Russia would like nothing more than to tie these funds up over a decades-long time period with complex litigation in order to keep from having to pay up. Interestingly, our court system is designed that this is possible if we don't have this legislation to make things happen otherwise. This provision would provide congressional intent to U.S. courts in this unique and extraordinary situation that

Russia should not be able to use the U.S. legal system to skirt its obligations and to lay justice for Ukraine.

Finally, the bill directs the president to engage with other like-minded allies and partners to establish an international compensation mechanism. While I believe the United States should have the authority to unilaterally seize Russian assets and send them to Ukraine, I do not believe we should act alone. Indeed, we should have our partners with us.

According to public reports, most of Russia's frozen assets are located in Europe. For us to make a dent in what Russia owes Ukraine, Europe will need to participate in this effort. But because this is an extraordinary situation, collective action in concert with our allies and partners will send the strongest possible message to

Putin and any other authoritarian state contemplating illegal military action. And, importantly, U.S. leadership here will be critical in encouraging our European allies.

While the REPO Act is focused on U.S. domestic law, it sends a strong message to our European partners that seizing Russia's sovereign assets would also be legal and appropriate under international law. Under the international law of "countermeasures," third-party countries have the right to take proportionate, temporary action aimed at compelling another state to comply with its legal obligations. Therefore, it is legal and appropriate for nations to terminate Russia's sovereign immunity and transfer Russian assets to Ukraine for reconstruction.

Some critics argue that this bill would limit the president's ability to negotiate an end to the war in Ukraine. Those with this view argue that the president should have total flexibility to use Russia's frozen assets as a carrot to entice Russia to the negotiating table and that placing pre-conditions on the return of those assets, as well as congressional oversight, hinders that ability. However, this legislation actually gives the president more tools to compel Russia to

negotiate.

By giving the president the discretion to use this authority, he will have added credibility in negotiations up to and until this authority is exercised. By making seizure a real possibility, Putin will be under greater pressure to make a deal and meet meaningful conditions of withdrawal and compensation. If Putin refuses, then this creates the pathway to make Ukraine whole.

Additionally, if Russia were to attempt to challenge seizure in U.S. federal courts, the bill would give Department of Justice lawyers the ammunition they need to rebuff challenges.

The argument I probably hear most often is that seizing Russia's sovereign assets will set a new precedent that undermines sovereign immunity. The principle, by the way, one of a number which have grown up over a period of time and are there for a reason, and in general and normal circumstances, could be good propositions. The principle that states are immune from having their property expropriated by other states to settle debts is an incredibly important principle. And the fact that the law of countermeasures has never been used to suspend sovereign immunity with regard to seizure of state assets is important. However, like most legal precedents, there are rare and extreme cases where exceptions are necessary as long are there are appropriate guardrails to keep the exception limited.

Indeed there is precedent for seizing sovereign assets of an aggressor state. In 1991, the international community collectively seized Iraqi sovereign assets following Saddam Hussein's invasion of Kuwait. I believe Russia's war in Ukraine is another unique but rare situation that warrants such similar action and is both legal, appropriate and very much in line with the single president that's out there, and that is the Iraq and Kuwait situation. Still others argue that if countries take Russia's assets, Russia will retaliate by seizing those countries' assets located inside Russia. Putin is already seizing Western assets. In April, Russia announced a new presidential decree which, ironically, cited the doctrine of countermeasures as justification to seize private companies if they are based in countries deemed "unfriendly" by the Kremlin. So the Russians themselves have provided a clear legal precedent for this legal action. So they've already done this, and it is appropriate that we

follow suit. Unfriendly countries are an interesting proposition by the Kremlin. That's probably everybody, with the exception of all the bad actors out there like North Korea, China, Iran and Cuba and Venezuela. But only a handful amongst the nearly two hundred countries on the planet fit this description.

Some critics have also expressed concern that if the United States were to take Russia's assets, we might seize other countries' assets. They also fear that countries would move their sovereign investments outside of the United States or finance their investments in other currencies. The fear is that confiscation could weaken the value of the dollar globally.

This argument doesn't hold water. Some countries have already tried to shift transactions away from the dollar – like China demanding that Saudi Arabia pay them for their oil using the Yuan. There is a reason these efforts have failed and been rebuffed. The dollar is the clear and safe global standard for international investment – period. It is highly unlikely, at least for the foreseeable future, that another currency could overtake the dollar. It is also clear this bill targets a very specific and unique case.

The approach in the REPO Act does not just represent my view. In crafting this legislation, I have worked closely with constitutional law professors, international law experts, policy practitioners, European partners, Ukrainian legal advocates, and Ukrainian government officials. This effort to bring so many stakeholders to the table is why this bill is THE bill on Russian sovereign assets that has bipartisan, bicameral support. It is also why the REPO Act is Ukraine's top legislative request of Capitol Hill.

In the Senate, I've partnered with Senator Sheldon Whitehouse – a strong advocate for anti-money laundering and a key architect of legislation enabling the seizure of private Russian assets in the United States. Other Senate cosponsors include Sen. Wicker, ranking member of the Senate Armed Services Committee, and Sen. Graham, ranking member of the Senate Defense Appropriations subcommittee.

In the House, the Foreign Affairs committee just passed its version of the bill by an

overwhelming bipartisan majority of 40-2. The REPO Act has also been endorsed by legal and policy scholars from all parts of the political spectrum outside of government.

We are entering a new phase of strategic competition that is growing more fierce with each passing day. We need to develop and use new and more creative tools to not only seek justice for those who are wronged, but to deter bad actors from doing things like Russia has done in Ukraine.

The countries that want to undermine and change the international system – Russia, China, Iran, and North Korea – don't care about the rule of law and never have. And they don't care about our precedents. We must be willing to put them on notice that they will not act with impunity—that they will not be allowed to act with impunity. They will be made to pay. The REPO Act will show them that is true – and I thank all of you who share this enthusiasm and support this effort, and I commit to you that we will move as diligently as we can to get this legislation across the finish line. So, with that, I'll take a question or two, whatever you like.

Addition V

Transcript of A Hearing Held on December 6, 2023, Before the Commission on Security and Cooperation in Europe U.S. Helsinki Commission

MAKING RUSSIA PAY: SOVEREIGN ASSET CONFISCATION FOR UKRAINIAN VICTORY

COMMISSION ON SECURITY AND
COOPERATION IN EUROPE,
U.S. HELSINKI COMMISSION,
HOUSE OF REPRESENTATIVES,
Wednesday, December 6, 2023.

The hearing was held from 2:12 p.m. to 3:41 p.m., room 608 Dirksen Senate Office Building, Washington, DC, Representative Joe Wilson [R-SC], Chairman, Commission for Security and Cooperation in Europe, presiding.

Committee Members Present: Representative Joe Wilson [R-SC], Chairman; Representative Steve Cohen [D-TN], Ranking Member; Senator Sheldon Whitehouse [D-RI]; Senator Richard Blumenthal [D-CT]; Representative Victoria Spartz [R-IN].

Witnesses: Ruslan Stefanchuk, Chairman of the Verkhovna Rada of Ukraine; Andriy Kostin, Prosecutor General of Ukraine; Ambassador Daniel Fried, Atlantic Council Weiser Family Distinguished Fellow; Paul Reichler, International Law Attorney, 11KBW; Yuliya M. Ziskina, Senior Legal Fellow, Razom for Ukraine.

OPENING STATEMENT OF JOE WILSON, CHAIRMAN, U.S. HOUSE, FROM SOUTH CAROLINA

Chairman WILSON: Ladies and gentlemen, I am Joe Wilson, Chairman of the U.S. Commission on Security and Cooperation in Europe, and just wanted to welcome everyone to be here. We have a circumstance where there is markup in the House, and then we also have different meetings that are underway, but people will be coming and going. I am really grateful that Senator Sheldon Whitehouse of the beautiful State of Rhode Island is here.

We will be beginning, and—because it is so important, the issues that we are discussing today in this hearing indeed. It is about "Making Russia Pay: Sovereign Asset Confiscation for Ukrainian Victory." I would like for our witnesses to take their place, and then we will be truly underway.

The hearing will come to order. It has been nearly 2 years since war criminal Putin's full-scale invasion of Ukraine. War criminal Putin has committed murderous atrocities against Ukrainians, including torture, systematic rape, and indiscriminate bombing of civilians. All the while, he has made it clear that his aims do not end in Ukraine. Putin would like nothing more than to freeze this war, take a rest, and reignite it a few years later after Russia's new production capacity has kicked in. He has every intention of

invading NATO countries in his effort to resurrect the deceased Soviet empire. Speaker Mike Johnson is correct: Putin will not stop in Ukraine and threatens, really, the security of all of Europe; and, indeed, threatens the security of the United States and all Western civilization.

Meanwhile, $350 billion of frozen Russian assets sit untouched in the U.S. and European financial systems. War criminal Putin must pay for his war. Confiscating this money for Ukrainian defense and construction would go a long way to ensuring Ukraine can continue the fight. Ukrainians want to fight and win. It is existential, and we need to have Ukraine win. Full Ukrainian victory is the only path to a sustainable peace with territorial integrity—beneficial for Ukraine and beneficial for the people of Russia who are living under Putin oppression. Victory is only possible if we are able to maintain security assistance for Ukraine. Why not use Russia's own money for this?

I am grateful to be an original co-sponsor of the REPO—R-E-P-O—Act, which would enable the president to confiscate Russian sovereign assets. This bill is critical to help Ukraine. The $350 billion of Russian sovereign assets total more than the United States and European Union have so far provided for Ukraine's defense.

The REPO Act also mandates an international agreement. This is important. We must be united with our allies in the confiscation of the funds.

Neither the free world nor Ukraine can afford further delays. Needless delays have already cost Ukrainian lives. Had the administration committed to victory in Ukraine and responded accordingly with full equipment, Ukraine could have already won the war. Allowing this genocidal war to be prolonged only serves the interests of war criminal Putin and his cronies.

We are grateful to have a distinguished panel here today to review the issues.

Ambassador Daniel is the—appreciated so much in Washington. A living legend right here, so thank you. He served as U.S. Ambassador to Poland, and has held economic and national security positions with the American government.

