



**THE LEGAL, PRACTICAL, AND MORAL CASE
FOR TRANSFERRING RUSSIAN SOVEREIGN
ASSETS TO UKRAINE**

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I. Executive Summary

In February 2022, President Vladimir Putin launched a full-scale war of aggression aimed at destroying Ukraine as an independent state. Since then, his forces have unleashed destruction on Ukraine and its people—killing thousands of Ukrainians; employing mass sexual violence and systemic torture; destroying critical infrastructure; devastating Ukraine’s economy; and pushing millions into abject poverty. All told, the estimated cost to rebuild Ukraine is at least \$400 billion.

As the human and financial toll of Putin’s war climbs with each passing day, there is a growing global consensus that Russia has an obligation to pay for the death and destruction that it has wrought on the Ukrainian people and other victims of Russian aggression. Many countries issued multi-faceted sanctions against Russia in the days, weeks, and months following its unlawful invasion of Ukraine. Some of those sanctions included the freezing of Russian sovereign bank assets located outside of Russia. Together, countries have frozen more than \$300 billion in sovereign assets, the majority of which is housed in Europe. Those assets thus cannot be moved; they cannot be sold; they cannot be used as collateral; and Russia cannot obtain the proceeds they might generate.

But freezing Russia’s assets is not enough. The United States and its allies can and must do more. Any country that currently holds Russian assets should transfer them to Ukraine. As this report makes clear, repurposing Russia’s frozen reserves in that manner fully comports with existing legal authorities and is the only practicable policy action that will hold Russia accountable for its heinous acts while allowing Ukraine to survive and recover from the war’s devastating effects. In urging the United States and its allies to undertake this proposal, this report in no way suggests that Ukraine is the sole victim of Russian aggression deserving of monetary relief. Nor does this report exclude the possibility that Russian sovereign assets may be transferred, consistent with U.S. domestic law and international law, to other beneficiaries—including non-Ukrainian

victims of Russian atrocities. Quite the contrary, a central goal of this report is to provide a broader blueprint for holding Russia and President Putin accountable for their unprecedented aggression and brazen contempt for the international order.

Factual Background. In Part II, this report sets forth the central facts about Russia’s illegal war in Ukraine and the global sanctions effort levied in response. The report summarizes the coordinated global effort to freeze Russian sovereign assets and provides an updated accounting, based on publicly available data and reporting, of the amount and location of such assets.

U.S. Domestic Law. In Part III, this report offers an authoritative legal analysis of U.S. law and explains why transferring Russia’s sovereign assets to Ukraine complies with domestic statutory and constitutional law. Although this part of the report may appear to tread familiar ground to some readers, it presents the most thorough exploration to date of the President’s authority to act in response to the crisis in Ukraine. That analysis of the President’s power under U.S. law begins with the undisputed axiom that whoever occupies the position of President possesses expansive authority to conduct foreign affairs on behalf of the United States. Over the years, Congress has authorized the Executive Branch to act broadly in this arena, providing the President a dynamic and extensive set of tools to carry out the nation’s objectives. And courts, in turn, have interpreted those powers capaciously. This is the foundation from which any discussion of the President’s power to respond to Russia’s illegal war must take shape.

In these extraordinary circumstances, the President’s power flows from the International Emergency Economic Powers Act (“IEEPA”). Through IEEPA, Congress granted the President the authority—in Subsections B and C of the statute—to address certain international emergencies in accordance with enumerated requirements. This report relies solely on authority conferred in Subsection B. Out of deference to the President’s expertise and authority in the realm of foreign

affairs, Congress empowered the President to define the scope of his powers under IEEPA. Presidents have long seized on that deference. And the President can act similarly here to achieve the proposed transfer through Subsection B.

To exercise his powers under Subsection B of IEEPA, the President must first declare a national emergency regarding an “unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States,” which originates “in whole or substantial part outside the United States.” Because the President has declared such an emergency following Russia’s unlawful invasion of Ukraine, the threshold requirement for exercising his authority under Subsection B of IEEPA has already been met.

Subsection B of IEEPA authorizes the President to, among other things, “block” and/or “direct and compel” the “transfer” of “any right, power, or privilege with respect to” Russia’s “property.” Congress did not define the statutory term “transfer,” so its meaning must be derived by using the traditional tools of statutory interpretation. Those tools demonstrate that “transfer” means the conveyance of a property interest from one entity to another. Accordingly, under Subsection B, the President has the power to “direct and compel” the conveyance of Russian sovereign assets to Ukraine. If there were any doubt about that straightforward interpretation of the statutory text, precedent and historical practice further reinforce what the plain text of IEEPA already makes clear.

Whether the President executes the proposed transfer under his existing powers under IEEPA or under newly enacted legislation, the resulting transfer must still be consistent with the Constitution and other domestic statutes. This report concludes that such a transfer would be. The Constitution would not prohibit the transfer of Russian assets to Ukraine because Russia, as a foreign sovereign, lacks both due process and takings rights under the Fifth Amendment. Nor

would any domestic statutes stand in the way of the proposed transfer. Specifically, the Foreign Sovereign Immunities Act does not apply because the transfer involves purely executive action and does not involve the courts. And the Administrative Procedure Act is satisfied because construing IEEPA to allow for the transfer is not just a plausible interpretation of the statute, it is the only reading supported by the statute's plain text.

International Law. The report's analysis does not end at the United States' borders. In Part IV, the report explains why international law poses no obstacle to transferring Russia's sovereign assets to Ukraine. To the contrary, the proposed transfer—whether achieved by the United States acting alone or acting in concert with other nations—constitutes a proportionate countermeasure to Russia's grave violations of international norms. That said, an international effort would carry far greater political and legal legitimacy than a unilateral effort by the United States. Given that most frozen funds are located in other nations, a coordinated effort will also result in more aid for Ukraine.

As this report explains in detail, transferring Russia's frozen assets to Ukraine would be permissible under the doctrine of third-party "countermeasures," which allows an action that would otherwise violate international law by one state taken with the aim of inducing another state to resume compliance with international law. The transfer of Russia's sovereign assets represents one such valid countermeasure for several reasons. *First*, Russia is plainly out of compliance with international law. *Second*, the countermeasure of transferring Russia's sovereign property satisfies the common-sense concept of proportionality, is not gratuitous, and if anything, is a far more targeted response to Russia's unlawful behavior than the sanctions levied so far. And *third*, it satisfies the reversibility requirement: the transfer operates as a temporary and narrow suspension of the normal legal relations between the Russia and the United States (and its allies). Once Russia

resumes compliance with international law, that suspension would be reversed, and Russia's legal relations with the United States and other nations would be normalized. Alternatively, the proposed transfer would satisfy reversibility because any financial damage Russia incurs can be credited against the debt it owes Ukraine.

Critics of this report's proposal to transfer Russia's assets to Ukraine have invoked "sovereign immunity" as a basis for hesitation. But that objection is misplaced for multiple reasons. As a threshold matter, the invocation of Russia's sovereign immunity as a defense against an asset transfer rests on a conceptual error. The United States and its allies are not prohibited from transferring Russian assets by virtue of some categorical immunity that shields Russia from any and all actions taken by other sovereigns. Sovereign immunity is a doctrine that insulates sovereign entities from liability in judicial proceedings, not a limitation on a sovereign's foreign policy carried out through executive or legislative action. Instead, the United States and other countries are constrained by well-established principles of foreign relations and customary international law, including reciprocity, comity, and fair compensation. But here, those principles do not foreclose the proposed transfer because the United States and its allies may transfer Russian assets to Ukraine under the doctrine of countermeasures. And in all events, even assuming that a doctrine like sovereign immunity were relevant, it would not bar the transfer of Russian assets any more than it barred countries like the United States from freezing them (which no one can seriously dispute was permissible under these extraordinary circumstances). At bottom, the doctrine of sovereign immunity provides no shelter for CBR assets.

The Practical and Moral Imperative for Taking Action. After establishing the legality of transferring Russian assets to Ukraine, Part V of the report discusses the relevant practical and moral considerations that compel action by the United States and its allies in the face of Russia's

ongoing atrocities against the Ukrainian people. Given the magnitude and scope of Russia's unlawful war of aggression, a refusal to invoke existing legal authorities to help Ukraine is not a morally or politically "neutral" position. Inaction in these circumstances would be nothing short of appeasement: it would serve to embolden Russia and send the dangerous signal that the United States and its allies lack the political and moral will to take all necessary steps to stop President Putin and his military from murdering civilians and flouting the basic rules of the international order. Denying Ukrainians access to Russia's assets would be a decision to grant Russia the benefit of retaining them. The United States and its allies should not follow down that morally bankrupt path.

Instead, all countries holding Russian assets have an obligation to impose real, material consequences on Russia in the form of an asset transfer. This move is appropriate on many fronts: (1) transferring Russia's assets to Ukraine will strengthen the international norm against aggression and discourage countries from violating that norm in the future; (2) the failure to act sends a dangerous message to the rest of the world that aggression, war crimes, and genocide will go unpunished; and (3) it would be a cruel irony to deny Ukraine the funds it needs by invoking respect for Russia's "sovereignty" and "property rights" when Russia has chosen to trample on the sovereignty and property rights of the Ukrainian people. The policy concerns driving inaction, such as the risk of "de-dollarization" and Russian retaliation, are highly overblown. Russia will not convince other countries to abandon the dollar as a reserve currency, especially given the dollar's many structural advantages and the absence of any viable alternative. And any supposed fear of retaliation or escalation ignores the limitations on Russia's ability to respond, as well as the lack of such retaliation in response to historic sanctions levied to date. These speculative concerns are no excuse for inaction.

To operationalize the transfer of Russian assets to Ukraine, the United States and other countries holding those assets should establish a workable and efficient transfer mechanism. As other experts have explained, each country holding Russian sovereign assets can create and control an escrow account and then agree to pool the funds in those accounts into an international fund—overseen by an independent international board—from which distributions can be made to Ukraine for its continued defense and eventual reconstruction. In addition, the United States and its allies should take steps to ensure that the transfer process is not undermined by corruption or the appearance of it. And finally, the funds should be sent directly and swiftly to the Government of Ukraine so that they are immediately available for use in defending and rebuilding the country.

Contrary to the concerns of policymakers who favor inaction in the face of Russia's atrocities, the contemplated transfer would not set a dangerous precedent. Russia's unlawful war of aggression on Ukraine constitutes an extraordinary rupture in the international order that demands an equally extraordinary response. While constraints of domestic and international law would not prohibit intervention in these rare circumstances, they do serve as meaningful sources of constraints on the United States and other nations in situations that do not come close to the kind of international emergency that Russia has inflamed. Put simply: transferring Russia's assets to Ukraine would not open the floodgates to similar maneuvers by bad-faith actors in the future. Moreover, the United States and its allies can easily adopt pragmatic constraints on the use of such power to ensure that there are appropriate limiting principles to guide future policymakers around the globe.

At bottom, the United States and its allies have the necessary legal authority and a moral obligation to punish Russia for its brutality and illegal actions by transferring Russian sovereign assets to Ukraine. As this report shows, no legal impediments or practical considerations stand in

the way of that bold and necessary action. The Ukrainian people and the international community have been waiting far too long to make Putin pay for the atrocities he has committed.

II. Factual Background

A. Russia's Illegal War in Ukraine

On February 24, 2022, Russian military forces launched a total and unprovoked invasion of Ukraine.¹ As many as 190,000 Russian soldiers invaded from the east, north, and south and immediately undertook a campaign focused on destroying the Ukrainian government.² Russia failed to capture Kyiv and certain Ukrainian political leadership,³ setting the stage for a prolonged conflict.

