

Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine

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Executive Summary

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

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

This proposal recommends that each state identify and transfer all Russian state assets within its jurisdiction to a central bank escrow account, trust, or analogous arrangement⁴ for subsequent disposition in accordance with international agreements. While the Russian state assets are held in escrow, eventual allocation rules and procedures shall be promulgated according to multilateral agreements and in the most transparent way possible, in accordance with the goals of the November 2022 U.N. resolution. Once a global fund to hold and distribute the assets has been established, such as at the Bank for International Settlements in Switzerland, states may then consolidate the assets by transferring them to the global fund.

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

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

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

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

3 *Id.* at ¶ 3.

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

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

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

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

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

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

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

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

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

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

Foreword

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

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

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

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

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

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

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ *Id.*

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

¹⁵ U.N. Charter art. 2(4).

I. Overview of the Multilateral Asset Transfer Proposal

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

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

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

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

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

17 G.A. Res. A/RES/ES-11/5, at ¶ 3.

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

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

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

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

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

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

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

II. Russia's Legal Obligation for Reparations

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

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

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

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

20 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

21 Ger. v. Pol., 1928 P.C.I.J. at 47.

22 ARSIWA, art. 31 (emphasis added).

23 ARSIWA, art. 31(2).

24 E.g., JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 267–269 (2013).

25 S.C. Res. 687, ¶ 16 (Apr. 3, 1991).

26 David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EJIL 183, 186 (2002).

27 See Bernhard Graefrath & Manfred Mohr, *Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait*, 43 AUSTRIAN J. INT’L L. 109 (1992).

28 S.C. Res. 687, ¶ 18.

29 See G.A. Res. A/RES/ES-11/1 (Mar. 2, 2022), available at https://unwatch.org/wp-content/uploads/2022/05/A_RES_ES-11_1-EN.pdf (deploring “in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter”).

30 G.A. Res. A/RES/ES-11/5; Ukr. v. Russ. Fed’n, 2022 I.C.J., *supra* note 1.

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

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

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

Russia's expulsion from the Council of Europe, nonparticipation in international dispute settlement procedures, and noncompliance with international judgments and awards cast doubt on whether claims instituted at the European Court of Human Rights will result directly in implementation of reparations by Russia to Ukraine or to Ukrainians.³⁶ Ukraine's claims instituted at the ICJ,³⁷ under the U.N. Convention on the Law of the Sea³⁸ and under bilateral investment treaties,³⁹ for similar reasons are unlikely to result directly in the implementation of reparations. And since Russia is a permanent member of the Security Council, it may, and has, used its veto to block binding legal action against it in that principal United Nations organ. It is improbable that Russia will agree to make full reparations to Ukraine and others for the injuries that Russia's invasion has

31 Council Eur., Decision, Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe (Feb. 25, 2022), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a5a360.

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

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

34 *Id.* at 84.

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

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

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

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

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

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

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

III. The International Law of Countermeasures

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

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

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

40 *Naulilaa Incident Arbitration* (Port. v. Ger.), II R.I.A.A. 1012 (1928).

41 See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 57 (Sept. 25) (recognizing "entitlement to take countermeasures").

42 *Id.* (recognizing "entitlement to take countermeasures." Countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and [...] directed against that State").

43 Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10, art. 22 § 1 (2001), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [ARSIWA with Commentaries]; see also *Air Services Agreement of Mar. 27, 1946 Between the United States of America and France* (U.S. v. Fr.), 18 R.I.A.A. 417, 443 ¶¶ 81-82 (Perm. Ct. Arb. 1978); *Hung. v. Slov.*, Judgment, 1997 I.C.J. 56, ¶ 87 (Sept. 25); Denis Alland, *The Definition of Countermeasures*, in L. OF INT'L RESP. 1127 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

44 See, e.g., *U.S. v. Fr.*, 18 R.I.A.A., at 44-46 ("counter-measures ... are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed"); see also *Hung. v. Slov.*, 1997 I.C.J. at 56, ¶ 83.