Very important, Paul Reichler is a renowned international law expert. He represents sovereign states before the International Court of Justice and has unique knowledge and experience on the subject that we have before us today, which is a lawful undertaking to provide for securing these funds for the benefit of the people of Ukraine.

With—Yuliya Ziskina is a senior legal fellow for Razom, one of the most important Ukrainian-American organizations advocating for Ukrainian victory and assisting Ukraine directly through humanitarian support.

We are also joined by Hon. Ruslan Stefanchuk, the speaker of the Verkhovna Rada of Ukraine.

Additionally, we are grateful to have the distinguished prosecutor general of Ukraine, Andriy Kostin, with us today.

Thank you all for being here and we look forward to your testimony. We will begin with the presentation by the speaker by way of Zoom.

PRESENTATION OF RUSLAN STEFANCHUK, CHAIRMAN OF THE VERKHOVNA RADA OF UKRAINE

Mr. STEFANCHUK: Chairman Wilson, Chairman Cardin, respectful members of the Commission, thank you for this opportunity to appear before you today and address the issue of confiscation of Russia's sovereign assets. At the outset, I wish to convey my sincere gratitude to the United States, to the Congress and the government, as well as to the American people for their unwavering and continuous assistance to Ukraine. Your aid and dedication is existential as we fight for our freedom and sovereignty. We are retaining our resilience and determination till the very end, till our victory. Therefore, we appreciate every dollar of American support, but Russia should pay as much of this cost as possible.

It is well-established principle of international law that a State responsible for the international wrongful act must make full reparation for the injury caused by international wrongful act, particularly if the State concerned repeatedly violate the imperative norms of international law such as prohibition to wage aggressive war and prohibition to commit international crimes. Throughout the past 2 years, we have been witnessing Russia's blatant breach of these rules, resulting in unprecedented damage and destruction to Ukraine and Ukrainian people.

The World Bank's estimates for reconstruction and recovery in Ukraine have been up to 411 U.S. dollars only for the first full year of war. It includes the monetary costs of infrastructure rebuilding as well as impact on people's lives and livelihoods. The costs of rebuilding are already projected to be 2.6 times greater than Ukraine's entire GDP. Russia's unjustified and unprovoked war has reversed years of development and economic progress of Ukraine.

Importantly, the World Bank's estimates do not envisage potential costs related to territories remaining under Russia occupation, parts of eastern Ukraine as well as the Crimea region. It also does not forecast the long-term efforts required to rectify damage resulting from Kakhovka Dam destruction. As we cross the 2-year cycle of this war, the number—411 billion U.S. dollars—could be very well doubled. Most importantly, we all owe redress to millions of victims and survivors of this war.

What are the ways forward that are permissible in international law. We have two options that are not mutually exclusive. Option one is the confiscation of the Russian sovereign assets by the State executive authority via an act. Option two is establishment of an international compensation mechanism.

Due to time constraints, I will focus on option one. That is being put forward in the Senate via the Rebuilding Economic Prosperity and Opportunity—so-called REPO—Act, as well as in the—in the House. We commend Chairman Wilson, Representative Cohen, Senator Wicker, Representative Veasey, Representative Lawler, Senator Blumenthal, and Senator Whitehouse, and others for cosponsoring the REPO Act in the House and the Senate. I believe it can be an important step toward ensuring that Russian assets seized because of their aggression can be repurposed and used to support Ukrainian victory and recovery.

In our understanding, Russian State assets are not unequivocally immune from confiscation. State-owned assets are covered by foreign sovereign immunity only from jurisdiction of the courts of another State, also known as adjudicated confiscation. There is an absence of a rule on immunity protection from the executive actions. Notably, the practice of confiscation of sovereign assets under an administrative act or measure is well known in wartime situations. It has taken place in World War I, World War II, Korean War, and in other armed conflicts. Thus, it is plausible to argue that there is a general wartime exception to sovereign immunities in the world when Russia, without remorse, continues act of aggression and atrocities, where the U.N. Security Council is paralyzed to address the issue due to the permanent member's interest who is the very wrongdoer.

We need to find pragmatic solutions and approaches for Russia to pay fully the reparation owed to Ukraine and Ukrainian people. For this reason, the proposals to transfer frozen Russian property to Ukraine as prescribed in REPO Act is sound law and sound policy, an adequate response to an unjustified and unprovoked aggression that destroys lives and leads to hundreds of billions of dollars in financial damages. Thank you for your attention.

Chairman WILSON: Thank you very much, Mr. Speaker, and I appreciate so much you referencing, indeed, the bipartisan situation of Republicans and Democrats actually very supportive of the people of Ukraine. Then, with Senator Whitehouse here, it even proves, too, remarkably, bipartisan, bicameral, and so this is a positive achievement.

Then I want to show you that we do have some domestic politics in America that may be an issue to go through, but we shall. Over and over again, the American people are supportive of the people of Ukraine for the existence of Ukraine, for the border of Ukraine.

Additionally, I just left a meeting where we had the foreign minister, Lord Cameron of the United Kingdom, here. He was very eloquent, as former prime minister himself, of describing the unity of the West. Bringing in Sweden and Finland, who would imagine? So—and Switzerland over and over again, and then, indeed, too, last week the former prime minister of the U.K., Liz Truss, was here and was very effective in bringing together why Western countries should be so proactive in supporting the very courageous people of Ukraine.

With that, we now proceed to Ambassador Dan Fried.

TESTIMONY OF DANIEL FRIED, AMBASSADOR, ATLANTIC COUNCIL WEISER FAMILY DISTINGUISHED FELLOW

Mr. FRIED: Chairman Wilson, Senator Whitehouse, I am honored to testify at today's hearing and to speak in support of the REPO for Ukraine Act.

I want to define in simple language the U.S. interest in Ukraine. Through world war and cold war, the United States learned the hard way that we do not want dictators marauding around Europe starting wars of conquest. Russian President Vladimir Putin wants to restore the Russian empire. He says so. That puts Russia on a collision course against its neighbors, including America's friends and allies, because that is what restoring the empire means.

Ukraine is fighting for its life, its independence, and its place as a free-market democracy, part of an undivided Europe and transatlantic community.

That would be good for the United States. For generations, the goal of U.S. grand strategy advanced by Democrats and Republicans alike has been to make the world, especially Europe, freer and more secure, creating conditions under which the U.S. and its friends—the free world—could prosper. Ukraine's freedom and success in this war helps us.

Much has been said about the recent course of that war. Ukraine's efforts to liberate more of its territory this year did not yield the results that Ukrainians' friends hoped for, but Russia failed to conquer all of Ukraine. Ukraine has liberated half the territory Russia initially conquered. Russia has failed to advance much this year. Ukraine's deep strikes against Russian military targets have been successful, for example against the Russian Black Sea Fleet.

I do not know how the war will end, but I am pretty sure it will not end with a Russian victory parade in Kyiv. It may— that war may be longer than we think, however, and certainly longer than we hoped. Putin is counting on a long war to work to his advantage—for Western political will to flag, giving him the chance to grind down Ukraine. Our counter should be to increase the pressure on Russia, to increase military support for Ukraine, and increase the resources available to sustain Ukraine in its fight for survival. It is a good investment, but it takes resources—and that is where REPO comes in.

Immediately after the Russian full-on invasion last February, G–7 governments immobilized Russian sovereign assets. Those funds amounted to somewhere around $300 billion. That was a bold move, well executed. That's good, but not good enough. Ukraine needs those assets now.

The administration has requested additional funding for Ukraine. I support that request, but all can see that this funding is being debated. The EU, which has provided Ukraine with roughly as much support overall as has the United States, is also grappling with how to sustain high levels of support for Ukraine. Russian assets can and should be used to compensate Ukraine for some of the destruction from the war that Russia started for no good reason. U.S. and European taxpayers might appreciate that.

The U.S. holds only a small portion of the immobilized Russian assets. Europeans hold the bulk. G–7 governments should move together. The EU's debating the issue. The U.S. can and should show leadership by passing REPO. We should lead.

There are arguments against G–7 governments taking this step. I am not a lawyer. I am not a financial expert, but that said, the argument that Russia's assets can be repurposed in response to its illegal war under the principles of countermeasures, a case put forth by Yuliya Ziskina here on this panel. My friend and former colleague Phil Zelikow, seems strong. A country that has shown contempt for international law to the point where its president has been indicted as a war criminal should not enjoy the benefit of international legal protections in avoiding consequences of its illegal war.

A second argument against REPO is that repurposing Russian sovereign assets to help Ukraine would wreck the international financial system by undermining the credibility of the U.S. and Europe as safe places for funds. That strikes me as questionable. By immobilizing Russia's sovereign assets, G–7 governments show that they do not regard these assets as untouchable. They crossed that line 2 years ago. Janet Yellen said in October that she supports using some of the Russian—some of the income generated by the immobilized Russian assets to help Ukraine. Well, it seems to me that if the U.S. supports using some of the Russian assets for Ukraine, it ought to support using all the assets that it can.

REPO advances U.S. interests. It makes Russia pay for Russia's war against Ukraine. I hope it becomes law. Thank you, Mr. Chairman.

Chairman WILSON: Thank you so much, Ambassador, for your passion on this issue, and I—we all appreciate your service as U.S. Ambassador to Poland. I especially do because I was really grateful my son was—oldest son, the attorney general of South Carolina, Alan Wilson, was smart enough to marry Jennifer Miskewicz of Polish American heritage, from Krakow. We have proved our deep affection for the people of Central and Eastern Europe over and over again in so many different ways.

We now proceed to Paul Reichler, Esquire, and indeed, the legal issues here are so important because we want to be respectful of every legal responsibility. We look forward to your presentation.

TESTIMONY OF PAUL REICHER, INTERNATIONAL LAW ATTORNEY, 11KBW

Mr. REICHLER: Good afternoon, Mr. Chairman, Senator Whitehouse, Representative Cohen. I am Paul Reichler. I am a practicing attorney based in Washington, DC, and specializing for over 40 years in public international law, which is the representation of sovereign states in disputes with other states before international courts and tribunals. This includes especially representation of states in litigation before the International Court of Justice in The Hague as well as before other international courts and arbitral tribunals.