Russian soldiers quickly showed little regard for civilian life. On March 16, 2022, only weeks after the invasion, Russia bombed a theater full of civilians in Mariupol and killed hundreds of Ukrainians who had believed they would be safe there.⁴ This atrocity was and is not an outlier. When Russian soldiers retreated from a different Ukrainian city, they left “bodies of dead civilians strewn on streets, in basements or in backyards, many with gunshot wounds to their heads, some with their hands tied behind their backs.”⁵ More recently, in early September 2023, more than a dozen people (including a child) were killed after a Russian missile struck a market in a town in eastern Ukraine.⁶ Russian soldiers have also employed mass sexual violence against Ukrainians⁷

¹ See Sammy Westfall, *A Russia-Ukraine timeline: Key moments, from attack on Kyiv to counteroffensive*, WASH. POST (Jun. 9, 2023), <https://www.washingtonpost.com/world/2023/06/09/russia-ukraine-war-timeline-counteroffensive/>.

² *Id.*; *The Russian invasion of Ukraine*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Ukraine/The-Russian-invasion-of-Ukraine>.

³ *Ukraine ‘retakes whole Kyiv region’ as Russia looks east*, AL-JAZEERA (Apr. 3, 2022), <https://www.aljazeera.com/news/2022/4/3/ukraine-retakes-whole-kyiv-region-as-russian-troops-pull-back>.

⁴ Lori Hinnant, Mstyslav Chernov & Vasilisa Stepanenko, *AP evidence points to 600 dead in Mariupol theater airstrike*, ASSOCIATED PRESS (May 4, 2022), <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1>.

⁵ Carlotta Gall, *Bucha’s Month of Terror*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/interactive/2022/04/11/world/europe/bucha-terror.html>.

⁶ Tim Lister, *Russian missile strikes eastern Ukraine market, killing 17, in one of the worst attacks in months*, CNN (Sept. 6, 2023), <https://www.cnn.com/2023/09/06/europe/russian-missile-donetsk-market-intl/>.

⁷ See Harriet Barber, *Castration, gang-rape, forced nudity: How Russia’s soldiers terrorise Ukraine with sexual violence*, TELEGRAPH (Nov. 22, 2022), <https://www.telegraph.co.uk/global-health/terror-and-security/how->

and have used “systematic and widespread” torture.⁸ And President Putin, for his part, at various points even suggested he would be willing to use nuclear arms in Ukraine.⁹

The recklessness and sheer brutality of Russian forces quickly extended to attacks on critical infrastructure. Early in the war, Russia seized multiple nuclear sites¹⁰ and forced a blockade of Ukrainian grain.¹¹ These moves threatened the safety and food supplies of millions of people. Russian soldiers also destroyed critical infrastructure across Ukraine leaving hundreds of thousands of Ukrainians without electricity or heat during the coldest months of winter.¹² And reports indicate that Russian soldiers have targeted Ukrainian ports full of grain used to feed much of the world.¹³

Amidst Russia’s attacks on civilians and infrastructure, Ukrainian forces successfully pushed Russian forces away from Kyiv and contained the fighting to eastern Ukraine.¹⁴ In September 2022, President Putin further escalated the conflict when he announced the illegal

russian-soldiers-terrorise-ukraine-sexual-violence.

⁸ Lori Hinnant & Jamey Keaten, *U.N.-backed investigation finds evidence of Russian war crimes in Ukraine*, PBS (Mar. 16, 2023), <https://pbs.org/newshour/world/u-n-backed-investigation-finds-evidence-of-russian-war-crimes-in-ukraine>.

⁹ See, e.g., Jessie Yeung & Katharina Krebs, *Ukraine war is going to ‘take a while,’ Putin says as he warns nuclear risk is increasing*, CNN (Dec. 8, 2022), <https://www.cnn.com/2022/12/07/europe/putin-ukraine-russia-nuclear-intl-hnk/index.html>.

¹⁰ See James M. Acton, *The Ukraine War’s Lingering Nuclear Power Danger*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 21, 2023), <https://carnegieendowment.org/2023/02/21/ukraine-war-s-lingering-nuclear-power-danger-pub-89080>; Tim Mak, *Russia’s seizure of nuclear power plant raises international concerns*, NPR (Mar. 8, 2022), <https://www.npr.org/2022/03/08/1085099940/russias-seizure-of-nuclear-power-plant-raises-international-concerns>.

¹¹ Sam Mednick, *Concerns rise as Russia resumes grain blockade of Ukraine*, ASSOCIATED PRESS (Oct. 30, 2022), <https://apnews.com/article/russia-ukraine-biden-europe-black-sea-crimea-4d00fd0378175a7f73b4778ca71cb045>.

¹² See Hinnant & Keaten, *U.N. backed investigation finds evidence*, *supra* note 8.

¹³ See Scott Simon & Michele Keleman, *A week after ending the grain deal, Russia is bombing Ukrainian ports carrying grain*, NPR (July 22, 2023), <https://www.npr.org/2023/07/22/1189580602/a-week-after-ending-the-grain-deal-russia-is-bombing-ukrainian-ports-carrying-gr>.

¹⁴ See Westfall, *A Russia-Ukraine timeline* *supra* note 1.

annexation of four eastern Ukrainian territories: Donetsk, Luhansk, Kherson, and Zaporizhzhia.¹⁵ A few months after Putin's declaration, Ukrainians recaptured the city of Kherson,¹⁶ and in June 2023, Ukraine launched a counteroffensive to regain territory throughout annexed regions.¹⁷ Although the Ukrainian military's defense (fortified by weaponry from the United States and the EU) has dramatically lowered the odds of total Russian victory, the possibility of an extended stalemate has increased significantly.¹⁸

Russia's illegal war of aggression has taken a catastrophic toll on human life. As of June 30, the United Nations reported that at least 9,177 Ukrainian civilians had been killed and 15,993 more had been injured.¹⁹ These numbers are likely significant undercounts,²⁰ as at least one U.S. official estimated that more than 42,000 Ukrainian civilians have died during the war.²¹ Both militaries have suffered significant losses: Ukrainian forces had lost somewhere between 10,000 and 20,000 soldiers as of May, with another 130,000 wounded; and as of September, a conservative

¹⁵ Charles Maynes, *Putin illegally annexes territories in Ukraine, in spite of global opposition*, NPR (Sept. 30, 2022), <https://www.npr.org/2022/09/30/1126020895/russia-ukraine-putin-annexation>.

¹⁶ See Charles Maynes & Ashley Westerman, *Ukrainian troops enter Kherson city after Russia retreats*, NPR (Nov. 11, 2022), <https://www.npr.org/2022/11/11/1135995012/ukrainian-troops-enter-kherson-russia-withdrawal-ukraine>.

¹⁷ See *Ukraine's counteroffensive against Russia in maps*, FIN. TIMES (Aug. 15, 2023), <https://www.ft.com/content/4351d5b0-0888-4b47-9368-6bc4dfbccbf5>.

¹⁸ See Daniel Michaels, *Ukraine's Lack of Weaponry and Training Risks Stalemate in Fight With Russia*, WALL ST. J. (July 23, 2023), <https://www.wsj.com/articles/ukraines-lack-of-weaponry-and-training-risks-stalemate-in-fight-with-russia-f51ecf9>.

¹⁹ Office of the High Commissioner for Human Rights, *Ukraine: Civilian casualties – 24 February 2022 to 30 June 2023*, UNITED NATIONS (July 7, 2023), <https://www.ohchr.org/en/news/2023/07/ukraine-civilian-casualties-24-february-2022-30-june-2023>.

²⁰ *Id.*

²¹ Lucas Y. Tomlinson, *Russian invasion kills 42K Ukrainian civilians since start of war, US officials say*, FOX NEWS (May 21, 2023), <https://www.foxnews.com/world/russian-invasion-kills-42k-ukrainian-civilians-since-start-war-us-officials-say>.

estimate suggested that more than 31,000 Russian soldiers had been killed,²² with upwards of 180,000 more wounded.²³

The fighting in Ukraine has also had devastating financial consequences. Ukraine's economy contracted by over 30 percent in 2022,²⁴ the value of monthly exports has fallen sixty-two percent since the beginning of the war,²⁵ more than six million people have had to leave their homes,²⁶ and in November 2022, the Kyiv School of Economics estimated that the damage to housing in Ukraine alone was upwards of \$53 billion and the damage to transportation infrastructure was upwards of \$35 billion.²⁷ As of February 2023, a joint assessment by the Government of Ukraine, the World Bank Group, the European Commission, and the United Nations found that the cost of recovery at the one-year mark of the war had reached \$411 billion.²⁸ The total cost of repair has almost certainly increased significantly since then, given that six more months of fighting have elapsed in the intervening period. For example, the destruction of the Kakhovka Dam will require significant repairs not only to the dam itself but to the area surrounding

²² See *Russian casualties in Ukraine*, MEDIAZONA (last visited Sept. 15, 2023), https://en.zona.media/article/2022/05/11/casualties_eng.

²³ See Tomlinson, *Russian invasion*, *supra* note 21.

²⁴ See *One year of the war in Ukraine leaves lasting scars on the global economy*, UNITED NATIONS (Mar. 6, 2023), <https://www.un.org/en/desa/one-year-war-ukraine-leaves-lasting-scars-global-economy>.

²⁵ Chris Knight, *5 ways to rebuild during a war*, EUROPEAN INV. BANK (Mar. 31, 2023), <https://www.eib.org/en/stories/ukraine-recovery-economy-report>.

²⁶ *Id.*

²⁷ See *Supporting Ukraine: A Study on Potential Recovery Strategies for Ukraine*, BOS. CONSULTING GRP. & EUROPEAN INV. BANK (Jan. 2023), <https://media-publications.bcg.com/Supporting-Ukraine-Potential-Recovery-Strategies-Feb-2023.pdf>.

²⁸ See Press Release, *Updated Ukraine Recovery and Reconstruction Needs Assessment*, WORLD BANK (Mar. 23, 2023), <https://www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment>; WORLD BANK, UKRAINE RAPID DAMAGE AND NEEDS ASSESSMENT at 21 (Feb. 2023), <https://documents1.worldbank.org/curated/en/099184503212328877/pdf/P1801740d1177f03c0ab180057556615497.pdf>.

it, which has suffered significant environmental and infrastructural damage.²⁹ The level of destruction in Ukraine and the ongoing conflict ensure that the Ukrainian recovery will require several years, hundreds of billions of dollars, and the help of the international community.³⁰

B. The Coordinated Blocking of Russian Sovereign Assets

The conflict in Ukraine has been universally recognized as an unrivaled rupture in the post-World War II settlement under which no Nation launches aggressive war against a sovereign neighbor, much less annexes all or part of a neighboring state.³¹ In that light, it is no overstatement that Russia's actions constitute an extraordinary and unusual international emergency: the geopolitical consequences of Russia's breach in the new order are shattering for the United States and for its allies, as well as for global peace.³² Russia's conduct, as explained more thoroughly

²⁹ See Katerina Sergatskova, *Aftermath of the Kakhovka Dam Collapse*, WILSON CTR. (Jun. 20, 2023), <https://www.wilsoncenter.org/blog-post/aftermath-kakhovka-dam-collapse>.

³⁰ See *supra* note 28.

³¹ NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER: A PROPOSAL FOR ENSURING REPARATIONS FOR UKRAINE 4, 12-13, 28 (June 2023) ("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."); Congressman Adam Schiff, et al., *Letter to President Biden on Transfer of Russian Assets to Ukraine* (May 23, 2023), https://schiff.house.gov/imo/media/doc/letter_to_president_biden_on_transfer_of_russian_assets_to_ukraine.pdf ("Russia's bloody and unprovoked war against Ukraine is the greatest threat to the international rules-based order since World War II.").

