

# MAKING RUSSIA PAY: SOVEREIGN ASSET CONFISCATION FOR UKRAINIAN VICTORY

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## HEARING

BEFORE THE

COMMISSION ON SECURITY AND  
COOPERATION IN EUROPE

U.S. HELSINKI COMMISSION

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

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## **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 co-sponsoring 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 is 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] European Union 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 is 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 restraints 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.]

**STATEMENT OF SHELDON WHITEHOUSE, U.S. SENATE, FROM  
RHODE ISLAND**

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 horrors, 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. Therefore, 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.

Anyone 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. 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 deterrent 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, hospitals, 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, apolo-

gize. 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.]

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ADDITIONAL SUBMISSIONS FOR THE RECORD

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## **Additional Submission for the Record**

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### **OPENING STATEMENT OF BEN CARDIN, CO-CHAIRMAN, U.S. SENATE, FROM MARYLAND**

Mr. Chairman, thank you for holding this hearing today. Putin's unlawful war of aggression in Ukraine is a brazen violation of international law and Russia's freely undertaken commitments as an OSCE participating State. The horrors Russia is inflicting on Ukraine continue even as we hold this hearing.

There is no question whatsoever that support for Ukraine in the face of Russian aggression is absolutely critical. I call on all of my colleagues to support urgent passage of supplemental appropriations for Ukraine.

The supplemental is a lifeline to Ukraine, on and off the battlefield.

Obviously, Russia has a moral and legal obligation to pay for the damage it has done in its genocidal war.

Given the scale of the issue and the nature of the rebuilding effort before us, we must look comprehensively at supporting Ukraine's efforts to rebuild its country and restore its role in the global economy.

More broadly, The United States and our European allies must maintain strong unity in the face of Russian lawlessness. We are once again headed into a difficult winter, but we must remain resilient and continue our support. This is the only way we will be able to halt Russian aggression and send a unified message about respect for international law.

I am grateful to see the many distinguished witnesses who care deeply about restoring peace and justice in the world. Russia's full-scale invasion is not only an attack on Ukraine, but an attack on any notion that there are international rules and norms. We must fight back in a way that reinforces these rules and norms and I look forward to hearing from you how we might do that.

Thank you and yield back.

### **TESTIMONY OF JIM RISCH, U.S. SENATE, FROM IDAHO**

#### **REMARKS AT HUDSON INSTITUTE ON REPO FOR UKRAINIANS ACT**

**NOVEMBER 16, 2023**

Thank you very much, it is 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 have 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. More importantly, there is enthusiasm for this particular issue on all parts. In that regard, it is 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 man-

ufacturing. 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? 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 is 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 U.N. 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 is what we are talking about today, and that is 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 U.N. and other international institutions which house traditional mechanisms for compensation, effectively rendering these mechanisms useless.

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 are 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? 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 U.N. 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 is not particularly relevant. The fact is that both sides of the Atlantic are working on this issue, and should, and it is really been a thing that is brought our partnerships on NATO together and our NATO countries together—and stronger, more so than it is 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 do not 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. 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. 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. 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 as 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 precedent that is 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. The Russians themselves have provided a clear legal precedent for this legal action. They have already done this, and it is appropriate that we follow suit. Unfriendly countries are an interesting proposition by the Kremlin. That is probably everybody, with the exception of all the bad actors out there like North Korea, China, Iran and Cuba and Venezuela. 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 does not 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 have 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 Senator Wicker, ranking member of the Senate Armed Services Committee, and Senator. 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—do not care about the rule of law and never have. They do not 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. With that, I will take a question or two, whatever you like.

**LEGAL MEMORANDUM**

NOVEMBER 20, 2023

## FROM:

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SUBJECT: On Purposed 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.

I. Summary [paras 1–9]

II. Relevant Facts [paras 10–21]

III. Legal Analysis

A. Countermeasures and the Law of State Responsibility [paras 22–42]

B. Countermeasures by States Beyond Ukraine [paras 43–63]

C. Substantive Limits on Countermeasures [paras 64–73]

D. Procedural Requirements for Countermeasures [paras 74–77]

IV. Conclusion [paras 78–82]

\*Paul Reichler or Philip Zelikow are corresponding authors for further inquiries on behalf of the signers.