45 ARSIWA, art. 22.

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

A. Conditions for the Validity of Countermeasures

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

- (1) Must be in response to a previous wrongful act that has already occurred and must be directed at the state responsible for that previous violation.⁴⁹ It is enough that the state resorting to countermeasures determines whether an international wrongful act has occurred; no previous assessment by a court or special agreement between states is needed.⁵⁰
- (2) Must be undertaken to compel the offending state to cease the violation and/or make reparations; the object of the countermeasures cannot be to punish the offending state.⁵¹
- (3) Shall, “as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.”⁵² The countermeasures must be terminated as soon as the responsible state complies with its international obligations or the injured state determines that the responsible state has done all that is necessary to make reparations for the wrongful act.⁵³ Thus, countermeasures should be reversible and allow the state taking the countermeasure to continue to comply with its international obligations.
- (4) Must be preceded by an opportunity for the offending state to cease or to repair before taking any countermeasure.⁵⁴ There is no specific timing for the notification; in fact, the state could theoretically notify and take countermeasures at the same time.⁵⁵

⁴⁶ Denis Alland, *Countermeasures of General Interest*, 13 EJIL 1221, 1226 (2002).

⁴⁷ See discussion below.

⁴⁸ Hung. v. Slov., 1997 I.C.J. at 37.

⁴⁹ ARSIWA, art. 49.

⁵⁰ See *Fourth Report on State Responsibility*, by Mr. Gaetano Arangio-Ruiz, *Special Rapporteur*, II (1) Y.B. Int’l L. Comm’n, UN Doc A/CN.4/444 and Add.1-3, 6 ¶ 2 (1992), available at https://legal.un.org/ilc/documentation/english/a_cn4_444.pdf.

⁵¹ ARSIWA, art. 49(1); see also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES* 284 (2002).

⁵² ARSIWA, art. 49(3).

⁵³ ARSIWA, art. 44.

⁵⁴ ARSIWA, art. 52(1).

⁵⁵ CRAWFORD, *supra* note 51, at 298.

- (5) Cannot be undertaken if there is a “dispute [...] pending before a court or tribunal which has the authority to make decisions binding on the parties.”⁵⁶ The objective of this condition is to ensure that recourse to countermeasures does not weaken any dispute settlement.
- (6) Must be proportionate to the harm suffered by the injured state as a result of the wrongful act.⁵⁷
- (7) Must not involve the use of force that is prohibited under international law.⁵⁸

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

B. Standing to Invoke Countermeasures

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

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

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

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

⁵⁶ ARSIWA, art. 52(3)(b).

⁵⁷ ARSIWA, art. 51.

⁵⁸ ARSIWA, art. 50.

⁵⁹ ARSIWA, art. 42.

⁶⁰ ARSIWA with Commentaries, art. 42 § 12.

⁶¹ ARSIWA, art. 48.

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

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

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

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

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

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

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

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

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

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

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

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

C. Countermeasures Versus Sanctions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁴ See, e.g., Caron & Mohr, *supra* note 27, at 185.

⁷⁵ *Id.* (“This difference is apparent in the fact, for example, that the work of the UNCC was not in any way tied to, or conditioned by, changes in the future behavior of Iraq's leadership”).

⁷⁶ Peter-Tobias Stoll, *State Immunity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1, 4 (last updated Apr. 2011), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106>.

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

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

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

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

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

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

79 See *id.*

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

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

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

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

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

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

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

⁸³ ARSIWA, art. 50.

⁸⁴ *Jurisdictional Immunities of the State* (Ger. v. It.: Greece Intervening), Application Instituting Procedures, 2012 I.C.J. 143 (Dec. 23, 2008).

⁸⁵ Ger. v. It.: Greece Intervening, Memorial of the Federal Republic of Germany, 2012 I.C.J. at 83 (Jun. 12, 2009).

⁸⁶ Ger. v. It.: Greece Intervening, Judgment, 2012 I.C.J. at 93 (Feb. 3).

⁸⁷ *Id.* at 95-97, 139.

⁸⁸ *Id.* at 48.