³² See, e.g., *Executive Order on Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine*, WHITE HOUSE (Mar. 8, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/08/executive-order-on-prohibiting-certain-imports-and-new-investments-with-respect-to-continued-russian-federation-efforts-to-undermine-the-sovereignty-and-territorial-integrity-of-ukraine> (finding that "the Russian Federation's unjustified, unprovoked, unyielding, and unconscionable war against Ukraine, including its recent further invasion in violation of international law, including the United Nations Charter, further threatens the peace, stability, sovereignty, and territorial integrity of Ukraine, and thereby constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States"); see also Lawrence H. Summers, Philip Zelikow & Robert B. Zoellick, *The Other Counteroffensive to Save Ukraine*, FOREIGN AFFS. (June 15, 2023), <https://www.foreignaffairs.com/ukraine/other-counteroffensive-save-ukraine>.

below,³³ is thus “a serious breach of preemptory norms of international law affecting all states, [and] all states are entitled”—and indeed obligated—“to address it.”³⁴

1. Global Sanction Efforts to Immobilize Russian Assets

The global community recognized the unusual stakes posed by Russia’s unlawful aggression and responded quickly to it. For starters, nations swiftly imposed sweeping sanctions against Russia within days of its illegal invasion of Ukraine, and have continued to impose new sanctions in the months that followed.³⁵ “The sanctions—unprecedented in terms of scope, coordination, and speed—target[ed] the overseas wealth and economic activity of Russia’s elites and decisionmakers.”³⁶ For instance, more than thirty countries have worked together to “impose[] price caps on Russian oil and diesel, [freeze] Russian Central Bank funds and restrict[] access to SWIFT, the dominant system for global financial transactions.”³⁷ And they have also “sanctioned roughly 2,000 Russian firms, government officials, oligarchs and their families.”³⁸

The freezing of Russian sovereign assets was a central facet of this sanctions campaign. On February 26, 2022, leaders of the European Commission, France, Germany, Italy, the United

³³ See *infra* Part IV.

³⁴ NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 4.

³⁵ See, e.g., Leonie Kijewski, *Western countries slap new sanctions on Russia on war anniversary*, POLITICO (Feb. 25, 2023), <https://www.politico.eu/article/western-countries-new-sanctions-russia-ukraine-war-anniversary> (“The sanctions package includes further trade restrictions on Russia, takes three more banks off the banking messaging system SWIFT and sanctions an additional 100 people.”); Fatima Hussein, *No economic ‘knockout’ yet from West’s sanctions on Russia*, AP NEWS (Feb. 22, 2023), <https://apnews.com/article/russia-ukraine-putin-biden-us-department-of-the-treasury-business-4d4e4c0ef4c8ff96d5936b98eb77e80f> (“Russia is now the world’s most heavily sanctioned country.”); *What are the sanctions on Russia and are they hurting its economy?*, BBC NEWS (May 25, 2023), <https://www.bbc.com/news/world-europe-60125659> (listing the various sanctions issued against Russia); Minami Funakoshi, Hugh Lawson & Kannaki Deka, *Tracking sanctions against Russia*, REUTERS (July 7, 2022), <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/> (similar).

³⁶ *The Economic Impact of Russia Sanctions*, CONG. RSCH. SERV. (Dec. 13, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12092>.

³⁷ Hussein, *No economic ‘knockout’ yet*, *supra* note 35.

³⁸ *Id.*

Kingdom, Canada, and the United States issued a joint statement explaining that they would impose “restrictive measures” on the Central Bank of Russia (“CBR”) as part of their sanctions efforts.³⁹ Two days later, the 27-member European Union voted as a bloc to approve freezes on CBR assets located within the members’ jurisdictions.⁴⁰ The United States,⁴¹ the United Kingdom,⁴² Canada,⁴³ and Japan⁴⁴ all acted in concert with the EU. Even Switzerland, which has historically stayed neutral in times of international conflict, adopted the EU’s sanctions on March 4, 2022.⁴⁵

On March 17, 2022, “top finance and justice officials” from the “United States, Australia, France, Canada, Germany, Japan, Italy, Britain and the European Commission” banded together to create “The Russian Elites, Proxies, and Oligarchs Task Force (REPO).”⁴⁶ Members of the task force “jointly commit[ed] to prioritizing our resources and working together to take all available legal steps to find, restrain, freeze, seize, and, where appropriate, confiscate or forfeit the assets of

³⁹ *Statement from Western allies on new sanctions against Russia*, REUTERS (Feb. 26, 2022), <https://www.reuters.com/world/statement-western-allies-new-sanctions-against-russia-2022-02-26>.

⁴⁰ *Switzerland adopts new EU sanctions on Russia*, REUTERS (Mar. 4, 2022), <https://www.reuters.com/world/europe/switzerland-adopts-new-eu-sanctions-russia-2022-03-04> (discussing recent sanctions imposed by the EU).

⁴¹ Alan Rappeport, *U.S. escalates sanctions with a freeze on Russian central bank assets*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/us/politics/us-sanctions-russia-central-bank.html>.

⁴² Guy Faulconbridge & William James, *West shunts Russian money out into the cold, Britain says*, REUTERS (Feb. 28, 2022), <https://www.reuters.com/business/uk-says-targeting-russian-central-bank-2022-02-28>.

⁴³ *Canada and G7 partners prohibit Russian Central Bank transactions*, DEP’T OF FIN. CAN. (Feb. 28, 2022), <https://www.canada.ca/en/department-finance/news/2022/02/canada-and-g7-partners-prohibit-russian-central-bank-transactions.html>.

⁴⁴ *Japan freezes assets of Russia’s central bank as part of new sanctions*, REUTERS (Feb. 28, 2022), <https://www.reuters.com/world/europe/japan-freezes-assets-russias-central-bank-part-new-sanctions-2022-03-01>.

⁴⁵ Michael Shields & Slike Koltowitz, *Neutral Swiss join EU sanctions against Russia in break with past*, REUTERS (Feb. 28, 2022), <https://www.reuters.com/world/europe/neutral-swiss-adopt-sanctions-against-russia-2022-02-28> (“Switzerland will adopt all the sanctions that the European Union has imposed on Russian people and companies and freeze their assets to punish the invasion of Ukraine, the government said in a sharp deviation from the country’s traditional neutrality.”).

⁴⁶ *Allies freeze \$330 bn of Russian assets since Ukraine invasion: task force*, FRANCE24 (June 29, 2022), <https://www.france24.com/en/live-news/20220629-allies-freeze-330-bn-of-russian-assets-since-ukraine-invasion-task-force>.

those individuals and entities that have been sanctioned in connection with Russia’s premeditated, unjust, and unprovoked invasion of Ukraine and the continuing aggression of the Russian regime.”⁴⁷ On June 29, 2022, REPO issued a statement identifying that its members have “[i]mmobilized about \$300 billion worth of Russian Central Bank assets” since the start of the war (or roughly half of Russian’s foreign currency reserves).⁴⁸ And most of these assets—reportedly more than \$200 billion—are currently held in Europe.⁴⁹

By freezing Russia’s sovereign assets, these countries have prevented Russia from accessing and using those assets for any purpose. The frozen assets cannot be moved; they cannot be sold; they cannot be used as collateral; and Russia cannot obtain any of the proceeds they might generate.⁵⁰ Moreover, many of these countries have made it clear that they do not intend to give Russia access to these assets until Russia agrees to pay for its crimes.⁵¹

⁴⁷ *Russian Elites, Proxies, and Oligarchs Task Force Ministerial Joint Statement*, U.S. DEP’T OF JUST. (Mar. 17, 2022), <https://www.justice.gov/opa/pr/russian-elites-proxies-and-oligarchs-task-force-ministerial-joint-statement>; see also *Total reserves (includes gold, current US\$) - Russian Federation*, WORLD BANK, <https://data.worldbank.org/indicator/FI.RES.TOTL.CD?locations=RU> (last visited Sept. 15, 2023).

⁴⁸ See Press Release, *Russian Elites, Proxies, and Oligarchs Task Force Joint Statement*, U.S. DEP’T OF TREASURY (June 29, 2022), <https://home.treasury.gov/news/press-releases/jy0839>; *What are the sanctions on Russia*, *supra* note 35.

⁴⁹ Jonathan Masters, *How Frozen Russian Assets Could Pay for Rebuilding in Ukraine*, COUNCIL ON FOREIGN RELS. (July 24, 2023), <https://www.cfr.org/in-brief/how-frozen-russian-assets-could-pay-rebuilding-ukraine>.

⁵⁰ Rappeport, *U.S. escalates sanctions*, *supra* note 41 (“Any Russian central bank assets that are held in U.S. financial institutions are now stuck, and financial institutions outside the United States that hold dollars for the bank cannot move them.”); see also Richard Partington, *Russia ‘preparing legal action’ to unfreeze \$600bn foreign currency reserves*, GUARDIAN (Apr. 19, 2022), <https://www.theguardian.com/business/2022/apr/19/russia-preparing-legal-action-to-unfreeze-600bn-foreign-currency-reserves> (“Built up over several years under a so-called “fortress Russia” strategy following the annexation of Crimea in 2014, the sanctions make it harder for the central bank to intervene in currency markets to defend the value of the rouble.”); Andrew Roth, *Moscow braces for rouble to crash at least 25% as new sanctions hit*, GUARDIAN (Feb. 27, 2022), <https://www.theguardian.com/business/2022/feb/27/ukraine-moscow-braces-for-market-meltdown-monday-as-new-sanctions-hit>.

⁵¹ See, e.g., Kylie Maclellan & Andrew Macaskill, *Britain to keep Russian assets frozen until Ukraine is compensated*, REUTERS (June 19, 2023), <https://www.reuters.com/world/europe/britain-plans-maintain-russian-sanctions-until-ukraine-is-compensated-2023-06-19>; Press Release, *G7 Leaders’ Statement on Ukraine*, WHITE HOUSE (May 19, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine> (reaffirming that “consistent with our respective legal systems, Russia’s sovereign assets in our jurisdictions will remain immobilized until Russia pays for the damage it has caused to Ukraine”).

2. The Estimated Location of Russian Assets

Although there appears to be a consensus over the approximate amount of CBR assets that have been frozen, there is less public clarity concerning what portion of the assets each of these countries currently holds.

Before Russian forces invaded Ukraine, the CBR released a report on where its then-\$585 billion in foreign exchange and gold assets were held around the world as of June 2021.⁵² At that time, G7 and EU countries held hundreds of billions of dollars' worth of these assets. Those countries included, among others, the United States, Japan, Germany, Austria, France, and the United Kingdom.⁵³ And of those reserves, the CBR stored \$127 billion in Russia (in gold), \$80 billion in China, \$71 billion in France, \$58 billion in Japan, \$55 billion in Germany, \$38 billion in the United States, \$26 billion in the United Kingdom, \$17 billion in Austria, \$16 billion in Canada, \$29 billion in "international institutions," and \$62 billion in a combination of other countries.⁵⁴ By the time Russia invaded Ukraine, its central bank possessed more than \$630 billion in international reserves, an increase of \$45 billion from June 2021.⁵⁵ In April 2022, the CBR issued its 2021 Annual Report, which appears to provide an updated breakdown of Russian assets held in foreign currency and gold.⁵⁶

As noted above, reporting suggests that G7 countries, EU countries, and others in total

⁵² Charles Lichfield, *Windfall: How Russia managed oil and gas income after invading Ukraine, and how it will have to make do with less*, ATLANTIC COUNCIL (Nov. 30, 2022), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/windfall-how-russia-managed-oil-and-gas-income-after-invading-ukraine-and-how-it-will-have-to-make-do-with-less/#money>; Monica Hersher & Joe Murphy, *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>.