I furnished the Commission with my c.v., [Commissionable Volume] which sets out the states I have represented and the cases in which I have appeared, as well as the articles I have published and the recognition I have received.

I also furnished the Commission with a legal memorandum that I, along with seven of the most prominent practitioners of public international law in the world, have co-authored. The memorandum addresses legality of countermeasures against the Russian Federation for its unlawful military invasion of Ukraine and annexation of Ukraine's sovereign territory, and its failure to pay reparations for the damages inflicted by its unlawful actions.

The countermeasures discussed in the memorandum are very similar to the measures that would be authorized under the REPO Act that is presently under your consideration. Specifically, our memorandum addresses the lawfulness under international law of transferring Russian State assets currently frozen by U.S. sanctions to Ukraine and other victims for compensation for the dam-

ages caused by Russia's internationally wrongful acts. The memorandum concludes that the transfer of frozen Russian State assets would be lawful under international law. I will summarize the reasons why in six key points.

First, under international law, a State—in this case, Russia—is responsible for its internationally wrongful conduct.

Second, when the wrongful conduct is so egregious that it violates a peremptory norm of international law, it is recognized to have erga omnes effects—that is, that it so serious a breach of fundamental principles of law that it is considered to impact all states, not just the direct victim of the unlawful acts, so that any State may take countermeasures against the wrongdoer to induce the cessation of its wrongful conduct or to provide compensation to the direct victim.

Third, countermeasures may include acts that would ordinarily be unlawful under international law, but which are rendered lawful if taken in response to grave breaches by the offending State.

Fourth, Russia's unprovoked war of aggression against Ukraine and its annexation of Ukraine's sovereign territory violate peremptory norms of international law with erga omnes effects, such that countermeasures may be lawfully imposed against Russia by any State.

Fifth, the transfer of already-frozen Russian State assets would be a proportionate response to Russia's aggression and its failure to comply with its obligation to compensate Ukraine and other injured parties for the damages it has inflicted, as long as the amount of Russian funds transferred does not exceed the total amount of compensation owed by Russia and Russia's obligation to pay compensation is reduced by the amount that is transferred.

Sixth, the compensation should be provided through an international mechanism that assures the fairness, objectivity, and transparency of the process.

This is the unanimous view of the eight co-signers of our legal memorandum, who are from the United States, the United Kingdom, Belgium, the Netherlands, Germany, and Japan, all of which are states that have frozen the Russian State assets held by their banks and financial institutions. None of us represents Ukraine or any other party with an interest in this matter.

In addition to setting out the legal bases for these conclusions, our memorandum seeks to dispel some of the confusion that appears to have been generated by commentators who have expressed concerns about sovereign immunity. In our view, sovereign immunity is not applicable to the transfer of frozen Russian State assets to Ukraine or other victims of Russia's aggression, nor is it applicable to any of the other provisions of the REPO Act.

In addressing this subject, we should understand the difference between immunity under international law and immunity under domestic law, including the law of the United States.

First, under international law, the assets of a foreign sovereign which has not engaged in internationally wrongful conduct would normally be protected against seizure by the host State. That protection disappears when the owner of the assets engages in egregiously wrongful conduct with erga omnes effects, as Russia has done, thus permitting the host State to take lawful counter-

measures against those assets to induce cessation of the wrongful conduct or payment of compensation to the victim. As I indicated a moment ago, a countermeasure is an act that would be unlawful in ordinary circumstances but is rendered lawful if it is adopted in response to another state's egregiously unlawful conduct. That would be the case here for the measures contemplated by the REPO Act.

Second, under domestic law, including U.S. law, sovereign immunity is a doctrine that restrains domestic courts from acting against the assets of a foreign sovereign. It has no application to and imposes no restrains on executive action by the president or legislative action by the Congress, and there is clear precedent for this. In the International Economic Emergency Powers [Act] of 1977, Congress authorized the president in certain circumstances to freeze the assets of a foreign sovereign. This has been done repeatedly. This is the authority under which Russia's State assets have already been frozen. No commentator has argued, to my knowledge, that this was a violation of sovereign immunity since it most definitely was not. If Congress has the power to authorize the executive to freeze a foreign state's assets, it must also have the power to authorize the executive to transfer them. If the assets are not immune from seizure, they are not immune from transfer either. The only issue is whether the transfer of the assets is proportionate to the gravity of the wrongful conduct or the extent of the injury caused. In this case, the requirement of proportionality is plainly met.

I have just one more paragraph, if I may continue, if you will indulge me, Mr. Chairman.

Finally, sovereign immunity is not absolute. It has many exceptions, as detailed in the Foreign Sovereign Immunities Act of 1969 and the various amendments enacted by Congress since then, all of which have carved out additional exceptions to immunity—for suits by victims of torture, for example; or for suits by victims of state-sponsored terrorism. The REPO Act is itself another example. It expressly removes any transfer of the frozen Russian assets from judicial review. This is certainly within the power of Congress to do. There is, thus, no issue of sovereign immunity either under international law or U.S. law insofar as the transfer of frozen Russian assets to Ukraine or others is concerned, nor is there any other legal impediment in international or U.S. law to the transfer of these assets.

I thank you, Mr. Chairman and members of the Commission, for the opportunity to appear before you. It has been a true privilege for me to be here, and I would be happy to respond to any questions you might have.

Senator WHITEHOUSE: Mr. Chairman, before we move on to the—

Chairman WILSON: Yes.

Senator WHITEHOUSE: —Next witness, may I ask unanimous consent that the legal memorandum that Mr. Reichler referred to be made a part of the record of these proceedings?

Chairman WILSON: Absolutely. Without—

Senator WHITEHOUSE: I would add the note that his co-author, Philip Zelikow, has a distinguished career including service as counsel to the U.S. Department of State.

Chairman WILSON: It is impressive, and thank you so much, Senator, because the memorandum is so helpful and can be a message to everyone, and maybe particularly a message to war criminal Putin and to Tehran on what might come their way, and maybe even to Beijing.

Additionally, we have been joined by the House Co-chairman, I am really grateful, Steve Cohen of Tennessee. We also have Senator Richard Blumenthal of Connecticut, and to see, again, bipartisan—and a message truly to the axis of evil, whether it be Moscow, Beijing, or Tehran, that there is unprecedented bipartisan, bicameral support for the people of Ukraine.

In every way it has been a remarkable achievement to see the unity, and so much the unity. I want to give credit. The value of the Ukrainian American community across—in every American State, the Ukrainian American community has assimilated to be so proactive in community activities, business, successful, and promoting victory in Ukraine. We are so grateful to Yuliya Ziskina here representing Razom, which is one of the largest Ukrainian American organizations.

TESTIMONY OF YULIYA M. ZISKINA, SENIOR LEGAL FELLOW, RAZOM FOR UKRAINE

Ms. ZISKINA: Good afternoon, members of the Commission. Thank you for the opportunity to share my testimony with you today. The legal case for asset transfer has been well established by the world's leading experts, as we have just heard, including from my fellow witness, Mr. Reichler. It is time to recognize that what underlies the reluctance to seize Russian State assets is not a legal barrier, but a political one. I would like to bring a sense of urgency which is often missing in the debate about asset seizure. The Russian goal in this war has not changed. It is either conquer Ukraine or destroy it. This war is being fought economically just as much as it is being fought on the battlefield. Ukraine must win them both.

There are three things happening right now at the same time. One, Ukraine is struggling to keep its economy running. It is lost a third of its GDP. Two, Russia is getting stronger. Its GDP has grown, allowing it to increase its military spending by 70 percent in 2024 compared to this past year. Meanwhile, while this is happening, the Western world is sitting on a $350 pot of Russian money. All these frozen funds are legally owed to Ukraine as compensation for reconstruction and reparations.

I want to emphasize that reconstruction is an ongoing process. It is not just something that happens after the war is over. Critical infrastructure that Russia targets, like power stations, hospitals, railways, utilities must be continually repaired during the war, literally to keep Ukraine's lights on. The frozen State assets are not just needed for ongoing physical reconstruction, but also for reparations to rebuild victims' lives. Eight percent of Ukrainians have loved ones who are injured or killed, and among this 80 percent, each person has on average seven close relatives or friends who were injured or killed, including by missiles like this.

This is shrapnel from a cruise missile that I personally brought back from Ukraine to be able to show you. The Russians used this

1,000-pound payload to target a civilian business in a small town in Kharkiv. These family photos are from the destroyed home of an elderly couple. We must be using Russia's own money now, not just to rebuild destroyed homes after the war ends, but to be saving the lives of people who live in them now. As Russia is pillaging Ukraine in violation of nearly every tenet of international law and basic human morality, the West seems more concerned with protecting Russian assets than using those assets to protect Ukraine.

We are, in effect, Putin's best bankers. It would be a cruel irony to deny Ukraine the lifesaving benefit of these assets by invoking precedents for Russia's sovereignty and property rights when Russia is blatantly violating Ukraine's basic right to even exist. There are those that argue we should hold the reserves until Russia voluntarily agrees to pay reparations or even use them as bargaining chips for negotiations. Let me be clear, Russia does not want peace. Russia wants Ukraine. It has just increased its military spending in the next year to almost half of its total budget. It is showing no signs of backing down.

Given Russia's total failure to comply with any international court orders so far, and its violation of 400 different international law treaties since just 2014, it is naive to believe that Russia will comply with any future judgments or agreements for reparations to Ukraine, or even a peace treaty itself. But even if these payments were negotiated at some point in the future, what matters is that under international law Russia already owes this money to Ukraine. No one disagrees with this. This is not a point of contention. The G–7 has already confirmed that the money is never going back to Russia. Instead of just sitting there in a pot, these funds could essentially be a downpayment on what Russia already legally owes.