**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 dam-

age 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 U.N. 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 March 16, 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. 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 2 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.<sup>1</sup> Under this approach, any assets transferred to Ukraine or other injured parties would be credited to Russia as an offset against its total liability.

<sup>1</sup> See, e.g., Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine' [Lawfare, May 2, 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, July 27, 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, May 13, 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, Sept. 17, 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, Jun. 14, 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, August 23, 2023] <https://>

## II. RELEVANT FACTS

10. On February 24 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.<sup>2</sup> 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.<sup>3</sup> 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 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 September 24, 2023, the U.N. 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.<sup>4</sup> 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.<sup>5</sup> 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 U.N. 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 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 February 21, 2022 “related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the ter-

[www.atlanticcouncil.org/in-depth-research-reports/issue-brief/the-case-for-seizing-russian-assets-ofaggression/](http://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/the-case-for-seizing-russian-assets-ofaggression/).

<sup>2</sup>See *Ukraine and the Netherlands v. Russian Federation* App nos 8019/16, 43800/14 & 28525/20 [ECtHR, January 25, 2023].

<sup>3</sup>Russian invasion of Ukraine: A timeline of key events’ [CNN, February 23, 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, February 24, 2023] <https://www.theguardian.com/world/2022/feb/24/russia-has-invaded-ukraine-what-we-know-so-far>.

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

<sup>5</sup>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/P1801740d1177f03c0ab18005755661-5497.pdf>.

territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter<sup>5</sup>; 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 dialog, negotiations, mediation and other peaceful means”.<sup>6</sup>

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

15. On March 24 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].<sup>7</sup> Again, by that resolution, an overwhelming majority of U.N. 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.

16. In addition to UNGA resolutions ES–11/1 and ES–11/2, on November 14, 2022, the UNGA adopted resolution ES–11/5 titled “Furtherance of remedy and reparation for aggression against Ukraine”.<sup>8</sup> 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.<sup>9</sup>

18. On February 23, 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 U.N. 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.<sup>10</sup>

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, 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.<sup>11</sup> 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.<sup>12</sup>

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

<sup>6</sup> UNGA Res ES–11/1 [March 2, 2022] U.N. 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.

<sup>7</sup> UNGA Res. ES–11/2 [March 24, 2022] U.N. Doc A/RES/ES–11/2.

<sup>8</sup> UNGA Res. ES–11/5 [Nov. 14, 2022] U.N. Doc A/RES/ES–11/5.

<sup>9</sup> *Ibid.*

<sup>10</sup> UNGA Res. ES–11/6 [February 23, 2023] U.N. Doc A/RES/ES–11/6.

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

<sup>12</sup> The White House, ‘G7 Leaders’ Statement on Ukraine’ [May 19, 2023] <https://www.whitehouse.gov/briefingroom/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 September 7, 2023, the U.S. Treasury reported that REPO expected that effort to be completed by the end of 2023. See Treasury, ‘Readout’ [n. 11].

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.<sup>13</sup> 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.

<https://www.ft.com/content/88ff88c4-6efe-40b7-b635-80eb6bd73c2c>.

### 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 become ARSIWA, through a series of reports.<sup>14</sup> 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 August 9, 2001, at its 270 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”].<sup>15</sup> In response, on January 28, 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.<sup>16</sup> 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.<sup>17</sup>

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 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

<sup>13</sup> See Laura Dubois and Niko Asgari, ‘Euroclear earns ?3bn from Russian assets frozen by West’ *Financial Times* [London, October 26, 2023]

<sup>14</sup> 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.

<sup>15</sup> *Ibid.*, paras 72–73.

<sup>16</sup> UNGA Res 56/83 [adopted without a vote] U.N. Doc A/RES/56/83.

<sup>17</sup> See, e.g., *Gabcákovo-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 February 1, 2011] ITLOS Reports 2011, 10, paras 66–67, 112, 169, 178–182, 194–196 & 210.

that State” [Article 1].<sup>18</sup> 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 toward 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 toward 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: “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.”<sup>19</sup>

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”.<sup>20</sup>

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 presumed that the measure would be lawful for as long as the wrongful conduct continues, but no longer. This would be consistent

<sup>18</sup>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].

<sup>19</sup>“Induce” in Cambridge Dictionary <https://dictionary.cambridge.org/us/dictionary/english/induce>.

<sup>20</sup>See the commentary to Article 49 of ARSIWA, at para 1.