⁵³ See Hersher & Murphy, *supra* note 52.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See CENTRAL BANK OF THE RUSSIAN FEDERATION, BANK OF RUSSIA ANNUAL REPORT FOR 2021, at 37, 101-02 (Apr. 8, 2022), https://www.cbr.ru/Collection/Collection/File/43443/ar_2021_e.pdf.

possess and have frozen in excess of \$300 billion of CBR assets.⁵⁷ But identifying the exact location, form, and aggregate total of those assets is a difficult task. Various efforts to conduct a comprehensive assessment remain incomplete or not yet public. For instance, in February 2023, the EU created a requirement for member states to report information on Russian assets within their jurisdictions.⁵⁸ After the requirement went into effect on May 12, 2023, a European Commission spokesman declared on May 25 that member states possessed more than \$215 billion in total assets (reportedly mostly in the form of central securities depositories).⁵⁹ But the spokesman did not break down this figure by member state, and no subsequent reporting has done so either. The limited reporting that has since emerged supports the understanding that a significant amount of Russia's assets in the European Union—approximately \$194 billion—reside in Euroclear Bank in Belgium.⁶⁰ As for the United States, when the Biden administration announced its freeze of Russian assets, it declined to share the total it had frozen, and it has not since released the number.⁶¹ U.S. Treasury Secretary Yellen recently testified in front of a congressional committee that the United States was working with its partners to “accurately map exactly where these assets are.”⁶² At the time of writing, no information has been released by the United States

⁵⁷ See *Russian Elites, Proxies, and Oligarchs Task Force Joint Statement*, *supra* note 48.

⁵⁸ Council Regulation (EU) 2023/427 of 25 February 2023, Amending Regulation (EU) No 833/2014 concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine.

⁵⁹ See Martin Sandbu, *The EU is doubled up over riddle of Russia's euro assets*, FINANCIAL TIMES (July 19, 2023), <https://www.ft.com/content/3c070940-d3bd-45ec-9349-f0eabac563b8>; 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?>.

⁶⁰ See Paola Tamma, *Ballsy EU Commission moves to make Russia pay for Ukraine*, POLITICO, (Jun. 21, 2023), <https://www.politico.eu/article/brussels-to-go-after-russian-frozen-foreign-reserves> (“Over €200 billion of that sits in Europe, mainly in central securities depositories — settlement houses that are part of the plumbing of the financial system — with Belgium's Euroclear and Luxembourg's Clearstream holding the largest portions.”); Sandbu, *The EU is doubled up over riddle of Russia's euro assets*, *supra* note 59 (noting that Euroclear houses about €180 billion in Russia's sovereign assets).

⁶¹ See Rappeport, *U.S. escalates sanctions with a freeze*, *supra* note 41.

⁶² Christopher Condon & Viktoria Dendrinou, *Yellen Says US, Allies Mapping Russia Assets; Seizures an Option*, BLOOMBERG L. (June 13, 2023), <https://news.bloomberglaw.com/white-collar-and-criminal-law/yellen-says->

regarding this effort.

All told, country-specific reporting remains inconsistent. Countries have committed to “taking steps to fully map holdings of Russia’s sovereign assets immobilized in [their] jurisdictions.”⁶³ Those efforts must continue to take priority, and, when completed, the information gathered must be made public. Greater access to information surrounding the assets will strengthen the legal and policy analyses concerning them. Putting all the facts on the table will therefore inform and improve efforts to hold Russia accountable.

In any event, although the precise location of all assets, the kinds of assets, and the total value of those assets are difficult to estimate given the publicly available information, a few key facts remain salient. At the time of invasion, the CBR had approximately \$300 billion in assets in G7 and EU countries that have since taken action to freeze all such assets in their respective territories. A significant proportion of these assets—over \$200 billion—reside in the European Union, with the largest sum of those assets housed at Euroclear bank. Some of those assets likely have appreciated in value even further while being held. According to the best available estimates, the total sum of CBR assets frozen would account for three-quarters of the funds needed to rebuild Ukraine.

us-allies-mapping-russia-assets-seizures-an-option.

⁶³ *G7 Leaders’ Statement on Ukraine*, *supra* note 51.

III. The President Has the Legal Authority to Transfer Russian Assets to Ukraine Under Existing U.S. Domestic Law

This Part examines the President’s legal authority under U.S. domestic law to transfer⁶⁴ to Ukraine any Russian sovereign assets located in the United States. We divide this analysis into three parts. *First*, we examine the President’s existing statutory authority to transfer blocked Russian assets and explain why he currently possesses that power under the International Emergency Economic Powers Act (“IEEPA”). *Second*, we dispose of any potential claims that the President’s transfer of blocked Russian assets to Ukraine would run afoul of the Constitution. And *third*, we demonstrate why such a transfer is consistent with the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*

A. The President Possesses the Authority to Transfer Russia’s Assets to Ukraine in Response to Russia’s Unlawful Aggression

1. The President’s Foreign Affairs Powers Are Vast

Before assessing the President’s legal authority to transfer another country’s sovereign assets under IEEPA, we begin with the broad principles that govern the President’s exercise of power in the international arena.

Any analysis of presidential power in this field necessarily begins with the undisputed axiom that whoever occupies the position of President at any given time has expansive authority to conduct foreign affairs on behalf of the United States. At the turn of the 19th Century, then-Congressman John Marshall declared the President “the sole organ of the federal government in

⁶⁴ Throughout, the term “transfer” refers to the act of removing Russia’s frozen assets from Russia’s control and placing them under Ukraine’s control. Other observers have used the terms “seizure” or “confiscation” to refer to this process, but this report opts for “transfer” to emphasize that, under this report’s proposal, Russia’s frozen assets will be used for the benefit of Ukraine and never retained by the United States for its own use.

the field of the nation in its external relations, and its sole representative with foreign nations.”⁶⁵ And the Supreme Court has long recognized the President’s singular role as the Nation’s chief diplomat.⁶⁶ Some of the President’s foreign affairs powers are vested through the Constitution itself. Article II specifies, for instance, that the President is the Commander in Chief of the Armed Forces, has the responsibility for appointing and receiving ambassadors, and is able to make treaties with the advice and consent of the Senate.⁶⁷ Courts have interpreted these explicit powers to imply others—such as the ability to determine the access of foreign governments to United States courts,⁶⁸ the authority to decide upon the immunity from suit of foreign heads of state,⁶⁹ and the power to specify which geographic territory constitutes the capital of a nation that the United States has formally recognized, even when that decision overrides an express congressional command.⁷⁰

But most of the President’s legal authority in this realm comes from Congress, which has amplified the President’s powers through express delegations. With respect to foreign affairs, the Constitution grants Congress the ability to “regulate commerce with foreign nations,” “declare war,” and “raise and support armies,” among other express powers.⁷¹ It also authorizes Congress to “make all laws which shall be necessary and proper” to carry out all powers vested by the

⁶⁵ See 10 ANNALS OF CONG. 613 (1800); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 347-51 (1990) (discussing Marshall’s statement).

⁶⁶ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see also *Haig v. Agee*, 453 U.S. 280, 291 (1981) (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”).

⁶⁷ See generally U.S. Const. art. II.

⁶⁸ See, e.g., *Pfizer, Inc. v. India*, 434 U.S. 308, 319-20 (1978); *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 82-83 (2d Cir. 1997).

⁶⁹ *Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945).

⁷⁰ *Zivotofsky v. Kerry*, 576 U.S. 1, 30-32 (2015).

⁷¹ See generally U.S. Const. art. I.

Constitution either in Congress or in any “Department or Officer” of the U.S. Government.⁷² Over time, Congress has invoked many of these enumerated powers to entrust significant discretion to the Executive in foreign affairs-related statutes.⁷³ And, as the Supreme Court has explained, those delegations, in practice, have necessarily been broad: “because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”⁷⁴ Taken together, “[t]he vast majority of the foreign affairs powers the president exercises daily are not inherent constitutional powers, but rather, powers that Congress has expressly or implicitly delegated to him by statute.”⁷⁵

The President’s use of this broad authority has faced little pushback from courts. Instead, the Judiciary has long afforded the Executive greater deference when acting in the foreign affairs arena than if he were to have taken similar action domestically.⁷⁶ Courts, in general, are “hesitant to construe foreign affairs statutes more narrowly than the text indicates, lest they inadvertently

⁷² See U.S. Const. art. I, sec. 8, cl. 18. See generally *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); see also Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS. (Mar. 2, 2017), <https://www.cfr.org/backgrounders/us-foreign-policy-powers-congress-and-president> (“The verdict of history, in short, is that the substantive content of American foreign policy is a divided power, with the lion’s share falling usually, though by no means always, to the president.”).

⁷³ See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 667 (2000) (citing the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1994), the Trading with the Enemy Act of 1917, 50 U.S.C. App. §§ 1-5 (1994), and provisions in the Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1994), as amended by the Trade Act of 1974, 19 U.S.C. § 2101-2495 (1994)).

⁷⁴ *Agee*, 453 U.S. at 292.

⁷⁵ Harold Hongju Koh, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 45 (1990).

⁷⁶ See *Curtiss-Wright*, 299 U.S. at 320 (Legislation concerning such issues “must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”).

contravene Congress’s prudent and reasonable decision to afford the President broad discretion in sensitive and difficult-to-predict national security issues.”⁷⁷

But this deference also stems from first principles. As Justice Robert H. Jackson declared in his influential *Youngstown* concurrence that now governs separation-of-powers questions, “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”⁷⁸ Presidential actions, Jackson said, can be broken down into three categories: (1) when the President acts “pursuant to an express or implied authorization of Congress” and therefore exercises not only his powers “plus all that Congress can delegate”; (2) when the President acts “in absence of either a congressional grant or denial of authority” and relies instead on his “own independent powers”; and (3) when the President “takes measures incompatible with the expressed or implied will of Congress.”⁷⁹ While the power of the President is at its “lowest ebb” in category three,⁸⁰ it is at its “maximum” in category one.⁸¹ Category-one executive action is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”⁸²

⁷⁷ *Al-Bihani v. Obama*, 619 F.3d 1, 39 (D.C. Cir. 2010); see also *id.* (“Put simply, Congress knows how to limit the Executive’s authority in national security and foreign policy; there is no reason or basis for courts to strain to do so absent such congressional direction.”); see also Bradley, *Chevron Deference and Foreign Affairs*, *supra* note 73, 86 VA. L. REV. at 664 (arguing that judicial deference stems from certain practical considerations, like the recognition that the President needs “a high degree of flexibility in order to respond to complex and changing world conditions,” that “decisions in this area tend to be more political than legal in nature and thus are properly made by a politically accountable branch of government,” and that “the executive branch has much greater expertise and access to information” concerning international affairs than the Judiciary).

⁷⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 635 (1952) (Jackson, J., concurring).

⁷⁹ *Id.* at 635-37.

⁸⁰ *Id.* at 637. Even at the “lowest ebb,” the President’s power is still considerable. See *Zivotofsky*, 576 U.S. at 10-17, 23-32 (explaining the President must “rely solely on powers the Constitution grants to him alone” in category three, determining that the Constitution provides him *exclusive* power over recognition determinations, and declaring unconstitutional a congressional statute that infringed on this power by requiring the Executive Branch to recognize the city of Jerusalem as the capital of Israel for the purposes of an individual’s passport).

⁸¹ *Youngstown*, 343 U.S. at 634-55 (Jackson, J., concurring).

⁸² *Id.* at 637.

And, as discussed below, that is precisely the sort of executive action contemplated here: the President acting under a broad delegation from Congress to address international emergencies.

Ultimately, through these converging considerations, the President has assumed significant control over the field of international law and foreign affairs. The President now “exercises unilateral power over most international lawmaking in the United States.”⁸³ The vast majority “of U.S. international agreements today are made by the President acting alone.”⁸⁴ And the Executive alone—working at the maximum level of presidential authority under *Youngstown*—decides and administers responses on behalf of the United States to perceived international emergencies.⁸⁵

2. Congress Expressly Delegated Broad Presidential Authority to Respond to International Emergencies

The President’s authority to send Russian sovereign funds located in the United States to Ukraine sits at the apex of Executive Branch power to respond to international emergencies. That is so because it flows from an express congressional delegation that the Supreme Court has long demonstrated a willingness to read capaciously.