The question is not whether Russia must pay. The question is when. The longer the West delays tapping into Russian reserves for crucial funding, the more we—and I mean we, not just Ukraine—we risk losing this war. Not only from Russia's weapons, but from every hospital that is unable to be rebuilt, every energy station that loses power, every damaged train that is unable to deliver medicine, and every child stolen from their country. The U.S. must cease and transfer Russia's frozen sovereign assets to perform Russia's existing obligation to compensate Ukraine. Congress must include the REPO Act in the supplemental aid package. It would provide an additional billions of dollars during the war for Ukraine's ongoing reconstruction.

This is not an exception to international law. It is international law. Again, this war is being fought economically just as much as the soldiers are fighting on the battlefield. Ukraine needs to win them both. Thank you for your consideration.

Chairman WILSON: Thank you very much, Ms. Ziskina, and thank you for being the senior legal fellow for Razom. It is just so inspiring to see the success of people of Ukrainian American heritage.

We will now proceed for my Co-chair. I am so grateful to be working, again, bipartisan, with Congressman Steve Cohen of Tennessee.

STATEMENT OF STEVE COHEN, CO-CHAIRMAN, U.S. HOUSE, FROM TENNESSEE

Representative COHEN: Thank you. Thank you, Mr. Chair. I am going to be brief.

We have had these hearings on issues concerning Ukraine and Russia for some time, and my record is fairly—is very consistent and fairly well known, I think. I think what Russia is doing is a violation of international law and needs to be condemned at every opportunity possible. I think we need to pass, obviously, REPO, and we passed some bills on oligarchs' assets in the past Congress. Those moneys should also go to Ukraine to help rebuild it.

What Putin is doing in destroying the country of Ukraine is an attempt to genocide. He is destroyed a lot of cultural artifacts, as well as necessary utilitarian structures and industries. We need to get the money there as quickly as possible, and continue the war, and supply the Ukrainians with the military that they need to win this war. They do need our support as well as European support, which they have been receiving.

I want to take a minute here just to talk about one of my subjects, that I am assigned to the Helsinki Commission as a special representative on political prisoners. What Putin has done in taking Navalny and Vladimir Kara-Murzoff and putting them—Kara-Murza—and putting them into gulags, and Siberia, and solitary confinement in a rather regular fashion, and depriving them of medical treatment that they need, is putting their lives at risk. It is typical Putinesque behavior. He does not have the Chechens to operate on his behalf as they did and in killing Nemtsov, and as they did in killing a great journalist about 13 years ago.

They killed—now Putin does it in a slow fashion, and he has taken a Wall Street Journal reporter. He has taken a lady from Radio Free Europe recently and detained them. They are political prisoners as well. Russia is a horrible representative of the international community and where the international community stands in 2023 and 2024.

I would like—can I ask a question? No? I am not going to ask a question. It was just a—I do not know why I thought of that. I yield back the balance of my time.

Chairman WILSON: No, no, hey, what we are going to do is that we are waiting for Speaker Stefanchuk to come. In the meantime, we are going to begin the 5-minute questioning. I am going to differ for me to be later, but out of incredible respect for Senator Whitehouse, as he was so early to be here, I would like to now refer and have the 5-minute program begin with Senator Sheldon Whitehouse of Rhode Island.

Representative COHEN: I would like to say how much I encourage that, and second it, and think it was a wise decision. [**Laughter.**]

Senator WHITEHOUSE: Thank you. Thank you, Steve. Much appreciated to you and Joe.

Mr. Reichler, my first questions are for you. The first is, what is the meaning of the temporary or reversible standard? How is it met in the case of seizing Russian frozen assets in these circumstances? Put your mic on.

Mr. REICHLER: Thank you. Thank you. Under general or customary international law, which is reflected in the articles on the

responsibility of states for internationally wrongful acts, countermeasures are limited to the nonperformance, for the time being, of international obligations of the State, taking the measures toward the responsible State. They shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question. These provisions have been interpreted by the International Court of Justice as requiring the reversibility of countermeasures, which is the term that you used, Senator. What that would mean in the case of the asset transfers to Ukraine or other victims would be that the assets—the amount of the assets transferred may not exceed the sum total of the compensation to which Russia owes Ukraine.

Senator WHITEHOUSE: Got it.

Mr. REICHLER: Furthermore, if I just may add—

Senator WHITEHOUSE: My time is running out, so if you do not mind being brief—

Mr. REICHLER: That that amount would be deducted—the amount transferred would be deducted from Russia's total liability. That would satisfy the reversibility standard, and I think that is what the REPO Act calls for.

Senator WHITEHOUSE: Thank you, and, Ambassador Fried, we have been told that the practical aftermath of seizure could lead to a gallery of horribles, including effects on the dollar as reserve currency, including creating a precedent for future unjustified sovereign asset seizures, and including moving the economic center of gravity away from the free world and from our institutions. Are those credible to you?

Mr. FRIED: Two-part answer to this. One, we all want risk-free policy options. They seldom exist. Second, I have heard the arguments also. I am not sure I buy them. To be blunt, the Chinese and Saudis probably noticed that we immobilize the Russian foreign exchange reserves. They did not pull their money out of G–7 banks, not out of goodwill but because they recognize that there are a few alternatives. They are going to—where else will they put them? I am not sure. I have always been skeptical of the arguments that this will cause a race from the dollar-and euro-dominated international financial system. Is there a zero risk? No. Considering the problem we are grappling with, which is a major war, a war of conquest and national extermination, it is worth doing.

Senator WHITEHOUSE: Thank you.

Ms. Ziskina, you are a U.S. lawyer, you work for a U.S. law firm. You understand the value of leverage, and you have described the West right now as serving as Vladimir Putin's bankers by holding on to the frozen funds for him. Tell me what you think the effect might be if the threat of seizure of those assets became credible to Vladimir Putin. It is one thing to have hundreds of billions of dollars on the shelf that you can plan on getting back at the conclusion of the conflict. It is a very different thing if we have actually started seizing and delivering to Ukraine those funds. Does that create international leverage on Putin in the meantime to ameliorate his behavior for fear of losing all of his sovereign funds?

Ms. Ziskina: Absolutely. I think it does, but first, I would like to address this leverage argument by asking what leverage, exactly? The funds have been frozen for over a year and a half. If we were

going to see meaningful leverage now, we would have already seen it. So doing the same—

Senator WHITEHOUSE: If freezing alone created the leverage, yes.

Ms. ZISKINA: If freezing alone, indeed. Russia has shown it is willing to pay a high price to conquer Ukraine. These assets are not leveraged by keeping them frozen. Russia has already written them off and they are a drop in the bucket in what he is spending on this war. By using them now, this shows that the West is serious about Russia's act of aggression. Not only does it show Russia and Putin the seriousness of the West, it also serves a function of helping Ukraine withstand Russia's aggression. That is perhaps the most important effect of this. It is an economic counteroffensive that the West must be doing right now.

Senator WHITEHOUSE: Good words to end on.

My time has expired. Thank you, Chairman.

Chairman WILSON: Hey, thank you very much, Senator.

We now proceed to Congressman Steve Cohen of Tennessee, the Co-chair of the Commission.

Representative COHEN: Thank you, sir.

Any one of you can answer this question. I think I know the answer, but did not Russia confiscate some assets of American companies—like airplanes and things like that? Mr. Reichler, you are nodding, so if you would respond.

Mr. REICHLER: Yes, they did.

Representative COHEN: They took airplanes, and they took all kind of properties that American companies had when they decided not to operate in Russia any longer.

Mr. REICHLER: Yes, they did. Without compensation.

Representative COHEN: Yes. Well, that seems like they have kind of set the stage. Do we really need to pass a law to do this? If it is international law and if it is appropriate that a country take another sovereign's assets for international crimes, which is what's happened here, is it necessary that the Congress pass a law to authorize it? Or can the Justice Department just do it on their own volition?

Mr. REICHLER: The executive—the president has the authority to do this without further legislation by Congress. Obviously, the legislation is very important, nonetheless. As a strictly legal matter, this is foreign policy. It is within the discretion and the power of the executive branch, and the President already has the authority under the International Economic Emergency Act of 1977. The same power that authorizes the president to freeze the assets also authorizes the president to transfer them.

Representative COHEN: Well, I do not think any one of us on the panel have—and we probably should have a better perspective on this than you might, but I am going to ask you the question. That is the authority I have, to ask the question. Why in the hell are they not doing it? What is holding up Blinken and Biden and Nod?

Mr. REICHLER: I wish I could answer that question, Congressman.

Representative COHEN: Do you have a guess?

Mr. REICHLER: I am a lawyer. Speaking from a legal perspective, there is no doubt that it would be lawful under international law for the administration to do that. It is a policy issue. That is one

of the reasons I think that this legislation is so important, because if Congress expresses its will that these countermeasures, these measures should be taken, it may make the difference in encouraging the administration to take the action.

Representative COHEN: Before I get to Ambassador Fried, do you know of any other country that might—Europe—that might have a similar interest in helping Ukraine? Why—they all would—but have any of them taken action to confiscate any assets?

Mr. REICHLER: Well, we know that G–7 countries and others have frozen Russian State—I think that almost 20 states that have frozen Russian State assets. Some of them are smaller amounts. I think that, to date, no other State has transferred the frozen Russian State assets to Ukraine. I do know, because my colleagues who are cosigners of our legal memorandum, are working in those states. They come from those states, and there is—there are strong tendencies now in some if not all of those states to move ahead with the transfers. As is often the case, they are looking to the United States for leadership.

Representative COHEN: They have not—have their parliaments passed authorizing legislation, or executives willing to or considering acting on their own?

Mr. REICHLER: I think it varies from State to State. I know Canada has passed legislation, although they have very little in the way of Russian State assets there. I can tell you for certain that Canada has passed a law similar, certainly in effect, to the REPO Act. In other states, depending upon their constitutional system, they may or may not need legislative action. That it may be possible for them to do it by executive action without further legislation. It would vary from State to State.

Representative COHEN: Thank you.

Ambassador Fried, you were a predecessor of Ambassador Ashe, were you not?

Mr. FRIED: I was a predecessor to Ambassador Ashe, yes, sir. I knew him well.

Representative COHEN: Another good Ambassador.