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.”<sup>21</sup> 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.”<sup>22</sup>

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.

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.<sup>23</sup> 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. 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.”<sup>24</sup> 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.”<sup>25</sup> 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 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

<sup>21</sup> Gabčíkovo-Nagymaros Project [*Hungary/Slovakia*] [1997] ICJ Rep 56–57, para 87.

<sup>22</sup> See the commentary to Article 49 of ARSIWA, at para 9.

<sup>23</sup> ARSIWA, Article 22, quoted above.

<sup>24</sup> *Ibid.*

<sup>25</sup> See the commentary to Article 49 of ARSIWA, at para 9.

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. 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.<sup>26</sup> 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.<sup>27</sup> The authority to take countermeasures resides with individual sovereign States and, in this sense, is a decentralized and voluntary obligation.<sup>28</sup>

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 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.”<sup>29</sup>

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 Ukraine’s transportation routes and commerce have harmed

<sup>26</sup> See the commentary to Chapter II of ARSIWA, in particular para 3.

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> Article 42 of ARSIWA, Comment 12.

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.<sup>30</sup> 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.

<https://www.clearytradewatch.com/2023/07/nationalization-of-russian-assets-of-investors-from-unfriendly-states-continues>.

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: they protect the interests of the international community itself.<sup>31</sup> 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.<sup>32</sup>

49. The obligation of non-aggression is another peremptory norm of international law, which has been recognized as an obligation *erga omnes*.<sup>33</sup> 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.<sup>34</sup> 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:

<sup>30</sup>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, July 24, 2023]

<sup>31</sup>Barcelona Traction Case [Belgium v. Spain] [Judgment] [1970] ICJ Rep at para 33.

<sup>32</sup>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.

<sup>33</sup>As recognised by the ICJ in the Barcelona Traction case [n. 31] at para 33.

<sup>34</sup>See further, ARSIWA, Chapter I, commentary at para 3.

[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.”

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”<sup>35</sup> 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.”<sup>36</sup> 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.”<sup>37</sup>

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.”<sup>38</sup> 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 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.<sup>39</sup> The examples identified by the ILC included [amongst others]:

a. “United States-Uganda [1978]. In October 1978, the U.S. 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.’”<sup>40</sup>

b. “Collective measures against Iraq [1990]. On August 2, 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 cutoff of financial relations to induce Iraq to put an end to its unlawful occupation and purported annexation of Kuwait.<sup>41</sup> 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.”<sup>42</sup> Subsequently, the United Nations Compensation Commission [“the UNCC”] processed claims and paid compensation for loss and damage caused by the invasion to the victims, partially from frozen assets.<sup>43</sup>

<sup>35</sup> M. Dawidowicz, “Third-party countermeasures: A progressive development in international law?” [2016] 4 QIL 29.

<sup>36</sup> Yearbook of the ILC 2001 [n. 14] 139, para. 6 of the commentary to Article 54.

<sup>37</sup> *Ibid.*, 137, commentary to Article 54.

<sup>38</sup> ILC, Yearbook of the International Law Commission 2000, vol 1 [UN,2005] 338.

<sup>39</sup> Yearbook of the ILC 2001 [n. 14] 137, commentary to Article 54.

<sup>40</sup> *Ibid.*, 138 [footnotes omitted].

<sup>41</sup> UNSC Res. 661 [Aug. 6, 1990] U.N. Doc S/RES/661.

<sup>42</sup> Yearbook of the ILC 2001 [n. 14] 137, commentary to Article 54 [footnotes omitted].

<sup>43</sup> 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 [October 23, 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

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.”<sup>144</sup>

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 November 14, 1979 U.S. President Jimmy Carter ordered the freezing of all Iranian government assets held in the U.S.<sup>45</sup> In the Algiers Accords of January 19, 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.<sup>46</sup>

<https://iusct.com/foundingdocuments-2/>

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.”<sup>47</sup>

<https://www.idiil.org/app/uploads/2017/06/2005—kra—01—en.pdf>.

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.<sup>48</sup> These measures were taken before any enforcement measures were adopted by the U.N. Security Council pursuant to Chapter VII of the U.N. Charter.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

<https://carnegie-mec.org/syriaincrisis/fa=48418> and <https://www.mfa.gov.tr/the-friends-groupeaffirmed-its-determination-to-support-the-just-cause-of-the-syrian-people.en.mfa>

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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.