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

A. Notice and Consent for Use of Countermeasures

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

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

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

89 *Certain Iranian Assets* (Islamic Repub. Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. 164 (June 14); Islamic Repub. of Iran v. U.S., Judgment, 2016 I.C.J. at 80 (Feb. 13, 2019) (Court dismissing the claims regarding jurisdictional immunity).

90 ARSIWA, art. 43.

91 ARSIWA, art. 52(1).

92 See, e.g., *Russia Has Shown No Interest In Negotiations To End War Despite Putin's Words, U.S. Officials Say*, RADIOFREEEUROPE/RADIOLIBERTY (Dec. 23, 2022), <https://www.rferl.org/a/russia-putin-war-negotiations/32190264.html>.

93 Jack Guy, Yulia Kesaieva, Mick Krever, Jonny Hallam & Josh Pennington, *Top Ukrainian security official says Russia preparing for 'maximum escalation' in the war*, CNN (Feb. 1, 2023), <https://www.cnn.com/2023/02/01/europe/russia-maximum-escalation-ukraine-intl/index.html>.

94 See CRAWFORD, *supra* note 24, at 267–269.

95 *Id.*

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

B. Reversibility and Proportionality of the Proposed Countermeasures

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

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

⁹⁶ Exec. Order No. 12817, 57 C.F.R. 48433 (Oct. 23, 1992).

⁹⁷ *Id.*

⁹⁸ S.C. Res. 706, UN SCOR, 47th Sess., 3046th mtg. at 6, UN Doc. S/RES/706 (Aug. 15, 1991); S.C. Res. 712, UN SCOR, 47th Sess., 3064th mtg. at 4, UN Doc. S/RES/712 (Sept. 19, 1991).

⁹⁹ S.C. Res. 687, UN SCOR, 46th Sess., 2983rd mtg. at 3, UN Doc. S/RES/687 (Apr. 3, 1991).

¹⁰⁰ Alfred B. Prados, *Iraqi Challenges and U.S. Responses: March 1991 through October 2002*, CONG. RSCH. SERV. REP. (Nov. 20, 2002), available at <https://www.everycrsreport.com/reports/RL31641.html>.

¹⁰¹ Some argue that Iraq’s acceptance of the ceasefire resolution (Sec. Res. 687) shows that consent was required in that case. This view is incorrect for several reasons. First, the U.N. had already established Iraq’s duty to compensate months before the ceasefire, without any agreement by Iraq. Second, under international law, “consent” cannot be attained at gunpoint (a standard illustration is the invalidity of Austria’s 1938 “consent” to being annexed by Germany). Iraq’s acceptance of Sec. Res. 687 was involuntary. Third, Iraq did not agree to any of the specific transfers of its state funds, nor did it agree to or participate in the subsequent processes of compensation, and indeed its government vehemently denounced them.

¹⁰² See, e.g., *Report: Proposals to Seize Russian Assets to Rebuild Ukraine: Session 22 of the Congressional Study Group*, BROOKINGS (Dec. 29, 2022), <https://www.brookings.edu/research/proposals-to-seize-russian-assets-to-rebuild-ukraine/>.

¹⁰³ ARSIWA, art. 49(1).

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

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

C. Lawful Expropriation

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

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

D. Adjudication of Pending Disputes

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

¹⁰⁴ ARSIWA with Commentaries, art 22 § 4.

¹⁰⁵ ARSIWA, art. 51 ("The countermeasures must be proportionate to the harm suffered by the injured State as a result of the wrongful act").

¹⁰⁶ E.g., Amir Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 VILL. L. REV 199 (1969).

¹⁰⁷ ARSIWA, art. 52.

proceedings against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide. On June 23, 2022, Ukraine also filed an application against Russia at the European Court of Human Rights (ECHR) concerning Russia's violations of the European Convention on Human Rights between the period of February 24 and April 7, 2022.¹⁰⁸ Although the ICJ issued an order on provisional measures,¹⁰⁹ a full decision on the merits in both cases is still pending.