Mr. FRIED: Just to add to what Mr. Reichler said, I think the U.S. acting alone would not make enough of a difference, because we do not hold many of the Russian assets. The Europeans hold much more. They hold the bulk. Passage of REPO would be a sign to the European Union, which is wrestling with this issue, and a sign to key governments like Germany that we were serious. U.S. leadership could help the European Union make a decision about this. That is certainly an added benefit politically of REPO.

Representative COHEN: Thank you.

Thank you, Mr. Chair.

Chairman WILSON: Thank you, Congressman Cohen.

We now proceed to Senator Richard Blumenthal of Connecticut.

STATEMENT OF RICHARD BLUMENTHAL U.S. SENATE, FROM CONNECTICUT

Senator BLUMENTHAL: Thank you, Mr. Chairman, and thank you for being here on the Senate side for this—

Chairman WILSON: We appreciate the temporary visa you provided. Thank you. [**Laughter.**]

Senator BLUMENTHAL: As you know, I have traveled frequently to your side of the Congress, and proud to do so whenever you have these hearings. Thank you to you and the ranking member for this very, very important, pertinent, and timely hearing. I am proud to be a cosponsor of the Rebuilding Economic Prosperity and Opportunity, also known as REPO, Act, for all the reasons that have been stated very powerfully here.

I agree with you, Ambassador, that it would send a signal and a message. We do not ordinarily pass legislation to send signals or messages when already there is power to do what we would be doing in the legislation. I think that this act has the additional value of actually clarifying the authority to take this action. I think it is important, critically important, for that purpose.

You mentioned that the Europeans have control over the vast bulk of these assets. I think it is through something called Euroclear. I guess my question, although it may sound somewhat technical, I think it has practical importance to those of us who are litigators. Who would actually contest the effort to provide these assets to the Ukrainians? Would it be Euroclear itself? Would it be the Russians? Both of them? Would the Russians have to submit to the jurisdiction of a court. Given the fact that Vladimir Putin has been declared a war criminal and there is a warrant for his arrest, would that have any implications as well if he failed to enter an appearance, so to speak? Maybe you can talk a little bit to the—to the technicalities here.

Mr. REICHLER: Thank you for that question, Senator. It is a subject that we address in the legal memorandum which is now part of the record. Russia has not submitted itself to the jurisdiction of any international court that would have the competence to consider a challenge brought by the Russian Federation to the seizure and transfer of its assets. There is no international court before which it could make a claim. It would have to submit itself to the jurisdiction of the national courts in the states that have seized and transferred the assets. Of course, I cannot speak for—about the law in each of these—in each of these states, because that is their own domestic law.

For example, in the United States, no court would exercise jurisdiction over such a claim because these are actions taken in the national security interest of the United States. The executive would be given the discretion to protect the national security and conduct the foreign policy of the United States.

Senator BLUMENTHAL: In other words, it would be a political question.

Mr. REICHLER: It would be a political question. Exactly. That is right, and I think in many of the other G–7 countries there is a similar doctrine. Although my profession is international lawyer, I am not an expert on the domestic laws of each of these countries.

The only other conceivable form would be if Russia had a bilateral investment treaty with one of the states and had the right to institute arbitration against them. The deposits of sovereign assets in banks are not considered investments. That would not be a feasible way for them either.

Senator BLUMENTHAL: Let me just cut right to the answer. Would there be in effect a default by Russia? Would there be any

legal challenge here? In other words, could not the chief executives of those countries that have control over the assets be at liberty to send these assets to Ukraine?

Mr. REICHLER: That is—I would agree with what you just said, Senator. The states could seize and transfer the assets to Ukraine. Russia will not have legal recourse in any of these courts to challenge such an act.

Senator BLUMENTHAL: I am sure that this information is somewhere in the materials, but maybe you could help me. How much does the United States control?

Mr. FRIED: I have heard various numbers, and the administration has not been definitive. The number I have heard the most is 8 billion.

Senator BLUMENTHAL: Eight billion.

Mr. FRIED: Yes.

Senator BLUMENTHAL: The total is in the range of 300 and—

Mr. FRIED: Three hundred and something billion. The estimates—

Senator BLUMENTHAL: Who holds the most?

Mr. FRIED: Europe.

Senator BLUMENTHAL: Yes, but—

Mr. FRIED: Belgium, through Euroclear.

Senator BLUMENTHAL: Belgium?

Mr. FRIED: Belgium, through Euroclear apparently has north of $200 billion.

Senator BLUMENTHAL: Are these assets under the control of the EU or individual European countries?

Mr. FRIED: Individual European countries, I believe, but EU law also govern some of this. Then you get into the tricky business of the EU—of the commission, EU law versus national law. That is where I stop, because I am not an international lawyer.

Senator BLUMENTHAL: Okay. My time has expired, but I am certainly going to pursue this under the great leadership of my friend and colleague Senator Whitehouse. I thank him for his efforts on this issue.

Chairman WILSON: Thank you very much, Senator, and, indeed, we are so fortunate that Senator Blumenthal and Senator Whitehouse, who is the lead along with Senator Jim Risch of Idaho. Indeed, we have got the leadership—significant leadership in the Senate. Then on the House side we are very grateful that Congressman Mike McCaul of Texas, the chairman of the Foreign Affairs Committee, is the lead there. So over and over again, very significant members of the House and Senate, bipartisan, are working together on this issue.

I will now begin my 5 minutes, and then I am really grateful that soon I hope we will be joined by other Members of Congress. It—hey, we are in so many different meetings today, it is always interesting. Mr. Reichler, can you provide any precedents of international law on this type of asset repossession?

Mr. REICHLER: Mr. Chairman, there are a number of precedents of various states freezing the assets of foreign states based on their internationally wrongful conduct. This has been done by the United States several times, by many of the European states, and, frankly, by many states around the world. If you like I could give you the

examples, but they are all listed in our legal memorandum. There are no examples of the freezing of the assets and the transfer to another State, as would be the case here. We say that there is no difference in principle under the law. If a State is authorized to freeze and seize the assets, it is also authorized to transfer them, provided the transfer is done in a proportionate way.

There are examples, and the United States is a leading practitioner of this, of freezing a foreign state's assets and transferring them to private U.S. citizens who are victims of wrongful conduct by that State. This was done in the case of Iran, Cuba, and Iraq. Assets were frozen by the U.S. Government and wronged U.S. citizens, who were wronged by those states, received as compensation funds which were transferred from those frozen assets. Again, we say that if the president of the United States has the authority to transfer the frozen State assets to aggrieved U.S. citizens, there is no difference in principle between transferring those assets to another State that is a victim of internationally wrongful conduct.

As my colleagues are reminding me of the Iraq's invasion of Kuwait. That is an example of where, through the United Nations Security Council but also individually, states, including the United States, froze the assets of Iraq. The compensation was provided via the United Nations and a special U.N. compensation commission.

Chairman WILSON: Well, again, thank you for your insight. This legislation, to me, has such significance today. Hopefully it is a deterrence to any country that may feel like they want to invade another country. It should hopefully be a deterrent in regard to Iran, their threats everywhere, and the Chinese Communist Party. What a message this can be to individuals that this conduct should not be provided.

Additionally, with the Prosecutor General Kostin, a question in the coming months. How could repossessed Russian funds be most effectively used to support the Ukrainian war effort?

TESTIMONY OF ANDRIY KOSTIN, PROSECUTOR GENERAL OF UKRAINE

Mr. KOSTIN: Thank you, Chairman. You want to understand that Ukraine needs not only financial, not only humanitarian, not only political, but also military support. This military support should come in time, because every day of delay cost us lives of our servicemen, of our civilians, including those who are—who are on the occupied territories and are suffering from war crimes committed by Russian aggressor.

I just wanted to mention that today in Ukraine we celebrate the day of armed forces of Ukraine. It is a professional day of our servicemen, military servicemen, who are now brave—who are brave heroes fighting on the front line protecting our land. I think this hearing is about leadership and about bravery. When we hear the words, "be brave like Ukrainians," I think it is also about all of us to take brave decision even in difficult legal circumstances. To take brave decision and to take them in time to save lives of Ukrainian servicemen and Ukrainian civilians. To send this support not only to win in this war, but also to keep our country running, to protect our civilians from humanitarian crisis, to protect them from terror after damaging and destroying critical civil infrastructure, hos-

pitals, schools. We need to be united in order to overcome this serious situation, and in order to win this war, we need to receive this financial support and military support in time.

These hearings are also about changing the mindset. We all hear many—I think, many months, Russia will pay the check. Let us change this mindset to Russia is paying the check, and this makes us stronger, United States and Ukraine. I will also come back to the leadership of United States. Let us not forget that United States is the first country to confiscate private assets, which happened this year by the decision of Department of Justice. Today, United States become the first country, rather than Ukraine, charging Russian war criminals for commission of war crimes against American citizen, which was declared today by Attorney General Garland and his team of FBI agents, different institutions who work for this case, with our support—with support of our prosecutors and investigators.

These true leadership of United States, if this REPO Act will be adopted as soon as possible, will be an explicit example not only of your leadership but of example of such action that should be taken by other countries—Canada, European countries—who hold the main bulk of these assets. We, Ukrainians, always rely on your leadership. Once again, changing mindset through leadership and bravery to take brave decisions in time.

Chairman WILSON: Thank you so much, Prosecutor General, and, indeed, it is inspiring to know that this is military appreciation for the Ukrainian military. What an inspiration the Ukrainian military is to the world today. I particularly appreciate it because my father served overseas in China—Kunming, Chengdu, Xian—to liberate China in 1944 from the aggression, at that time—and then I was domestic service, but my eldest son served in Iraq, and my second son a doctor in Baghdad, and my third son served in Egypt, and my youngest son served for a year, engineer in Afghanistan. Military service the American people really appreciate.

We have been joined, of course, by a superstar here, Congresswoman Victoria Spartz all the way from Indiana, by way of the USSR, and actually, was born in Ukraine. Now a very significant member of the U.S. Congress, and we have also been joined, of course, by Ruslan Stefanchuk, the speaker of the Rada of Ukraine. What we will do, Mr. Speaker, because we like legislators, we will let you speak first. We respect that, and then we will ask questions from Congresswoman Spartz.