That delegation is found in the International Emergency Economic Powers Act of 1977 (“IEEPA”), 50 U.S.C. § 1701 *et seq.* Through IEEPA, Congress granted the President “certain powers to respond to any threat to the national security, foreign policy or economy of the United States that is ‘unusual and extraordinary’ and that ‘has its source in whole or substantial part outside the United States.’”⁸⁶ Those powers include the authority to:

... (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding,

⁸³ Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 215 (2009).

⁸⁴ *Id.* at 140.

⁸⁵ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403-04 (2018); Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1094 (2020).

⁸⁶ *United States v. Dhafir*, 461 F.3d 211, 213 (2d Cir. 2006) (quoting 50 U.S.C. § 1701(a)).

withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States ...⁸⁷

Congress also expressly authorized the President to “issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.”⁸⁸ Congress therefore empowered the President to define the scope of his power under IEEPA, so long as he does not contradict any clear textual limitations imposed by the Act’s text or the Constitution. This deference reflects Congress’s recognition that the President is often in the best position to determine what actions are necessary to address international emergencies under IEEPA. Seizing on that deference, “Presidents have not only construed IEEPA’s definitions broadly, but have also expansively read its delegated powers to execute national security policies.”⁸⁹

⁸⁷ 50 U.S.C. § 1702(a)(1)(B)-(C).

⁸⁸ *Id.* § 1704.

⁸⁹ Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT’L LAW. 715, 744 (1992); Christopher A. Casey, Dianne E. Rennack & Jennifer K. Elsea, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 2 (Mar. 25, 2022); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 753 (7th Cir. 2002).

As we explain below, Subsection B provides the President with the authority to respond to Russia’s unlawful aggression against Ukraine by seizing Russian sovereign assets located in the United States.⁹⁰

B. The President Has the Authority to Transfer Russian Assets Under Subsection B of IEEPA

1. The Procedural Requirements of Subsection B

a. Declaration of a National Emergency

Before the President can invoke the powers listed in Subsection B, he must first declare a national emergency.⁹¹ That emergency must be an “unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States,” and the threat must originate “in whole or substantial part outside the United States.”⁹² Only then can the President use the authorities under Subsection B, and those authorities must be used to deal with the threat directly, not “for any other purpose.”⁹³ Out of deference to the President’s principal role in shaping foreign

⁹⁰ Because Subsection B authorizes the President to transfer CBR assets to Ukraine, this report does not rely on Subsection C as an independent basis for the proposed transfer in light of Russia’s other hostile actions toward other countries, including its well-known cyberattacks against the United States and Ukraine. *See, e.g.*, Andy Greenberg, SANDWORM: A NEW ERA OF CYBERWAR AND THE HUNT FOR THE KREMLIN’S MOST DANGEROUS HACKERS 46-47, 120, 213-24, 224-25, 313 (2019) (documenting Russia’s history of using cyberattacks to undermine Ukraine); Exec. Order No. 14,024, 86 Fed. Reg. 20249 (Apr. 15, 2021) (declaring that Russia’s “malicious cyber-enabled activities” constitute “an unusual and extraordinary threat” to U.S. national security). As noted above, under Subsection C, the President may “confiscate” foreign sovereign assets and “vest” those assets in any agency or person designated by the President “when the United States ... has been attacked by a foreign country.” 50 U.S.C. § 1702(a)(1)(C). To date, Subsection C has been invoked twice, when President George W. Bush used Subsection C to confiscate and vest frozen Iraqi assets in the United States Treasury on two occasions in 2003. The first use concerned sovereign assets, while the second concerned the assets of senior officials of the former Iraqi regime and their family members. *See* Exec. Order No. 13,290, 68 Fed. Reg. 14307 (Mar. 20, 2003); Exec. Order No. 13,315, 68 Fed. Reg. 52315 (Aug. 28, 2003). President Bush relied on a determination that the United States was “engaged in armed hostilities” with Iraq on both occasions. Some scholars have questioned whether Russia’s cyberattacks constitute an “attack” against the United States sufficient to trigger the President’s “confiscation” authority under Subsection C, *cf.* Paul Stephan, *Giving Russian Assets to Ukraine—Freezing is Not Seizing*, LAWFARE (Apr. 26, 2022), <https://www.lawfaremedia.org/article/giving-russian-assets-ukraine-freezing-not-seizing>, but this report does not and need not intervene in that vibrant debate to justify the transfer of Russian sovereign assets to Ukraine.

⁹¹ 50 U.S.C. § 1701.

⁹² *Id.* § 1701(a).

⁹³ *Id.* § 1701(b).

policy, and because no other viable option existed,⁹⁴ Congress left to the Executive the task of defining an “unusual and extraordinary threat” for the purposes of IEEPA.

b. Reporting Requirements and Congressional Oversight

Of course, IEEPA does not give the President boundless, unchecked authority to respond to international exigencies whenever he pleases. To the contrary, Congress ensured both legislative and public accountability over the President’s use of IEEPA’s authorities by imposing specific procedural requirements on the Executive Branch. Accordingly, when the President declares a “national emergency” and acts pursuant to IEEPA, he must send Congress a report specifying: (1) “the circumstances which necessitate such exercise of authority”; (2) “why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States”; (3) “the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances”; (4) “why the President believes such actions are necessary to deal with those circumstances”; and (5) “any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.”⁹⁵ Every six months, the President must furnish Congress with follow-up reports.⁹⁶

⁹⁴ Indeed, Congress could not define what might constitute an “extraordinary” and “unusual” threat, or such a threat could hardly be considered “extraordinary” or “unusual.” Moreover, as the Supreme Court has recognized, in the foreign affairs context, “Congress cannot anticipate and legislate with regard to ... every possible situation in which [the President] might act.” *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). Nor is the Judicial Branch in a better position, as “there are no discernible and manageable standards for deciding whether” a particular international situation constitutes such a threat. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

⁹⁵ 50 U.S.C. § 1703(b). IEEPA also requires that “in every possible instance” supplementary consultations between the President and Congress shall be held before the President makes a declaration of a national emergency and for as long as the President exercises the authority under IEEPA. Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1118-19 (1983).

⁹⁶ *Id.* § 1703(c) (“At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with

In addition, these IEEPA-specific requirements are supplemented by others contained in the National Emergencies Act (“NEA”).⁹⁷ Finally, if Congress disagrees with a President’s declaration of a national emergency, Congress can cancel it through a joint resolution.⁹⁸

c. National Emergency Declaration Regarding Ukraine

As relevant here, President Obama declared a national emergency related to Russian aggression in 2014, when the country had initially annexed portions of Ukraine.⁹⁹ President Biden “expand[ed] the scope” of that emergency declaration in late February 2022 when Russian soldiers unlawfully invaded Ukraine.¹⁰⁰ Pursuant to that declaration, President Biden blocked Russian sovereign assets located within the United States.¹⁰¹ President Biden has since renewed that national emergency declaration in accordance with the relevant procedures—most recently in March 2023.¹⁰²

Because the Executive Branch has undertaken those threshold steps, the central question is whether the President has the authority under IEEPA to transfer Russia’s blocked assets to Ukraine. As explained below, the answer to that question is yes.

respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).”).

⁹⁷ *Id.* § 1601, *et seq.*

⁹⁸ *Id.* § 1706(b). IEEPA originally allowed for Congress to cancel an emergency declaration through a concurrent resolution, rather than a joint one. After the Supreme Court ruled that this procedure violated the Constitution in *INS v. Chadha*, 462 U.S. 919 (1983), Congress amended the relevant statutory language to require a joint resolution. Pub. L. 99-93; 99 Stat. 407, 448 (1985) (amendments to NEA).

⁹⁹ Exec. Order No. 13,660, 79 Fed. Reg. 13491 (Mar. 6, 2014). Presidents Obama and Donald Trump subsequently renewed that emergency declaration in the proceeding years. *See, e.g.*, Exec. Order No. 13,661, 79 Fed. Reg. 15533 (Mar. 16, 2014); Exec. Order No. 13,662, 79 Fed. Reg. 16167 (Mar. 20, 2014); Exec. Order No. 13,685, 79 Fed. Reg. 77357 (Dec. 19, 2014); and Exec. Order No. 13,849, 83 Fed. Reg. 48195 (Sept. 20, 2018). Any action the President takes would be against the backdrop of these documented violations of international law and illegal annexation. *See infra* Section V.C (discussing limiting principles on the President’s seizure and transfer power).

¹⁰⁰ Exec. Order No. 14,065, 87 Fed. Reg. 10293 (Feb. 21, 2022).

¹⁰¹ *Id.*

¹⁰² *Continuation of the National Emergency With Respect to Ukraine*, 88 Fed. Reg. 13285 (Mar. 1, 2023).

2. The Plain Text of Subsection B Gives the President Clear and Unambiguous Authority to Transfer Blocked Russian Assets to Ukraine

Subsection B’s text is sweeping and unqualified. It authorizes the President to engage in a wide array of conduct: he may “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit.”¹⁰³ And he may undertake these actions with respect to “any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”¹⁰⁴

These powers are expressly phrased in the disjunctive. So, for instance, the power to “block” can be exercised in addition to the power to “direct and compel.”¹⁰⁵ And as the text makes clear, there are various permutations in which the President might exercise his authority under Subsection B. This report focuses its analysis on the President’s statutory authority to “block” and/or “direct and compel” the “transfer” of “any right, power, or privilege with respect to” Russia’s “property.”¹⁰⁶

a. Meaning of “Transfer” in IEEPA

But what, precisely, does “transfer” mean? Because Congress did not explicitly define that term, the statute’s meaning must be derived using the traditional tools of statutory construction. As with any question of statutory interpretation, the evaluation of IEEPA’s scope must begin with

¹⁰³ 50 U.S.C. § 1702(a)(1)(B).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

the statute’s text: we must “interpret[] [the] statute in accord with the ordinary public meaning of its terms at the time of its enactment.”¹⁰⁷ If the statutory language is clear, the analysis is over—“when the meaning of the statute’s terms is plain, our job is at an end,” and neither courts nor Presidents are free to rewrite a statute’s “plain terms based on some extratextual consideration.”¹⁰⁸

At the time of IEEPA’s passage, “transfer” as defined by the Webster’s New Collegiate Dictionary meant the “conveyance of right, title, or interest in real or personal property from one person to another.”¹⁰⁹ Black’s Law Dictionary somewhat more narrowly defined it as “an act of the parties, or of the law, by which the title to property is conveyed from one person to another.”¹¹⁰ The definition of “transfer” promulgated by the Executive two years after IEEPA’s passage conforms with the broadest version of this understanding: “The term transfer shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, *any right, remedy, power, privilege, or interest with respect to any property ...*.”¹¹¹

These authorities confirm that the ordinary meaning of transfer captures the conveyance of a property interest from one entity to another. And IEEPA plainly states that the President can “investigate,” “block,” “regulate,” “direct and compel,” “nullify,” “void,” and “prevent or prohibit” any such conveyances, and that those powers address conveyances of “*any right, power,*

¹⁰⁷ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1738 (2020); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

¹⁰⁸ *Bostock*, 140 S. Ct. at 1749.

¹⁰⁹ *Transfer*, WEBSTER’S NEW COLLEGIATE DICTIONARY (8th ed. 1977). Webster’s New Collegiate Dictionary is one of the dictionaries the majority of the Supreme Court used in *Bostock* to construe the meaning of statutory language. See *Bostock*, 140 S. Ct. at 1740.

¹¹⁰ *Transfer*, BLACK’S LAW DICTIONARY (4th ed. 1968).