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

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

E. Countermeasures and the U.N. Security Council

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

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

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

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

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

¹¹¹ *Id.*

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

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

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

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

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

The jurisdiction *ratione materiae* [relation to the subject matter of the dispute] of the [Security] Council is limited, and its ability to respond to wrongful acts efficiently and effectively is frequently hampered by political disagreement and by the threat or use of the veto by one of the five permanent members. *It is precisely in situations when the Security Council fails to act or its actions are ineffective in enforcing serious illegalities, such as the large-scale human rights violations in Rwanda, Sudan, Syria, and so on, that the demand for a right of collective action by states is strongest. ...*

While the Council’s responsibility for the maintenance of international peace and security is ‘primary’, *it is not exclusive*. The General Assembly may also be required to take steps for the maintenance of international peace and security, for example in situations *where the Security Council is prevented by the veto from acting*, or has otherwise been ineffective [and the UNGA has acted in just this way in the Russia-Ukraine case]. In keeping with the established prohibition of forcible countermeasures by individual states, however, sanctions involving the use of force can only be adopted by the Security Council, acting in pursuance of its Chapter VII powers.¹¹⁷

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

113 CRAWFORD, *supra* note 24, at § 21.3.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

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

F. The Flexibility of State Practice of Countermeasures

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

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

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

118 Franchini, *supra* note 82, at 464.

119 See ANTONIOS TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL* 188 (2011). See also Dawidowicz, *supra* note 64, at 413 (noting the same attitude in relation to third-party countermeasures).

120 CRAWFORD, *supra* note 51, at 302–304. For a systematic and comprehensive study on state practice of third-party countermeasures, see also Dawidowicz, *supra* note 65.

121 ARSIWA with Commentaries, art. 54 § 3.

122 See Section III(A), *infra*.

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

V. Domestic Legal Mechanisms of State Countermeasures

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

A. Executive Acts of State Under International and Domestic Law

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

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

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

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

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

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

¹²⁶ *See id.*

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

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

2. Justiciability Under Domestic Law

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

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

127 Tom Ruys, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions*, in TOM RUYS, NICOLAS ANGELET, & LUCA FERRO, *THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW* (2019); Ingrid (Wuerth) Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, (forthcoming) 1 GEORGE WASH. L. REV. 14–23 (2023); Philippa Webb, *Building Momentum: Next Steps Towards Justice for Ukraine*, ARTICLES OF WAR 2 (May 2022), available at <https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine/>.

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

129 Justiciability, CORNELL LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/justiciability/>.

130 See JS Martinez, *Horizontal Structuring*, in MICHEL ROSENFELD & ANDRÁS SAJÓ, *OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 548–549 (2012); CHRISTOPH MOELLERS, *THE THREE BRANCHES* 16 (2013).

131 *Id.*

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

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

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

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

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

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

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

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

¹³⁶ *Id.*

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

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

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

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

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

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

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

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

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

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

144 50 USC § 1702(a)(1)(B).

145 *Id.* (emphasis added).

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

In January 1981, as part of a series of actions taken to effectuate the Algiers Accords, which resolved the Iranian hostage crisis, U.S. President Reagan directed all U.S. banks holding Iranian assets — which had been blocked under the authority of IEEPA since 1979¹⁴⁷ — to transfer those assets to the U.S. Federal Reserve Bank. The President then directed the Federal Reserve Bank to transfer all Iranian state gold and other assets to an escrow account at the Bank of England held on behalf of a third party, the Algerian Central Bank.¹⁴⁸ The assets in the escrow account would then be disposed of based on other diplomatic agreements. The petitioner in the case sued to challenge the executive orders and actions taken by the Secretary of the Treasury to implement the Algiers Accords, arguing that these actions nullified its right to attach Iranian assets in satisfaction of a judgment it had obtained against Iran in U.S. courts, and argued that IEEPA gave authority only to freeze, not to transfer. The Court disagreed and refused to “read out of IEEPA all meaning to the words ‘transfer,’ ‘compel,’ or ‘nullify,’ and limit the President’s authority in this case only to continuing the freeze.”¹⁴⁹ The Court recognized that the congressional purpose in authorizing blocking orders is to “put control of foreign assets in the hands of the President,”¹⁵⁰ and, from the moment they are blocked, the assets become “‘bargaining chip[s]’ to be used by the President”¹⁵¹ and are “at his disposal” when dealing with a hostile country.¹⁵²

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

146 *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

147 Exec. Order No. 12170 (Nov. 14, 1979), available at <https://www.presidency.ucsb.edu/documents/executive-order-12170-blocking-iranian-government-property/>.