TESTIMONY OF RUSLAN STEFANCHUK, CHAIRMAN OF THE VERKHOVNA RADA OF UKRAINE

Mr. STEFANCHUK: Yes. Chairman Wilson, and Co-Chairman Cohen, Senator Whitehouse, Victoria Spartz, dear members of the Helsinki Commission, dear ladies and gentlemen, first of all, apologize. Excuse my being late. Sorry, it is not my fault, but the traffic jam is too hard, but I am here. Thank you very much, and I would like to thank the Commission for holding this important hearing on making Russia pay sovereign assets confiscation for Ukrainian victory.

This hearing is crucial for raising awareness for these issues, not only in the U.S. Congress but also around the world. I am sincerely

grateful to the Helsinki Commission, which is one of the most influential and respected bipartisan group in the U.S. Congress, for its leadership in supporting Ukraine, for drawing the attention of Members of Congress to all aspects of Russia's war against Ukraine. They need to bring the aggressor to justice.

Today, there is no doubt that Russia aggressor against Ukraine is an illegal and unprovoked act of aggression against a sovereign State. It has caused thousands of deaths, suffering, and significant losses of my country and the Ukrainian people. Every day Russia destroys civilian infrastructure, bombs school and hospitals, erases cultural heritage, and damages our environment. Russia's June 1923 bombing of the Kakhovka power plant caused more than $3 billion in damage. This barbaric act qualified as a war crime of ecocide. It is a grave environmental disaster. Its effect is felt far beyond Ukrainian borders.

According to the World Bank, as of this spring 2023 the damage caused to Ukraine exceeded from their $400 billion. It is difficult to give an up-to-date estimate to Ukrainians losses in the ongoing war, as the numbers are growing every day. Russia must pay for all the damage and losses. We cannot wait for the war to end. The best legal instrument to introducing the mechanism for compensation for damage caused by a Russia aggressor against Ukraine is the possibility to using both Russia's sovereign and private assets. From the point of view of the international law, this approach is entirely legitimated.

We are grateful to the U.S. Congress for passing new legislation last year that allows the confiscated assets of Russian oligarchs to be used for Ukrainian needs, and this is not enough. Russian sovereign assets must be confiscated and transferred to the victims of this war through a transparent international mechanism. Establishing an international compensation mechanism is an integral part of comprehensive system of accountability and restoration of justice. It is also one of the key priority of Ukrainian president Volodymyr Zelensky. It is impossible to achieve the expected result without global cooperation.

Here I would like to thank the U.S. Government for supporting Ukraine initiative to establish an international compensation mechanism. The U.S. plays a leading role in this process, including efforts to adopt the relevant United Nations General Assembly Resolution in November 2022 and relevant initiatives among G–7 countries. I would like to emphasize that the first possible step in this regard has already been taken with the establish of the register of the— **[inaudible]**. The U.S. decision to confiscate the reserves of the Russian Central Bank will send a clear signal to Putin and all the tyrannies that there is no chance to avoiding responsibility for an acts of aggression against a sovereign State. This should also send a clear signal to our partners, especially in Europe. It is time to act decisively. The United States, as a leader of the free world, must lead.

I would like to express my most sincere gratitude to the representative and senators who introduced and supported the Rebuilding Economic Prosperity and Opportunity Act, the so-called REPO Act. I strongly believe that the successful adaptation of the REPO Act bring us one step closer to victory and sets a motivating

precedent for other country. This legislative initiative not only demonstrates their commitment to justice, but also inspires international cooperation in order to prosecute aggressors.

We also welcome other new initiatives, such as a bipartisan Asset Seizure for Ukrainian Reconstruction Act introduced by Senator Sheldon Whitehouse and Lindsey Graham, along with Representatives Joe Wilson and Steve Cohen. Putin's crony oligarchs have been instrumental in the financial Russia aggressor against Ukraine, and the mass murder of Ukrainians are lining their money coffers and enjoying the freedoms they are actively trying to destroy. According to the latest Bloomberg Billionaires Index of November 29, 2023, Russian oligarchs have become $38.6 billion richer, despite all the sanctions imposed, in just 1 year. This is about two-thirds of the administration's additional request for support for Ukraine.

There is always the issue of the effectiveness of sanctions. As in the case of the REPO Act, Ukraine unequivocally supports this initiative. We are pleased to see that it is being implemented as bipartisan and bicameral initiative. We very much hope that this bill will quickly pass in Congress and signed by the president. This will be another contribution of your great country and people to restoration of justice and fair punishment of the barbaric Putin's regime and his corrupt clique. Thank you for your attention.

Chairman WILSON: Thank you very much, Speaker Stefanchuk, and, indeed, we want the people of Ukraine—really the people of the world—to say something. We could tell you that there is support, House and Senate. We will, you are going to see it right here. We have got distinguished senators who have been here. We have got members of the House. We have got Republicans. We have got Democrats. It is just startling indeed how the American people have come together to support the people of Ukraine, and then also a million Ukrainian Americans.

With Ms. Ziskina, who would ever—how important it is, the role of Ukrainian Americans. Then in the House of Representatives, again, we are so pleased with Congresswoman Victoria Spartz, who herself is Ukrainian American heritage. To show how people become successful, the American dream, coming to America and then elected to the U.S. House to represent Indiana. Congresswoman Spartz.

STATEMENT OF VICTORIA SPARTZ, U.S. HOUSE, FROM INDIANA

Representative SPARTZ: Thank you, Mr. Chairman, and thank you for all of your work. I will ask—first I will start with our attorney, just have some practical questions, Mr. Reichler. I came from discussions of Ukrainian aid and, regardless what is said, majority of my Republican colleagues want to make sure that we do deliver better weapons and faster weapons. That hopefully we can work on this issue on a bipartisan basis, but definitely with all of the fiscal challenges we have discussions on, you know, how we are going to be paying for all of that.

My question is for you, and that has been kind of socialized has ideas to actually use some of this confiscated assets to pay for, because ultimately Russia signed agreement —you know, Budapest

Memorandum—which actually, you know, it was not guarantees, but assurance. We signed it too, and U.K. Which actually with today's new foreign minister, he was very convincing, and to really support Ukraine. It was great to have our U.K. counterparts here. They have been doing a great job, tried to organize Europe with all of the challenges that Europe has.

You know, it is been, you know, a lot of, you know, discussion how to do that. I wanted to—just to get your thoughts on that. Is there is a way? From a, you know, legal view—because some of my colleagues raise due process issues, and, you know, how could that be used to, you know, to pay for some of the weapons transfer that we really need to do urgently to Ukraine?

Mr. REICHLER: Yes. Thank you for your question, Congresswoman.

Russia, like all states, is bound by principles of international law, including those set forth in the United Nations Charter. It is a member of the United Nations. One of the most fundamental principles of international law is the prohibition on launching wars of aggression against another sovereign State, and the prohibition on acquiring the territory of another State by force. Russia has violated many more principles of international law, but let me just stop here with those two.

These are considered such egregious violations of international law, they are violations of what we call peremptory norms of international law from which no State is permitted to derogate, that they have what we lawyers call erga omnes effects. That means the violations of these fundamental principles are considered so egregious that every State is considered a victim of this wrongful conduct. Therefore, every State has the right to take countermeasures against the wrongdoer, in this case the Russian Federation.

Those countermeasures can include measures that ordinarily would not be considered lawful in the absence of wrongful conduct by the other State. Where, as I have said, Russia has committed such egregiously wrongful conduct, such egregious breaches of the fundamental principles of international law, every State—not just Ukraine and those that have most directly suffered—but every State, including the United States, has the right to take appropriate proportionate countermeasures against Russia. Those countermeasures could include, as provided in the REPO Act, the—not only the freezing of Russia's State assets, which already has been done, but the seizure of those assets and their transfer to Ukraine to offset the compensation which Russia already owes Ukraine for the horrendous damage that it has—

Representative SPARTZ: I was talking about for us paying—because I have just a minute left—for us to pay for our weapons transferred to Ukraine, so that we can, you know, transfer more, and faster, and better weapons. Is that something for United States to use this to pay—to do the paying?

Mr. REICHLER: Well, I think the United States can do what you are suggesting under two theories. One, that it is injured because all states are injured. Also, the United States can claim that it is directly injured because of the cost the United States has incurred in helping Ukraine defend itself.

Representative SPARTZ: Indeed, we did. I think it is important, and unfortunately, you know, Ukraine give up nuclear weapons. Now a lot of people forgot. Just briefly, I know that I am almost out of time, maybe Ambassador, because there is a challenge. We have talked with some officials on executive branch and Europeans kind of struggling with that issue. Can you help me, what will—because me and chairman and some other colleagues, we have a lot of discussions and meetings with Europeans. How could we help to make sure that— and that is what State Department is kind of struggling too— to get Europeans on board with this issue?

Mr. FRIED: Well, I think passing the REPO Act would help. The Europeans may be waiting for American leadership, a sign of congressional unity. Through passage of the REPO Act, we would strengthen the administration's hand in working with the Europeans, both the EU, the Commission, and national states. Saying, we have moved, now you must. We should work together. The principle of solidarity applies, but often in the—since the beginning of the Russo-Ukraine war, we have seen that American leadership can help crystallize European decisions. I think they are looking—my own discussions with the European suggests that they are wading through the legal issues, but they are waiting for us, and passage of REPO would help.

Representative SPARTZ: Thank you. I yield back.

Chairman WILSON: Thank you very much, Congresswoman Spartz. Indeed, we so appreciate that Senator Whitehouse is here, and—Sheldon Whitehouse, and we look forward to his questions—additional questions.

Senator WHITEHOUSE: Thank you, Chairman.

Is Prosecutor Kostin still with us?

Mr. KOSTIN: Yes, Senator.

Senator WHITEHOUSE: Hooray. Good to hear you.

Mr. KOSTIN: Nice to see you, yes.