¹¹¹ See 31 C.F.R. § 535.310 (1979) (emphasis added). The most recent 2023 regulations contain a similar definition. See *id.* § 548.320 (2023).

or privilege” with respect to property that a foreign country has an interest in and that is subject to the jurisdiction of the United States.¹¹² As applied to this situation, that grant of authority means that the President can use Subsection B to “direct and compel” the conveyance of Russian sovereign assets located in the United States to Ukraine. Consequently, the plain meaning of Subsection B unambiguously authorizes the transfer of Russian assets to Ukraine.

b. Precedent and Historical Practice

Precedent and historical practice further reinforce what the explicit text of IEEPA already makes clear. The first major stress test under IEEPA occurred shortly after passage and is particularly instructive in demonstrating the breadth of the President’s authority under Subsection B. In late 1979, Iranian militants stormed the U.S. Embassy in Tehran and took approximately seventy Americans hostage.¹¹³ President Jimmy Carter quickly issued Executive Order 12,170, declaring a national emergency and using his authority under IEEPA to block transactions with Iran and freeze all Iranian assets located within the United States.¹¹⁴ Later, after the United States reached an agreement with Iran (brokered by Algeria), the President (then Ronald

¹¹² 50 U.S.C. § 1702(a)(1)(B) (emphasis added). Others have agreed. Bethany Kohl Hipp, *Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions*, 17 EMORY INT’L L. REV. 1311, 1364 (2003) (“[T]he President’s authority under IEEPA to ‘direct and compel transfer’ property or ‘nullify, void, [or] prevent’ the exercise of a right in relation to property (e.g., freezing assets on a long-term basis) may be functionally equivalent to vesting or taking title to the property because, in either case, the titleholder to the asset is deprived of its use or right of disposal.”); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1241 (1987) (“Omission of the vesting power does not seem significant in light of the President’s other powers over foreign-owned property, including the power to ‘direct and compel’ its ‘transfer, withdrawal ... or exportation.’); *The International Emergency Economic Powers Act*, *supra* note 95, 96 HARV. L. REV. at 1108 (“IEEPA’s legislative history indicates that to vest property is ‘to take title’ to it. Taking title, however, does not appear to differ from the other actions permitted by IEEPA’s foreign-property controls. Under these controls, if title involves some sort of possessory interest in property, the President can ‘direct and compel [the property’s] transfer.’ If title permits the exercise of some right, power, or privilege with respect to property, the President can ‘nullify, void, [or] prevent’ that exercise. The vesting power thus seems to be included in the general provision for foreign-property controls, and apparently is granted by IEEPA in all but name.”).

¹¹³ Muhammad Sahimi, *The Hostage Crisis, 30 Years On*, PBS (Nov. 3, 2009), <https://www.pbs.org/wgbh/pages/frontline/tehranbureau/2009/11/30-years-after-the-hostage-crisis.html>.

¹¹⁴ Exec. Order No. 12,170, 44 Fed. Reg. 65729 (Nov. 14, 1979).

Reagan) used his power under IEEPA to effectuate the agreement's terms.¹¹⁵ In Executive Order 12,277, he "licensed, authorized, directed, and compelled" the "Federal Reserve Bank of New York" to "transfer" "all gold bullion[] and other assets ... in its custody[] of the Government of Iran" to Iran or an entity designated by it.¹¹⁶ He also nullified all "rights, powers, and privileges" other than Iran's to those assets.¹¹⁷ In Executive Order 12,294, he suspended legal claims against Iran in the United States and directed that they be pursued, if at all, through the Iran-United States Claims Tribunal located abroad.¹¹⁸

This broad use of authority was challenged in court. Americans with claims against Iran and its nationals who had secured attachments on the frozen assets brought actions disputing the President's authority under IEEPA to nullify those attachments and to transfer the funds beyond the jurisdiction of the United States. Two courts of appeals rejected these claims, resting their analyses on the plain text of the statute alone.¹¹⁹ The Supreme Court agreed with those decisions and upheld the President's actions in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Like the courts below before it, the Supreme Court held that IEEPA's text unambiguously authorized the President's challenged actions. In resisting that straightforward conclusion, the

¹¹⁵ See Marvinne Howe, *Wary Algeria Edged Into Pivotal Role*, N.Y. TIMES (Jan. 26, 1981), <https://www.nytimes.com/1981/01/26/world/wary-algeria-edged-into-pivotal-role.html>.

¹¹⁶ Exec. Order No. 12,277, 46 Fed. Reg. 7915 (Jan. 23, 1981).

¹¹⁷ *Id.*

¹¹⁸ Exec. Order No. 12,294, 46 Fed. Reg. 14111 (Feb. 24, 1981).

¹¹⁹ *Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 806-07 (1st Cir. 1981) ("The President's actions ... are in keeping with the language of IEEPA: initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the 'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them.... [While plaintiff] argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish 'interests' in foreign assets held by United States citizens," "we can find no such limitation in IEEPA's terms."); *Am. Int'l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 439 (D.C. Cir. 1981) ("The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA.").

Petitioner in *Dames & Moore* raised many of the same arguments levelled against our plain-text reading of the statute.

First, Petitioner argued that IEEPA’s legislative and enactment history revealed that Subsection B allowed the President “only to continue the freeze [of assets] or to discontinue controls.”¹²⁰ But the Court correctly rejected that argument, which would “read out of [Subsection B] all meaning to the words ‘transfer,’ ‘compel,’ or ‘nullify.’”¹²¹

Next, Petitioner argued that Subsection B did not permit the President to *permanently* dispose of property because it lacked a “vesting” power.¹²² And because the “nullification of the attachments and the transfer of the assets will permanently dispose of the assets,” Petitioner claimed, Subsection B could not permit such action.¹²³ The Court rejected this argument too: “Although it is true the IEEPA 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 ... the IEEPA ... to otherwise permanently dispose of the assets.”¹²⁴ According to the Court, Petitioner fundamentally erred in “assuming that the only power granted by the language used in [Subsection B] is the power temporarily to freeze assets. As noted above, the plain language of the statute defies such a holding.”¹²⁵ Ultimately, the Court found that President Reagan’s actions were proper.¹²⁶

¹²⁰ *Dames & Moore*, 453 U.S. at 672.

¹²¹ *Id.* at 672 n.5.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The Supreme Court upheld the President’s suspension of claims under a theory of congressional acquiescence, not as authorized by IEEPA. *Id.* at 668-74.

To be sure, *Dames & Moore* cautioned that its opinion was “confine[d] ... to the very questions necessary to the decision of the case.”¹²⁷ But that truism does not undermine the central lesson of the opinion: that the President possesses sweeping authority under Subsection B not just to temporarily freeze sovereign assets, but to transfer them too. Indeed, to our knowledge, no court has refused to apply *Dames & Moore* to subsequent challenges to the President’s use of IEEPA’s authorities.

Ultimately, the crisis in Iran exemplifies the wisdom of IEEPA’s flexible design. Facing an international emergency, the President construed his authority under IEEPA broadly and exercised his vast powers to respond to a rapidly developing global crisis. That conduct was not hostile to congressional will—it was consistent with Congress’s deliberate choice to empower the Executive to react nimbly and decisively in the face of an international emergency. As the Office of Legal Counsel observed: “[T]he words [of IEEPA] indicate rather clearly that Congress intended to confer on the President the power to regulate things other than the mere transfer of foreign property or the creation of interests in foreign property. ... Congress has determined that in time of emergency the exercise of rights or privileges with respect to foreign property may create dangers or difficulties that cannot be met by a simple prohibition against transfer or use, and Congress has given the President power to deal with those dangers.”¹²⁸ OLC’s last point bears emphasis here: there is no implied limitation on the powers listed in Subsection B that prevents the President from using them to achieve more than temporary freezes.

Dames & Moore was not a ticket good for one day only. Presidents have since invoked the Supreme Court’s capacious understanding of the power granted by Subsection B to take similar

¹²⁷ *Id.* at 661.

¹²⁸ *Presidential Power to Regulate Domestic Litig. Involving Iranian Assets*, 4A OP. O.L.C. 236, 238 (1980).

actions in response to international emergencies. For example, in 1992, after Iraq invaded Kuwait, President George H.W. Bush declared a national emergency, invoked IEEPA, and froze Iraqi assets in the United States.¹²⁹ A United States-led coalition of allied military forces expelled Iraqi forces from Kuwait two years later.¹³⁰ Around this time, the United Nations Security Council passed Resolution 687, which established a formal cease-fire and imposed long-term conditions on Iraq, including compensating victims of its aggression.¹³¹ The Resolution required member states to transfer certain Iraqi funds (representing Iraqi oil sale proceeds) to the United Nations Compensation Commission to fund Iraq's obligations.¹³² After initially agreeing to the cease-fire resolution, Iraq fought this specific obligation and "refused to participate in, or consent to, any subsequent arrangements to carry out any compensation."¹³³

That rescission of Iraq's consent did not stop President Bush from acting, however. In Executive Order No. 12817, the President, invoking his powers under IEEPA, "directed and compelled" every financial institution in the United States to "transfer" "funds or other assets in which the Government of Iraq or its agencies, instrumentalities, or controlled entities have an interest [that] represent[s] the proceeds of the sale of Iraqi petroleum or petroleum products" to the Federal Reserve Bank of New York.¹³⁴ President Bush further directed the Federal Reserve to "hold, invest, or transfer such funds and assets, and any earnings thereon, when, to the extent, and

¹²⁹ See Exec. Order No. 12,722, 55 Fed. Reg. 31803 (Aug. 2, 1990).

¹³⁰ Alfred B. Prados, Cong. Res. Serv., RL31641, *Iraqi Challenges and U.S. Responses: March 1991 through October 2002* (Nov. 20, 2002).

¹³¹ S.C. Res. 687 (Apr. 3, 1991).

¹³² Evelyn Leopold, *U.N. Seizes Iraqi Oil, Money Abroad*, WASH. POST (Oct. 3, 1992), <https://www.washingtonpost.com/archive/politics/1992/10/03/un-seizes-iraqi-oil-money-abroad/eb9d428c-a04c-4a7a-abac-b53b30f194b6/>. For a discussion of Iraq's lack of consent to the transfer, see *infra* note 574.

¹³³ NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 24.

¹³⁴ Exec. Order No. 12,817, 57 Fed. Reg. 48433 (Oct. 23, 1992).

in the manner required by the Secretary of the Treasury in order to fulfill the rights and obligations of the United States under United Nations Security Council Resolution[s].”¹³⁵ The Secretary eventually ordered the Federal Reserve to send the Iraqi funds to the Compensation Commission.

This maneuver undoubtedly “transferred” Iraq’s ownership interests in the funds to a new entity. The only way that the President could have achieved that outcome was by exercising his statutory authority under Subsection B of IEEPA. The President successfully “directed and compelled” the “transfer,” *i.e.*, the “conveyance of right, title, or interest in,”¹³⁶ the Iraqi sales proceeds from Iraq to the Federal Reserve to the Compensation Commission. While the President also cited NEA and the United Nations Participation Act when issuing the relevant executive orders instructing the Secretary to proceed, neither statute contains a similar transfer power.¹³⁷

As these precedents demonstrate, it would be neither unlawful nor unprecedented for the President to respond to Russia’s aggression by ordering the transfer of Russia’s frozen sovereign assets to Ukraine. And because the President’s authority to undertake this transfer flows directly from the statutory text of IEEPA, it is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”¹³⁸ As we explain below, opponents of the proposed transfer cannot come close to meeting that heavy burden.

¹³⁵ *Id.*

¹³⁶ *Transfer*, WEBSTER’S NEW COLLEGIATE DICTIONARY (8th ed. 1977).

¹³⁷ Compare 22 U.S.C. § 287c (detailing the President’s authority to “give effect” to the U.N. Security Council’s authorizations) and 50 U.S.C. § 1601 *et seq.* (NEA), with § 1702 (IEEPA).

¹³⁸ *Dames & Moore*, 453 U.S. at 657 (quoting *Youngstown*, 343 U.S. at 637).