148 Exec. Order Nos. 12277–12285, 46 Fed. Reg. 7913–7932 (Jan. 19, 1981), available at <https://www.presidency.ucsb.edu/documents/executive-order-12277-united-states-iran-agreement-release-the-american-hostages/>.

149 *Dames & Moore*, 453 U.S. at 655.

150 *Id.* at 673.

151 *Id.*

152 *Id.*; see also Ofc. of Legal Counsel, U.S. Dept. of Justice, *Legality of International Agreement with Iran and Its Implementing Executive Orders* (Jan. 19, 1981), at 309 (“the President has power under IEEPA to direct the transfer of funds of Iran”), available at <https://www.justice.gov/file/22421/download/>.

153 *Harisiades*, 342 U.S. at 589.

154 *Bank Markazi v. Peterson*, 578 U.S. 212, 235 (2016) (citing *Dames & Moore*, 453 U.S. at 673–674, 679–681 (describing this history)).

155 *Dames & Moore*, 453 U.S. at 674–675.

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

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

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

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

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

158 50 U.S.C. § 1702(a)(1)(C).

159 *Id.*

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

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

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

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

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

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

¹⁶³ *Dames & Moore*, 453 U.S. at 672.

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

A. Constitutional Concerns

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

1. Due Process

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

2. Takings Clause

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

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

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

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

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

170 U.S. CONST. amend. V.

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

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

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

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

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

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

B. Sovereign Immunity Under U.S. Law

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

VII. Parliamentary System Case Example: Canadian Domestic Law

In Canada, the federal government has constitutional authority over foreign affairs matters. The government has used the Special Economic Measures Act (SEMA),¹⁷⁷ and more recently the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law),¹⁷⁸ to impose sanctions in situations where international organizations such as the United Nations have requested that it do so, or where international security crises, grave breaches of human rights, or corruption by foreign state officials prompted such a move by the federal Cabinet.¹⁷⁹ SEMA, in particular, had previously provided for the property¹⁸⁰ of designated foreign states or their nationals to be “seized, frozen or sequestered” by way of an order issued by the federal Cabinet.¹⁸¹

In spring 2022, the Canadian government introduced new confiscatory measures, primarily in response to Russia’s invasion of Ukraine and the government’s evident desire to strengthen its economic sanctions regime in response to the worsening situation. In June 2022, the Canadian Parliament passed the new law as part of Bill C-19 (the government’s budget bill),¹⁸² as amendments to the existing SEMA¹⁸³ and the Magnitsky Law.¹⁸⁴

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

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

175 28 U.S.C.A. § 1604.

176 *See supra* note 133.

177 Special Economic Measures Act, S.C. 1992, c. 17 [hereinafter SEMA].

178 Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c. 21.

179 SEMA § 4(1.1).

180 “Property” is broadly defined in SEMA § 2 to include “any type of property, whether real or personal or immovable or movable, or tangible or intangible or corporeal or incorporeal, and includes money, funds, currency, digital assets and virtual currency.”

181 SEMA § 4(1)(b) (prior to the 2022 amendments).

182 Budget Implementation Act, S.C. 2022, c. 10.

183 SEMA, as amended.

184 Sergei Magnitsky Law, as amended. The measures built on those originally championed by the World Refugee and Migration Council. *See Repurposing Frozen Assets to Assist the Forcibly Displaced – Research Paper*; WORLD REFUGEE & MIGRATION COUNCIL (Sept. 14, 2020), <https://wrmcouncil.org/publications/research-paper/repurposing-frozen-assets-to-assist-the-forcibly-displaced>.