Senator WHITEHOUSE: You and I have discussed the work that you are doing to catalogue and gather evidence regarding the individual harms to individual Ukrainians, whether they have had family murdered, whether they have suffered personal injuries, lost limbs, whether they have had their homes and apartments destroyed. There has been a very significant burden of cost and injury and pain put on the Ukrainian people. One of the places in which Russian sovereign assets could be dedicated is to provide a fund adequate to meet those claims of individual Ukrainians. Could you give us a quick overview of the numbers of those claims, the extent of the estimated damages, and how you are handling having to keep tens of thousands of cases open and organized?

Mr. KOSTIN: Thank you, Senator, and thank you for your leadership. First of all, to date the Office of Prosecutor General has registered more than 111,000 incidents of war crimes. You rightly mentioned, these—the range of war crimes is unprecedented, from willful killing to sexual violence and to damage of private property, of private infrastructure of civilians. Their homes, their houses, their business, their cars are damaged or destroyed by Russian attacks, whether they are held close to the front line or far from it by missile and drone attacks.

Of course, all the victims and survivors of all war crimes, from our point of view, has a primary role in receiving fair compensation or reparation from the assets of the perpetrator, because it is perpetrator's obligation to compensate damage to every victim and survivor of war crime. At the moment, you know that also with the leadership of United States the International Register of Damage start its operation in The Hague. The board of directors is already selected, and the Register of Damage will be fully operational in coming weeks. After that, it will start to collect claims also from the individual victims and survivors of war crimes.

On our side, we are preparing the register of victims and survivors, and as prosecutor general, it is my obligation to ensure that every person who suffered from war crimes committed by Russia will have an opportunity to file the claim to the Register of Damage. For that, we also introduced Victims and Witnesses Coordination Center of the Office of Prosecutor General to help victims and survivors also to file the claims in order to include them in the—into the register of damage, and I thank you for your question.

At the moment, we have no estimation about the potential claims of the victims who beloved members of family were killed, or who were wounded, or who were tortured, humiliated. These are the issues where Ukrainian parliament and international compensation mechanism, starting from the Register of Damage, should also play their role. Once again, as a matter of delivering justice to victims and survivors, it is not only making Russian perpetrators liable in criminal cases, but also to ensure that all of them will receive fair compensation by the means of the assets of their aggressive State. Thank you.

Senator WHITEHOUSE: Thank you, Prosecutor. Best wishes to you and your work.

Chairman WILSON: Thank you very much, Senator, and indeed, as we conclude, I would like to thank Senator Whitehead for his—house for his—Whitehead—Whitehouse—for his strong support. As we conclude, I want to get a picture in a moment with our witnesses, and I certainly want the senator be right in the middle, and so—behind. As we conclude, I want to thank Congresswoman Spartz. Can you believe she is ahead of the curve again?

There is so many good people in America who say why cannot we get along, why do not we just sign an agreement? No, the Budapest Memorandum should have been very revealing, and that is that a country gave up their nuclear capability and weapons with the understanding of territorial integrity. The agreement with the United States, United Kingdom, Russian Federation, Ukraine. Then there were violations in 2008, 2014, 2022, and so, sadly, it should be understood that the Russian Federation, following the tradition of the Soviet Union, follows no agreements. Agreements are simply a period to rearm and to re-oppress the people of their country.

With that, we are going to be adjourned. [**Sounds gavel.**]

[Whereupon, at 3:41 p.m., the hearing ended.]

Addition VI

Letter Submitted by RDI:
RENEW DEMOCRACY INITIATIVE

Garry Kasparov, *Chairman*

Renew Democracy Initiative 1230 6th Avenue, Floor 16
New York, NY 10020

Dear Chairman Cardin, Ranking Member Risch, and Esteemed Members of the Foreign Relations Committee:

Thank you for your support for Senator Risch's amendment in the nature of a substitute to S.2003, the REPO for Ukrainians Act.

The Renew Democracy Initiative (RDI) applauds your bipartisan efforts to ensure that no resource goes untapped in supporting Ukraine's fight for freedom against authoritarian Russian aggression.

This conflict is deeply personal to me. In my chess career, I represented both the U.S.S.R. and the Russian Federation internationally. In fact, I was the first person to compete under a Russian flag instead of the Soviet one. And yet, the flag that I once proudly represented is now stained by the blood of countless people. Countless more will die unless we take swift action. Therefore, I wholeheartedly endorse the seizure of frozen assets from the country I once called home in defense of American interests and in pursuit of Ukraine's victory.

RDI maintains that President Biden has the undisputed authority to transfer Russian assets held in the United States—as clearly explained in an **independent study**, "Making Putin Pay," which RDI commissioned from leading legal scholar Laurence Tribe last year. However, given both the urgency of this question and the executive branch's reluctance to move decisively, I commend your leadership with legislative action. Your work may well push the administration to take the actions that this moment requires.

In closing, I urge you to reject any amendment that would either limit the amount of available funds to help Ukraine or restrict the president's ability to seize and transfer those funds as effectively and efficiently as possible, consistent with U.S. national interests.

Respectfully,

Garry Kasparov
Chairman
Renew Democracy Initiative

Addition VII

Op-Ed from *Financial Times*, January 21, 2024
War in Ukraine – Transferring Frozen Russian Reserves to Ukraine Is Elegant Justice

By Robert Zoellick

Opinion War in Ukraine - Transferring frozen Russian reserves to Ukraine is elegant justice
Western allies of the nation are overstating the fears and failing to truly recognise the benefits
By Robert Zoellick
January 21, 2024
Financial Times | Link

The writer is a former president of the World Bank

As Ukraine struggles to survive Russia's relentless onslaught, the G7 countries are still debating the transfer of frozen Russian reserves to Ukraine. Some hesitate because of supposed risks to financial stability. Others assert legal worries even though prominent international lawyers have endorsed the transfer. The doubters far overstate these fears and fail to weigh the strategic benefits in the balance.

Take the fears first. Countries hold reserves for protection against macroeconomic risks, not so that they can overrun their neighbours. If the G7, including the EU, act together, other countries will not find good alternatives for investing their reserves. Some may hold gold, but it is not liquid. Even as China has encouraged the use of renminbi for its trade, countries have not been relying on China's currency for their reserves with good reason.

China and other economies do not hold dollars or euros because they are friends with Europe and the US. Rather, they run trade surpluses that earn foreign currencies. If Beijing dumped its dollars or euros for renminbi, it would have to figure out where to invest the proceeds at the same time that it undermined its exporters' exchange rate, thus hurting its trade.

Moreover, governments and markets have already offered a test. The G7 nations and others have frozen Russian reserves for two years without creating a disruptive, chilling effect. If countries believe that they cannot conquer and annex their neighbours without losing access to their global reserves, that is a good thing.

Rogue states have always been free to nationalise foreign investments without compensation or legal basis. Most do not do so because they would cut off international investment. And G7 countries are not likely to hold their reserves in Russian roubles, Venezuelan bolívars or even Chinese renminbi.

With little risk, consider the diplomatic, economic, and legal gains from transferring frozen Russian reserves to an escrow for Ukraine and possibly other claimants. Russia is waging a war of attrition against Ukraine. Ukraine's friends need to send a signal that Moscow cannot outlast Kyiv; it is elegant justice to do so with Russia's own assets. Ukraine would also benefit psychologically from a large, enduring show of financial support during its winter of discontent.

If one approves of sending weapons to fight Russian soldiers, it seems odd to shrink from transferring Russia's assets to Ukrainian victims. It is not likely that governments and their publics will send the billions they have frozen back to Russia. And we should consider how the reserves can be used constructively.

The promise of financial support for survival, recovery and reconstruction may ease Kyiv's eventual acceptance of a settlement. If Russia agrees to a true peace settlement, however unlikely, the G7 could return some funds.

Well respected-international lawyers — from the UK, Belgium, the Netherlands, Japan, and the United States — have endorsed the use of the countermeasures principle to transfer frozen Russian reserves to an escrow for Ukraine. We should applaud the use of international law to meet modern challenges and support future deterrence, instead of relegating it to an ineffectual statement of protest.

Moreover, the experience of a claims process for Iraq's reserves after the reversal of its 1990 invasion of Kuwait opens the possibility of setting aside some of the Russian reserves to assist developing countries that have been demonstrably hurt by higher food and energy prices. In addition, some amount could be allocated for claims by companies that suffered Russian retaliation.

Some critics of the proposed transfer use a mistaken analogy to reparations after the first world war. But Weimar Germany was a fragile democracy that had accepted defeat and a peace treaty. Putin's autocratic Russia has done neither — and so Kyiv's fragile democracy seems closer to Weimar Germany.

Finally, a transfer of Russian reserves should complement the continuation of military and financial support from the EU, the US and other friends of Ukraine. Indeed, US supporters of congressional action maintain that transferring Russian reserves will help win votes. Citizens might reasonably complain about politicians using their tax dollars for Ukraine while hesitating to use Russian funds. The sponsors of bipartisan bills in the House and Senate, which would affirm US President Joe Biden's existing authority to transfer Russian assets, want to use all tools to back Ukrainian self-defence.

Policymakers rarely find opportunities based on sound policy, good politics, and compelling ethical values. Putin continues to pulverise Ukraine mercilessly. The G7 and other friends should quit dithering and instead use an obvious economic tool to help the nation resist.

Addition VIII

Letter Submitted in Support of the *Rebuilding Economic Prosperity and Opportunity for Ukrainians Act*

January 22, 2024

Dear Members of the Senate Foreign Relations Committee:

As supporters of Ukraine, we applaud Members of the Committee for advancing the Rebuilding Economic Prosperity and Opportunity for Ukrainians (REPO) Act. Russia is engaged in a brutal war of aggression against Ukraine and against the Free World. The Putin regime has made it clear that its aims are not limited to Ukraine, but include deterring, discrediting, and dividing the U.S. and its partners. The REPO Act is a moral, just, and effective tool to impose costs on Russian President Vladimir Putin and to aid Ukraine, which is fully consistent with U.S. and international law. We urge the Committee in the strongest terms to pass the REPO Act and oppose efforts that would weaken, postpone, or effectively delay the actionable elements of the legislation.