3. None of the Counterarguments Levied Against Subsection B's Transfer Power Has Merit

Critics of this report's text-driven interpretation of the President's Subsection B powers generally offer three counterarguments in response. First, that this understanding of the Subsection B authority is inconsistent with congressional action after IEEPA's passage. Second, that it is incompatible with the Act's enactment history. And third, that it collides with the longstanding understanding of Subsection B's scope. None of these arguments withstands examination.

a. A Broad Transfer Power Is Fully Consistent with the PATRIOT Act Amendment to IEEPA

Long after IEEPA's passage (and the Iranian-hostage-crisis transfer at the heart of *Dames & Moore*), Congress amended IEEPA to add Subsection C. This amendment was part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("PATRIOT") Act of 2001, which Congress passed in the immediate aftermath of the September 11, 2001 terrorist attacks.¹³⁹ Some have argued that the language in the PATRIOT Act amendment retroactively repealed by *implication* what would previously have been the correctly broad understanding of the President's use of Subsection B to change the ownership interest in property—or retroactively demonstrated that the broad understanding of Subsection B would have been wrong from the start.¹⁴⁰ But each of those arguments falls apart under scrutiny.

Subsection C provides that the Executive can "confiscate" and "vest" "all right, title, and interest" in foreign property into "such agency or person as the President may designate ... in the interest of and for the benefit of the United States."¹⁴¹ At the time that Subsection C was enacted,

¹³⁹ Pub. L. 107-56, 115 Stat. 272 (2001).

¹⁴⁰ See, e.g., Stephan, *Giving Russian Assets to Ukraine*, *supra* note 90; Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), <https://www.lawfaremedia.org/article/legal-challenges-presented-seizing-frozen-russian-assets>.

¹⁴¹ 50 U.S.C. § 1702(a)(1)(C).

“vest” meant “to place or give into the possession or discretion of some person or authority,” and “to grant or endow with a particular authority, right, or property.”¹⁴² Black’s Law Dictionary has defined the word “vest” in similar terms.¹⁴³ Critics of reading Subsection B in accord with its plain meaning draw on these definitions as proof that the President’s power to take title to assets flows from Subsection C—not Subsection B.¹⁴⁴ So, the arguments go, if the President wants to change ownership interests in frozen assets (i.e., to “vest” those property interests in Ukraine), he is allowed to do so only pursuant to Subsection C.¹⁴⁵ This naturally leads to two analytically distinct arguments.

The first rests its premise on legislation by implication. Under this view, although the plain language of Subsection B provided the authority to compel the transfer of the ownership interest in assets, Congress repealed that power by enacting Subsection C in 2001. But there is a strong presumption that Congress does not legislate by implication—indeed, it is black letter law that the “intention of the legislature to repeal must be clear and manifest.”¹⁴⁶ Absent that affirmative showing, such repeals are permissible only when the text is irreconcilable.¹⁴⁷ As explained below, Subsections B and C are harmonious under their express terms.

¹⁴² *Vest*, WEBSTER’S NEW COLLEGIATE DICTIONARY (10th ed. 1999).

¹⁴³ *Vest*, BLACK’S LAW DICTIONARY (7th ed. 1999) (“To confer ownership of (property) upon a person. 2. To invest (a person) with the full title to property. 3. To give (a person) an immediate, fixed right of present or future enjoyment.”).

¹⁴⁴ *See supra* note 140.

¹⁴⁵ Stephan, *Giving Russian Assets to Ukraine*, *supra* note 90; Paul Stephan, *Response to Philip Zelikow: Confiscating Russian Assets and the Law*, LAWFARE (May 13, 2022), <https://www.lawfaremedia.org/article/response-philip-zelikow-confiscating-russian-assets-and-law>.

¹⁴⁶ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *accord Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662-63 (2007) (collecting cases); *see also Georgia v. Pa. R. Co.*, 324 U.S. 439, 456-57 (1945); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842).

¹⁴⁷ *Nat’l Ass’n of Home Builders*, 551 U.S. at 662.

The second argument is that the President *never* had the authority under Subsection B to change an ownership interest in property.¹⁴⁸ On this view, since IEEPA’s enactment, the President could “direct and compel” the “transfer” of Russian assets under Subsection B only if that transfer did not result in any kind of change of ownership. But that view rests on nothing beyond sheer assertion—what Congress may have thought useful to add in 2001 tells us little if anything about the plain meaning or contemporaneous understanding behind the broader language Congress in fact used in 1977: time’s arrow moves only forward.

In addition, the narrow interpretation of “transfer” advanced under this theory introduces absurdity into the statute. For instance, no one seriously disputes that, under Subsection B, the President can “block” the “transfer” of an asset even if doing so would radically change the ownership interests in that asset, not to mention its financial value to the asset’s owner, either as a source of investment income or as collateral. Thus, if Russia wanted to convey the title (and not just the possessory interest) of some of its U.S.-based assets to another country in exchange for some benefit from that country, the President could surely “block” that transaction under Subsection B. But, according to critics of reading Subsection B in accord with its clear language, the President could not “direct and compel” that same transaction (even though both scenarios involve a change in ownership of foreign property interests). That makes no sense. The term “transfer” in Subsection B should not take on a different meaning depending on the verb in connection with which it is used or the type of property interest it affects. A word might be, as Justice Holmes once said, “the skin of a living thought” rather than “a crystal, transparent and unchanged,”¹⁴⁹ but it surely is not the skin of a chameleon, changing coloration depending on

¹⁴⁸ Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140.

¹⁴⁹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

immaterial aspects of sentence structure. If the President can “block” a “transfer” that changes property interests and their value to all relevant stakeholders, it follows that the President can “direct and compel” the same “transfer.”

That commonsense reading respects the parallelism mandated by the statutory text and structure of Subsection B,¹⁵⁰ without rendering Subsection C superfluous—the objection made by those who persist in deconstructing Subsection B and reducing it to nonsense. For, unlike Subsection B, Subsection C covers circumstances in which the United States wishes to take title to foreign assets *not* in order to transfer them to those victimized by the foreign state formerly owning those assets without restriction but, instead, to use those assets “in the interest of and for the benefit of the United States.”¹⁵¹ Thus, if the President wanted to seize foreign assets for the benefit of the United States, he would have to exercise his confiscation/vesting powers under Subsection C, rather than his transfer powers under Subsection B. That is a confiscation/vesting power upon which the President need not rely to effectuate the proposed transfer.¹⁵²

Here, the President’s transfer of Russian assets fits comfortably within his Subsection B authority. As this report’s discussion of the status of such asset transfers under international law

¹⁵⁰ Proponents of an artificially narrow reading of Subsection B may counter that parallelism can be achieved if the word “transfer” is limited to conveyances of non-ownership interests across all the verbs listed in Subsection B. Under that reading, the President lacks the power to “block” any transfer that changes an ownership interest in property. But there is nothing in Subsection B’s text, structure, legislative history, or purpose that supports that novel and frankly bizarre interpretation of the statute.

¹⁵¹ 50 U.S.C. § 1702(a)(1)(C). The use of “vest”—and the original meaning of that term—in IEEPA’s predecessor statute supports this understanding. In defining vest then, Black’s Law Dictionary cited to an executive order that President Roosevelt issued under the predecessor statute: “Under Executive Order empowering Alien Property Custodian to ‘vest’ any property of enemy national in the process of administration, the term is equivalent to ‘seize’ and gives the Custodian the right to the immediate possession of the property for the benefit of the United States.” *Vest*, BLACK’S LAW DICTIONARY (4th ed. 1968); *see also Seize*, WEBSTER’S NEW COLLEGIATE DICTIONARY (8th ed. 1977) (“to put in possession of; 1 a: to vest ownership of a freehold estate b: to put in possession of something 2 a: to take possession of b: to possession of by legal process 3 a: to possess or take by force b: to take prisoner 4 a: to take of hold of b: to possess oneself of.”). For a broader discussion on the predecessor statute, *see infra* Section III.B.3.b.

¹⁵² *See supra* note 90.

will make clear, any proposed transfer would be executed alongside a coordinated international effort to address the human rights catastrophe in Ukraine.¹⁵³ The United Nations has already provided billions of dollars of aid to support Ukraine and assist Ukrainian refugees¹⁵⁴ and has mobilized many of its humanitarian agencies such as UNICEF, UNHCR, the U.N. World Food Programme, and the World Health Organization to provide crucial assistance to the Ukrainian people.¹⁵⁵ But the United Nations has also gone farther, declaring that Russia has violated international law by instigating this unlawful war and owes Ukraine reparations.¹⁵⁶ And countries around the world have recognized a commitment to help Ukraine where possible.¹⁵⁷ In sending Russia's sovereign assets to Ukraine through the Subsection B transfer mechanism, the United States would simply be acting in line with those obligations and deploying IEEPA in a manner fully consistent with international law by permitting Ukraine to use the funds as it sees fit. Thus, interpreting Subsection B to authorize transfers of Russian foreign assets to Ukraine for Ukraine's benefit would by no means render Subsection C superfluous. Put otherwise, because the natural interpretation of Subsection B would not attribute to the Congress that enacted Subsection C any wish to use the lawmaking process without purpose, this analysis leaves entirely unsupported the

¹⁵³ See *infra* Part IV.

¹⁵⁴ *How the UN is Supporting the People of Ukraine*, UNITED NATIONS FOUND., <https://unfoundation.org/ukraine/>.

¹⁵⁵ *Id.* The United States has offered support for these efforts, including the July 2023 announcement that the U.S. Agency for International Development will give \$500 million in humanitarian assistance to Ukraine to be administered “through the United Nations and other non-governmental organization partners.” Daphne Psaledakis & Anna Voitenko, *USAID chief announces over \$500 million in assistance on Ukraine visit*, REUTERS (July 17, 2023), <https://www.reuters.com/world/europe/usaaid-chief-announce-over-500-million-aid-visit-ukraine-2023-07-17/>.

¹⁵⁶ *General Assembly adopts resolution on Russian reparations for Ukraine*, UNITED NATIONS NEWS (Nov. 14, 2022), <https://news.un.org/en/story/2022/11/1130587>; G.A. Res. ES-11/5, *Furtherance of Remedy and Reparation for Aggression Against Ukraine* (Nov. 14, 2022).

¹⁵⁷ See, e.g., *FACT SHEET: One Year of Supporting Ukraine*, WHITE HOUSE (Feb. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/21/fact-sheet-one-year-of-supporting-ukraine/>.

only argument for treating Subsection C as limiting Subsection B when the text of Subsection C does no such thing.

In any event, even if this report’s reading of IEEPA results in some measure of overlap between Subsections B and C, that is not a legitimate reason to discard it. Courts have increasingly rejected arguments that “surplusage” must be avoided “at all costs.”¹⁵⁸ That tolerance for surplusage is especially appropriate where (as here) Congress has expressly empowered the President to respond to international emergencies. Given Congress’s desire to afford the President wide latitude in addressing such emergencies, it makes good sense that Congress employed a belt-and-suspenders approach in drafting the relevant provisions of IEEPA.

Finally, this report’s interpretation of Subsections B and C has also played out naturally in practice. Recall the international incident in Kuwait in the early 1990s.¹⁵⁹ After Iraq invaded, President George H.W. Bush froze all of Iraq’s assets in the United States.¹⁶⁰ Then, in 1992, against the backdrop of coordinating international actions, the President invoked Subsection B to direct and compel the transfer of certain of those assets to the Compensation Commission against Iraq’s then-present wishes.¹⁶¹ But those were not the only assets that the United States had frozen

¹⁵⁸ *Territory of Guam v. United States*, 141 S. Ct. 1608, 1615 (2021); see also *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019) (“Sometimes the better overall reading of the statute contains some redundancy.”). That trend reflects the practical reality that Congress often takes a belt-and-suspenders-like approach to crafting statutory language, “intentionally err[ing] on the side of redundancy.” See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013); see also, e.g., Victoria Nourse, MISREADING LAW, MISREADING DEMOCRACY 92-93 (2016) (explaining and describing how Senate rules encourage redundancy in statutory language); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1448, 1469 (2014) (noting that “repetition (i.e., surplusage) is typically what supporting institutions and groups want from the legislative process”); Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 718 (2014) (explaining that “members of Congress often want to be redundant . . . to make doubly sure about things,” so courts “should be more careful” in applying the canon against surplusage).

