

WITNESS STATEMENT OF PAUL REICHLER
Before the Helsinki Commission
December 6, 2023

1. Good afternoon, Mr. Chairman and Members of the Commission. 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.
2. I have furnished the Commission with my CV, 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 awards I have received.
3. I have 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 the legality of countermeasures against the Russian Federation for its unlawful military invasion of Ukraine and annexation of Ukrainian 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 as compensation for the damages caused by Russia's internationally wrongful acts.

4. The Memorandum concludes that the transfer of frozen Russian State assets would be lawful under international law. I will briefly 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 which is recognized to have *erga omnes* effects, that is, to be so serious a breach of fundamental principles that it is considered to impact all States, not just the direct victim of its unlawful acts, any State may take countermeasures against the wrongdoer to induce the cessation of its wrongful conduct or to compensate the direct victim. Third, countermeasures may include acts that would ordinarily be unlawful, but which are rendered lawful under international law if taken in response to grave breaches by the offending State. Fourth, Russia's unprovoked aggression against Ukraine violates a peremptory norm of international law with *erga omnes* effects, such that countermeasures may be lawfully imposed against it. 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 or 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. And sixth, the compensation should be provided through an international mechanism that assures the fairness, objectivity and transparency of the process.
5. 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.

6. 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 other victims of Russia's aggression, or to any of the other provisions of the REPO Act. In addressing this subject, it is important to understand the difference immunity under international law, and immunity under domestic law, including the law of the United States.
7. 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. But 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 countermeasures 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 countermeasures contemplated by the REPO Act.
8. 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. There is clear precedent. In the International Economic Powers Act of 1977, Congress authorized the President, in certain circumstances, to freeze the assets of a foreign sovereign. This is the authority under which Russia's State assets have been frozen. No commentator has argued, to my knowledge, that this was a violation of sovereign immunity, as 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.

9. Moreover, 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, and for suits by victims of State-sponsored terrorism. The REPO Act itself is 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, under either 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 a transfer of these assets.
10. I thank you for the opportunity to appear before you, and I would be happy to respond to any questions that you might have.