As the December 2023 G7 Leaders' Statement declares, "It is not right for Russia to decide if or when it will pay for the damage it has caused in Ukraine… [an amount which] already exceeds $400 billion dollars."[1] It is already a matter of general consensus that the hundreds of billions of dollars in frozen Russian state assets will be used at some point to provide direct or indirect compensation to Ukraine. The crucial question is one of timing. The U.S. cannot wait to act only when many of the potential benefits have passed. Instead, the U.S. must lead the Free World by paving the political pathway for European governments to follow in helping Ukraine and sending a clear signal of resolve to Putin.

Although the executive branch has sufficient authority under the international legal doctrine of state countermeasures and the U.S. International Economic Emergency Powers Act (IEEPA) to transfer frozen Russian assets for the benefit of Ukraine, the REPO Act removes any possible remaining ambiguity on this question by confirming this existing authority.[2] Transferring Russian state assets will of course be more impactful when done in concert with U.S. allies and partners. However, this should be a matter of policy, not law.

It would be a mistake were the Committee to add in new provisions to the REPO Act that require the approval of third countries—even allies—before the U.S. can transfer Russian state assets. It would be unprecedented and unconstitutional to require the prior consent of foreign governments before the U.S. president can take discretionary action. Such a move would

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[1] G7 Leaders' Statement, The White House, December 6, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/06/g7-leaders-statement-6/

[2] Yuliya Ziskina, et al., "Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine," *Newlines Institute*, June 14, 2023, https://newlinesinstitute.org/rules-based-international-order/multilateral-asset-transfer-a-proposal-for-ensuring-reparations-for-ukraine/; Laurence Tribe, et al., "The Legal Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine," *Renew Democracy Initiative*, September 17, 2023, https://rdi.org/wp-content/uploads/2023/10/RDI-Making-Putin-Pay-Report-September-2023_compressed-1.pdf

significantly hamper the legislation, changing it from a confirmation of pre-existing executive authority to a significant curtailment of the U.S. government's existing ability to counter Russia's illegal war of aggression. This would be an alarming new precedent.

It is advantageous and vital that the U.S. acts multilaterally with its allies on asset transfer. However, such a certification requirement would impose a self-limiting regulation onto an otherwise good and practical policy choice. This would distort a good policy position into an unnecessary and misguided legal requirement, undercutting the efficacy of the REPO Act entirely.

Members of the Committee should be well aware that not only has support for REPO grown within Congress and the Biden Administration, but the idea of asset transfer is increasingly supported by policymakers in Europe. For example, the U.K. Foreign Minister and former Prime Minister David Cameron recently said, "Instead of just freezing that money, let's take that money, spend it on rebuilding Ukraine, and that is, if you like, a down payment on reparations that Russia will one day have to pay for the illegal invasion that they've undertaken… I've looked at all the arguments and so far, I haven't seen anything that convinces me this is a bad idea."[3] Other leaders have publicly and privately restated those thoughts with increasing frequency.

The time has long since passed for the executive branch to use Russia's frozen assets for the support of Ukraine, and legislation such as the REPO Act encourages the Administration to take expedient action. Seizing frozen Russian assets and the legislation prompting such action reflect a rare intersection of bipartisan and bicameral agreement. This proposal has support at home and abroad, even more so than is publicly acknowledged. We implore Members of the Committee to pass the REPO Act in its current form.

[3] Athena Stavrou, "David Cameron calls for $350bn in frozen Russian bank accounts to fund Ukraine war," *The Independent*, December 9, 2023, https://www.independent.co.uk/news/world/europe/david-cameron-russia-ukraine-war-b2461413.html

Sincerely,

Timothy Ash
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Dr. Anders Åslund
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David Bonior
Former Member of Congress, House Majority Whip

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Ambassador Paula Dobriansky
Former Under Secretary of State for Global Affairs

Ambassador Eric S. Edelman
Former U.S. Ambassador to Finland and Turkey
Former Undersecretary of Defense for Policy

Ambassador Daniel Fried
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Former U.S. Deputy Secretary of State

Ambassador John Herbst
Former U.S. Ambassador to Ukraine

LTG Ben Hodges, U.S. Army, Retired
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Lawrence Summers
71st Secretary of the Treasury
Charles W. Eliot University Professor
Harvard University

Ambassador William Taylor
Former U.S. Ambassador to Ukraine

Laurence H. Tribe
Carl M. Loeb University Professor Emeritus
Harvard University

Ambassador Alexander Vershbow
Former Deputy Secretary General of NATO
Former U.S. Ambassador to Russia

Ambassador Marie Yovanovitch
Former U.S. Ambassador to Ukraine

Philip Zelikow
Senior Fellow, Hoover Institution
Stanford University

Yuliya Ziskina
Senior Legal Fellow
Razom for Ukraine

Robert Zoellick
Former President of the World Bank
Former U.S. Trade Representative and Deputy Secretary of State

Titles and affiliations are for the sole purpose of identification and do not imply institutional endorsement.

Addition IX

The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine

By: Laurence H. Tribe, Raymond P. Tolentino, Kate M. Harris, Jackson Erpenbach, and Jeremy Lewin

https://rdi.org/wp-content/uploads/2023/09/2023.09.17-MPP-Report.pdf

Addition X

Lawrence Summers, Philip Zelikow, and Robert Zoellick on Why Russian Reserves Should Be Used to Help Ukraine

The Economist, 27 July 2023

By Invitation | Ukraine, Russia and reparations

Lawrence Summers, Philip Zelikow and Robert Zoellick on why Russian reserves should be used to help Ukraine

Doing so would strengthen, not undermine, international law, they argue

LAST WEEK *The Economist* cautioned about how to use Russian assets to help Ukraine. We appreciate the invitation to make the case for what we believe can and should be done. Two of us are lawyers. Each of us has worked on problems of international law and knows the arguments in this case. We know that, as the Ukraine war wears on, the outcome may be determined by the balance of hope or despair as well as on the battlefield. The Ukrainian economy is in the intensive-care unit. But we face a unique circumstance. As Russia launched the largest act of international aggression since the second world war, it left enormous sums, at least $300bn-worth of dollars, euros, sterling and yen, in the law-abiding states that oppose this aggression.

Public international law has always combined "black letter" law with customs established as state practice adapts to new challenges. As international law confronts its most severe test since the founding of the United Nations, states can wring their hands, baffled, while Ukraine burns. Or they can strengthen international law.

The international law of state countermeasures differs from law or EU directives which govern "sanctions". Countermeasures have long been recognised as extra-judicial state measures of self-help. As the UN's International Law Commission explained back in 2001, "traditionally the term 'reprisals' was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach." Now international lawyers use the term "countermeasures" for non-violent reprisals, with the law limiting collective countermeasures to the most serious cases.

We have proposed that, as one such countermeasure, relevant states should transfer frozen Russian assets into escrow to give Ukraine hope that it can rebuild, perhaps also help others injured by Russia's aggression, and assist in a future settlement. The countermeasure would induce Russia to perform its legal duty to compensate, voluntarily or involuntarily, the victims of its aggression. Though some worry that the move might make some countries more reluctant to hold dollars or euros, it poses no added risk to the stability of reserve currencies.

The Economist worried that state assets are ordinarily protected from transfer or seizure under a doctrine of sovereign immunity. But this doctrine applies to judgments by foreign courts. State assets, in contrast to private assets, are protected from other sovereigns only by customary obligations of reciprocal regard (or in bilateral investment treaties). Court action is unnecessary or quite limited in the case of an international act of state. State assets have been seized or transferred before. In 1992, in the lesser case of Iraq's invasion of Kuwait, America and European countries placed Iraqi state assets into escrow to compensate Iraq's victims (including mainly claims from Kuwait but also from 42 other states) without Iraq's voluntary consent.

Ordinarily Russia could claim repayment for lost assets. In this case Russia's own serious breach of the inviolable norms of international law permits a legal suspension of that obligation. *The Economist* called for "patient, relentless work to expand the legal case against Russia". But a ruling by the International Court of Justice (ICJ), handed down in March 2022, has already demanded that Russia end its aggression, and Russia has ignored this obligation for 16 months. In November 2022 the UN General Assembly established Russia's duty to provide reparations under the very procedure—"a stand-in for the Security Council"—that *The Economist* recommended. Russia has ignored that notice and duty for nine months.

Calls for years of litigation in the ICJ—which even then could end fruitlessly, just as Georgia's case against Russia fizzled for jurisdictional reasons more than ten years ago—seem, as former American secretary of state George Marshall put it, like allowing the patient to die while the doctors deliberate. The Russian assets sit idle while damages grow, rewarding the aggressor. There is indeed much more work to do in preparing the way for the transfer of funds, and more work to design international mechanisms for timely reconstruction assistance and sifting claims. But the legal prerequisites for the enabling countermeasure have been met.

Why does *The Economist* seem to offer such conflicted advice? Its article candidly revealed the core of the opposing position: Russia's assets, it said, can only be used if Russia consents.

Why? Because, we are told, the opponents fear that such countermeasures might be abused by powerful states. Any law enforcement can be abused. But reflect on the paradox. In this argument to restrain the powerful, it is Russia, the powerful aggressor, whose rights take precedence over the rights of those it has injured. And this will reinforce the rule of law?

The solicitude for Russia's rights is particularly ironic. We advocate targeting only Russian state assets. Anything else, such as moves against oligarchs, would indeed require due process to establish an association between that person and the target state.

Russia is not so considerate. In April it announced a presidential decree using the doctrine of state countermeasures to declare that it can seize private companies if they are domiciled in countries deemed "unfriendly". It then seized German and Finnish companies and has since grabbed the Russian operations of Danone, a French food company, and Carlsberg, a Danish brewer, turning them over to Vladimir Putin's cronies. To this patently unlawful use of state countermeasures, Western governments have offered no coherent reply.

Some of those who disagree with us fall back to a position that a countermeasure must be reversible. They presume Russia might have to be paid back. But the well-established codification of this principle, adopted more than 20 years ago by the UN's International Law Commission, says that the suspended obligations need only be restored "as far as possible".

In 1949 Robert Jackson, a justice on the United States Supreme Court, warned: "There is a danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

At this moment in history, those who want to defend the rule of law should not take positions that would cut out its heart. ■

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