185 SEMA § 4(1)(b).

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

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

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

A. Sovereign Immunity Under Canadian Law

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

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

186 SEMA § 4(1.1).

187 SEMA § 5.4(1).

188 SEMA § 5.4(2) and (3). Though, notably, the person is not entitled to contest the Governor-in-Council's initial order seizing or restraining the assets (§ 5.1(1)).

189 SEMA § 5.6.

190 SEMA § 7.1.

191 *R v. Hape*, S.C.C. 26 ¶ 36 (2007).

192 R.S.C. 1985, c. S-18.

193 PHILLIP M. SAUNDERS & ROBERT J CURRIE, *KINDRED'S INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 386 (9th ed. 2019).

194 SIA § 4(3)(a).

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

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

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

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

Conclusion

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

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

¹⁹⁶ SEMA § 4(1)(b).

Afterword

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

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

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

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

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

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197 Marnix Provoost & Pieter Balcaen, *What Is Russia's Strategy In Ukraine?*, MODERN WAR INSTITUTE (Jun. 5, 2023), <https://mwi.usma.edu/what-is-russias-strategy-in-ukraine/>.

198 *Updated Ukraine Recovery and Reconstruction Needs Assessment*, *supra* note 12.

Appendix A: Author and Contributor Biographies

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

Yuliya M. Ziskina (Principal Author) is a human rights and copyright lawyer focused on international law, open access information policy, and ethics. She is currently Counsel at Razom and at Quinn Emanuel Urquhart & Sullivan. She was previously a Fellow at the World Bank Integrity Vice Presidency and the U.S. Department of Justice, where her legal work consisted of investigating and prosecuting international financial crime. She is also former Enforcement Counsel at the New York City Conflicts of Interest Board, where she prosecuted violations of New York City's anti-corruption laws. Ms. Ziskina has authored briefs in the U.S. Supreme Court, D.C. Circuit Court of Appeals, and the Southern District of New York. Her work has appeared in the Wall Street Journal, Bloomberg Law, Ars Technica, and Wired.

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

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

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

Dr. Azeem Ibrahim OBE (Chair, Reparations Study Group) is the Senior Director of Special Initiatives at the New Lines Institute. He is also an Adjunct Research Professor at the Strategic Studies Institute, U.S. Army War College. He completed his Ph.D. from the University of Cambridge and served as an International Security Fellow at the Kennedy School of Government at Harvard and a World Fellow at Yale. Over the years he has met and advised numerous world