<sup>44</sup> Yearbook of the ILC 2001 [n. 14] 137, commentary to Article 54 [footnotes omitted].

<sup>45</sup> U.S. Executive Order 12170 [November 14, 1979], 44 F.R. 65729.

<sup>46</sup> Iranian assets were transferred into a domestic escrow account, then to an international escrow account. U.S. Executive Order 12277 [January 23, 1981], 46 F.R. 7915. The founding documents of the IUSCT area available on its website:

<sup>47</sup> For the full text of the Resolution, see Institut de Droit International, Fifth Commission, ‘Obligations and rights erga omnes in international law’ [Krakow session, August 27, 2005]

<sup>48</sup> Swiss Federal Council, ‘Ordonnance instituant des mesures à l’encontre de certaines personnes originaires de la Libye’ [February 21, 2011] RS 946.231.149.82; US Executive Order 13566 [February 25, 2011].

<sup>49</sup> UNSC Res 1970 [February 26, 2011]; UNSC Res 1973 [March 17, 2011]. See further: Dawidowicz, ‘Third-party countermeasures’ [n. 35].

<sup>50</sup> Council Implementing Decision 2011/302/CFSP [23 May 2011]; Council Decision 2012/122/CFSP [February 27, 2012]; Council Decision 2015/837/CFSP [May 28, 2015].

<sup>51</sup> See further: Dawidowicz, ‘Third-party countermeasures’ [n. 35] at 7 and Martin Dawidowicz, Third-party countermeasures in international law [CUP 2017].

<sup>52</sup> See:

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.<sup>53</sup> 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<sup>54</sup> 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*.<sup>55</sup>

<https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>.

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].<sup>56</sup>

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,<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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

<sup>54</sup> Australia, Bahamas, Canada, Iceland, Japan, Liechtenstein, Monaco, New Zealand, Norway, Republic of Korea, Singapore, Switzerland, United Kingdom and the United States.

<sup>55</sup> See Minami Funakoshi, Hugh Lawson, and Kannaki Deka, 'Tracking Sanctions against Russia' [Reuters, July 6, 2022]

<sup>56</sup> 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 Public International Law*, at para 58; Christian Tams, *Enforcing Obligations Erga Omnes* [CUP 2005, reissued 2010], 1–251.

<sup>57</sup> 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.

<sup>58</sup> 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, January 20, 2023] [www.lawfaremedia.org/article/cautionary-tale-what-iran-and-cuba-can-teach-us-about-designating-russia-statesponsor-terrorism](http://www.lawfaremedia.org/article/cautionary-tale-what-iran-and-cuba-can-teach-us-about-designating-russia-statesponsor-terrorism) The legislation allowing the Iranian transfer was Section 2002 of the Victims of Trafficking and Violence Against Women Act of 2000.

<sup>59</sup> See congressional Research Service, 'Justice for United States Victims of State-Sponsored Terrorism Act: Eligibility and Funding' [CRS, April 11, 2023]

<https://crsreports.Congress.gov/product/pdf/IF/IF10341>.

61. In 2022, Canada adopted Bill C-19,<sup>60</sup> 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.

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."<sup>61</sup> 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. 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".<sup>62</sup> Nor can Ukraine's rights be overstated: 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

<sup>60</sup> Statutes of Canada 2022, Bill C-19 [Royal Assent] [June 23, 2022].

<sup>61</sup> ARSIWA, Comment 3 on Part Three, Chapter One.

<sup>62</sup> 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."].

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.<sup>63</sup>

67. A first countermeasure—the freezing of Russian State assets—has already been taken by various States. 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.

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*.<sup>64</sup> 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.<sup>65</sup>

<sup>63</sup> 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.

<sup>64</sup> App no 5809/08 [ECtHR, June 21, 2016].

<sup>65</sup> 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 of any of these courts or tribunals. 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



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. 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.

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.<sup>66</sup>

<https://www.ft.com/content/f625893a-4377-44f1-b100-47ee07b794ef>.

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

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.

<sup>66</sup>Chris Giles and Max Seddon, ‘Volodymyr Zelensky calls for global plan to rebuild Ukraine after war,’ *Financial Times* [London May 23, 2022]

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 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.<sup>67</sup>

#### 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 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.



<sup>67</sup> See para 2 of the commentary to Article 52 of ARSIWA.



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