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

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

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

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

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

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

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

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

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

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

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

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

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

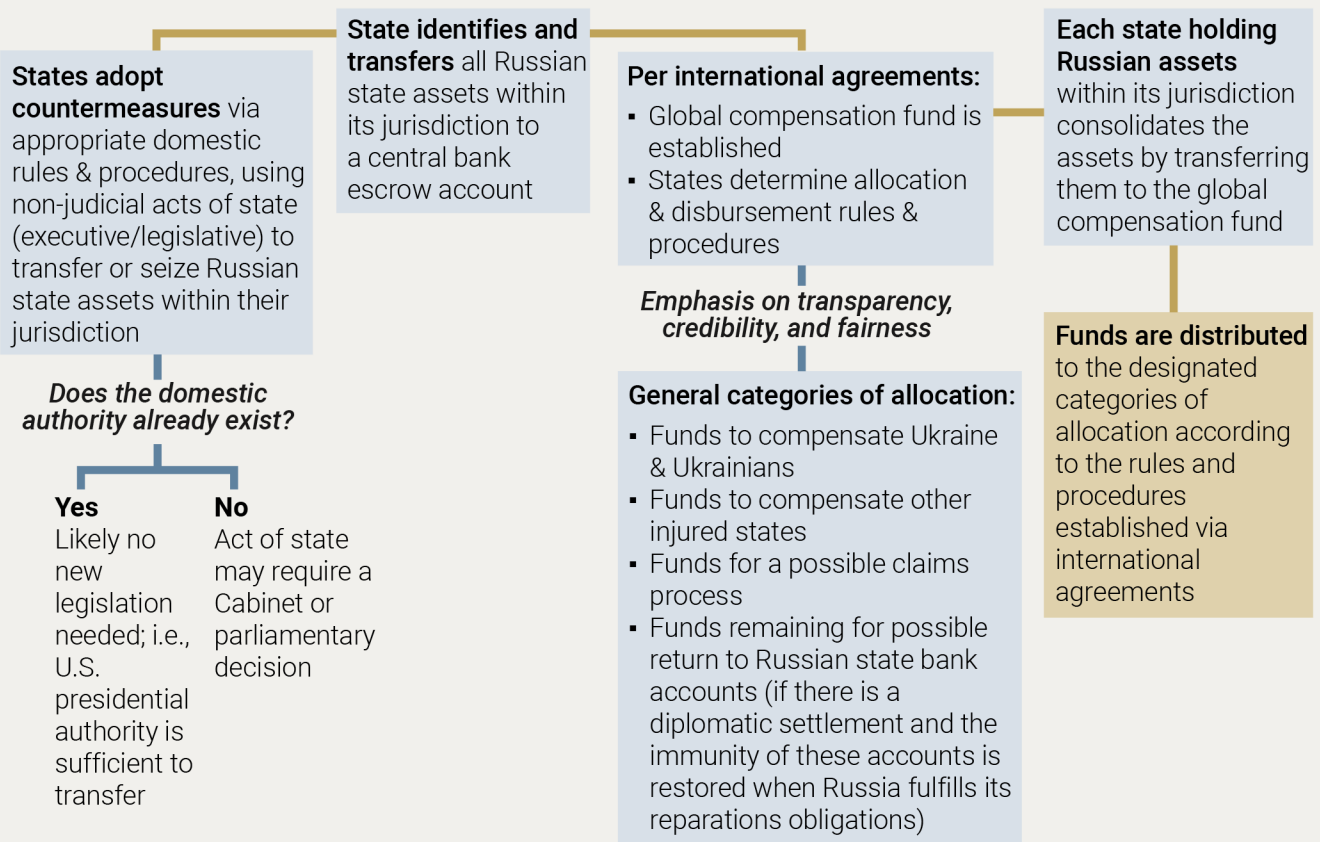
Multilateral Action Framework for Transferring State Assets

Why transfer Russian state assets?

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

November 2022 U.N. Resolution:

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



U.S. International Emergency Economic Powers Act (IEEPA):

1977 IEEPA: "Transfer" authority

- Authorizes the President to "direct and compel ... any ... transfer ... with respect to" foreign property
- President can transfer foreign state assets to use as "bargaining chips" with a hostile nation (Dames & Moore v. Regan, 453 U.S. 654 (1981))
 - Can be used in the absence of wartime
 - Can be used to transfer Russian state assets

2001 IEEPA Amendment: "Confiscation" authority

- "When the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals," the President may "confiscate foreign-owned property and to dispose of it as he sees fit."
- Grants additional powers to the President, but does not replace or override the original 1977 IEEPA
 - Can only be used during wartime or attack on the U.S.
 - Without amendment, cannot be used to confiscate Russian state assets

"Transfer" vs. "Confiscation"

State assets

Transfer:

- Control over movement
- No claims of ownership
- Title does not vest

1977 IEEPA
(no amendment needed)

Confiscation:

- Control over ownership
- Title vests in the U.S.

2001 IEEPA
(amendment would be needed for Russian state assets)

President invokes existing authority under 1977 IEEPA for transfer of Russian state assets

OR

Congress amends IEEPA to authorize President to confiscate Russian state assets

U.S. identifies and transfers all Russian state assets via executive act to a central bank escrow account, e.g., Federal Reserve Bank of New York

Per international agreements:

- Global compensation fund is established
- States determine allocation & disbursement rules & procedures

U.S. and all other states with Russian state asset holdings consolidate the assets by transferring them to the global compensation fund

Funds are distributed to the designated categories of allocation according to the rules and procedures established via international agreements