¹⁵⁹ See *supra* at 129-135.

¹⁶⁰ See Exec. Order No. 12,722, 55 Fed. Reg. 31803 (Aug. 2, 1990).

¹⁶¹ Exec. Order No. 12,817, 57 Fed. Reg. 48433 (Oct. 23, 1992).

originally. The rest remained blocked in the United States until 2003, when President George W. Bush invoked Subsection C to seize and vest in the Department of Treasury much of the remaining Iraqi assets.¹⁶² Those assets were then used to assist the United States’ various efforts in Iraq.¹⁶³ These different uses of Subsections B and C in practice underscore their plain textual differences while honoring Congress’s sweeping delegation of power to the President. In short, there is no merit to the assertion that Congress’s enactment of Subsection C prohibits the President from transferring Russian assets to Ukraine under Subsection B.

b. A Broad Transfer Power Is Consistent with IEEPA’s Enactment History

Critics of the interpretation advanced in this report regularly rely on IEEPA’s enactment history as evidence that Subsection B was intended to authorize only temporary freezing of assets (and not permanent transfers).¹⁶⁴ But the enactment history proves no such thing.

IEEPA did not emerge out of the ether. Congress pulled Subsection B’s language directly from an earlier statute, the Trading with the Enemy Act (“TWEA”). Congress enacted TWEA in 1917 to give the President certain emergency powers during times of war.¹⁶⁵ Through a series of amendments, Congress slowly expanded the tools available to the President and the situations in

¹⁶² Exec. Order No. 13,290, 68 Fed. Reg. 14307 (Mar. 20, 2003).

¹⁶³ *Id.* As President Bush explained to Congress, “This power is being used here because it is clearly in the interests of the United States to have these funds available for use in rebuilding Iraq and launching that country on the path to speedy economic recovery.” *Message to the Congress Reporting on Confiscation and Vesting of Certain Iraqi Property* (Mar. 20, 2003), <https://www.govinfo.gov/content/pkg/WCPD-2003-03-24/pdf/WCPD-2003-03-24-Pg344-2.pdf>.

¹⁶⁴ Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140; Andrew Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable*, JUST SEC. (Apr. 18, 2022), <https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/>.

¹⁶⁵ Trading with the Enemy Act of 1917, Pub. L. 65-91, 40 Stat. 411 (codified as amended at 50 U.S.C. § 4305).

which those tools could be used.¹⁶⁶ As a result, TWEA (originally a wartime statute) expanded to address all emergencies, both foreign and domestic.¹⁶⁷

At its peak, TWEA contained the following powers in Section 5(b), among others:

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the Jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States¹⁶⁸

As in IEEPA, TWEA granted the President the authority to define “any and all” of the powers at his disposal.¹⁶⁹ The President could then use those powers “[d]uring the time of war or during any other period of national emergency declared by [him].”¹⁷⁰ At first, Congress lacked any ability to challenge or oversee the President’s exercise of the powers afforded to him by TWEA. This lack of oversight proved to be a problem.

¹⁶⁶ See Hipp, *Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions*, *supra* note 112, 17 EMORY INT’L L. REV. at 1319-41.

¹⁶⁷ Joseph W. Bishop, Jr., *Judicial Construction of the Trading with the Enemy Act*, 62 HARV. L. REV. 721 (1949); accord Lee R. Marks & John C. Grabow, *The President’s Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 79 (1982).

¹⁶⁸ 50 U.S.C. § 4305(b)(1).

¹⁶⁹ See Ch. 593, § 301(3), 55 Stat. 839 (1941) (“That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision.”).

¹⁷⁰ 50 U.S.C. § 5(b)(1)(A)-(B) (1943). See also James J. Savage, *Executive Use of the International Emergency Economic Powers Act – Evolution Through the Terrorist Taliban Sanctions*, CURRENTS: INT’L TRADE L.J., Winter 2001, at 28, 29 (“Section 5(b) of the TWEA provided the precedent, the majority of the text, and background, for the creation of the IEEPA.”).

Without any meaningful constraints on the President’s emergency powers, TWEA “had been used repeatedly for new and important purposes, wherever and whenever its broad and unqualified language would permit new action to be taken.”¹⁷¹ And to make matters worse, presidential invocations of TWEA “were rarely related to the circumstances in which the national emergenc[ies] [were] declared.”¹⁷² Indeed, “[t]he historical record shows that once a President had declared the existence of a national emergency, he was slow to terminate it even after the circumstances or tensions that had led to the declaration could no longer be said to pose a threat of emergency proportion to the Nation.”¹⁷³

In response to this sprawling abuse of power, Congress enacted NEA and IEEPA. Through NEA, Congress placed various “new restrictions on the manner of declaring and the duration of new states of emergency.”¹⁷⁴ And through IEEPA, Congress conferred “upon the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of [TWEA] and subject to procedural limitations, including those of [NEA].”¹⁷⁵ But IEEPA was in no way intended to “t[ie] the President’s hands in times of crisis.”¹⁷⁶ Indeed, many of the changes were strictly procedural.

One substantive change concerned the situations in which the President could exercise his powers under IEEPA. In particular, Congress narrowed those circumstances to “any unusual and

¹⁷¹ *Presidential Power to Regulate Domestic Litig. Involving Iranian Assets*, 4A OP. O.L.C. 236, 240 (1980).

¹⁷² Casey, Rennack & Elsea, *The International Emergency Economic Powers Act*, *supra* note 89, at 8.

¹⁷³ *See Regan v. Wald*, 468 U.S. 222, 245 (1984) (Blackmun, J., dissenting); *see also* 123 Cong. Rec. 22475 (Jul. 12, 1977) (statement of Rep. Bingham) (“None of these uses of section 5(b) respond to any existing emergency; they are justified on the basis of emergencies long past. In short, these authorities are used because they are convenient—because they are there.”).

¹⁷⁴ Casey, Rennack & Elsea, *The International Emergency Economic Powers Act*, *supra* note 89, at 8.

¹⁷⁵ *Id.* at 9.

¹⁷⁶ 123 Cong. Rec. 22477 (July 12, 1977) (statement of Rep. Leggett).

extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”¹⁷⁷ This was a significant curtailment from TWEA, which had been used to address situations that were neither unusual nor extraordinary and that typically concerned purely domestic matters.¹⁷⁸ But IEEPA’s limits on the substantive tools available to address qualifying emergencies should not be overstated. Congress did not alter the language that would become Subsection B of IEEPA when it copied and pasted that preexisting language into the statute from TWEA.¹⁷⁹ While Congress made explicit textual changes to other authorities, the language in Subsection B of IEEPA remained exactly the same. In the words of President Carter when he signed IEEPA into law: “The bill is largely procedural ... [and] does [not] affect the blockage of assets of nationals of [foreign] countries.”¹⁸⁰

To be sure, Congress did not carry over TWEA’s “vesting” authority when it initially passed IEEPA (that authority would come later with the PATRIOT Act amendment). But that omission tells us precious little about the President’s separate authority under Subsection B, which by its plain text authorizes the President to “direct and compel” the “transfer” of Russian assets located in the United States.¹⁸¹

Undeterred still, critics insist that Subsection B does not mean what it says and that IEEPA’s legislative history shows that Congress understood Subsection B to facilitate the

¹⁷⁷ 50 U.S.C. § 1701(a).

¹⁷⁸ Casey, Rennack & Elsea, *The International Emergency Economic Powers Act*, *supra* note 89, at 10.

¹⁷⁹ Compare 50 U.S.C. § 1702(a)(1)(B), with *id.* § 4035(b).

¹⁸⁰ Presidential War Powers Bill, Statement on Signing H.R. 7738 Into Law, 13 WEEKLY COMP. PRES. DOC. 1941 (Dec. 28, 1977).

¹⁸¹ See *supra* Section III.B.2.

temporary freezing of assets—and nothing more.¹⁸² But, even if one could know with certitude what the collectivity referred to as Congress uniformly “understood,” this entire line of argument is unavailing. The Supreme Court has made clear that “[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”¹⁸³ And as demonstrated above, no ambiguity at all exists about how IEEPA’s terms apply to the circumstances here.

If there were any doubts on this score, they are definitively resolved by the Supreme Court’s opinion in *Dames & Moore*, which stated unequivocally that Subsection B offered the President *more* authority than simply imposing temporary freezes on movement of foreign assets.¹⁸⁴ Any contrary interpretation would require reading out “all meaning to the words ‘transfer,’ ‘compel,’ or ‘nullify’” in the statute.¹⁸⁵ In addition, the Petitioner in *Dames & Moore* raised these very same arguments based on IEEPA’s legislative history, and the Court squarely rejected them given the clarity of Subsection B’s text.¹⁸⁶ Those doomed legislative history arguments should meet the same fate today.

¹⁸² Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140; Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable*, *supra* note 164; *Vesting of Iranian Assets*, 4A OP. O.L.C. 202, 202 (Mar. 12, 1980) (concluding that the President lacked authority under Subsection B to vest frozen Iranian assets or to “change title” to those assets and defining “vesting” as a “process by which the United State would take title to assets of a foreign country or its nationals”).

¹⁸³ *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011).

¹⁸⁴ *Dames & Moore*, 453 U.S. at 672 n.5.

¹⁸⁵ *Id.* at 672.

¹⁸⁶ *Id.* at 671-72.

c. Anti-Novelty Arguments Against a Broad Transfer Power Are Likewise Meritless

Finally, some have argued that Subsection B cannot possibly authorize the President to transfer Russia’s U.S.-based assets to Ukraine because the Congress that enacted IEEPA would have never anticipated that result.¹⁸⁷ This argument is meritless.

For starters, “the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command.”¹⁸⁸ And, as the Supreme Court has explained, “‘it is ultimately the provisions of’ those legislative commands ‘rather than the principal concerns of our legislators by which we are governed.’”¹⁸⁹ Fidelity to the text that Congress wrote is of particular importance with respect to IEEPA. As both Congress and the Judiciary have wisely and repeatedly acknowledged, the President is best situated to coordinate our Nation’s response to international emergencies and humanitarian crises.¹⁹⁰ Given these considerations, when “Congress delegates power broadly to the President to deal with an international emergency, there is no prudential reason to read the delegation more narrowly than the words and the Constitution will permit.”¹⁹¹ And here, the words of the statute compel a straightforward conclusion: the President possesses the authority to “direct and compel” the “transfer” or Russia’s U.S.-based assets to Ukraine.

¹⁸⁷ Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140.

¹⁸⁸ *Bostock*, 140 S. Ct. at 1749 (cleaned up); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

¹⁸⁹ *Bostock*, 140 S. Ct. at 1749 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)); *see also* A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012) (noting that unexpected applications of broad language reflect only Congress’s “presumed point ... to produce general coverage—not to leave room for courts to recognize ad hoc exceptions”).

¹⁹⁰ *See supra* Section III.A.

¹⁹¹ *Presidential Power to Regulate Domestic Litig. Involving Iranian Assets*, 4A OP. O.L.C. 236, 238 (1980).

Notably, this would not be the first time that IEEPA has reached beyond what some would categorize as the “expectations” of its enactors. Starting in the late 1990s, the President began relying on his authority under IEEPA to target individuals connected to terrorism but unconnected to a national affiliation.¹⁹² This was unprecedented. In doing so, President Bill Clinton “broke new ground under IEEPA by ordering sanctions targeting not a state and its citizens but, instead, terrorist organizations and their members.”¹⁹³ Presidents have continued this practice,¹⁹⁴ and courts have continually upheld such measures.¹⁹⁵ The same should be true here.

C. The Constitution Does Not Prohibit the President’s Transfer of Russian Assets to Ukraine

Because IEEPA already affords the President the authority he needs to transfer Russian assets to Ukraine, the enactment of new legislation (such as the pair of bills recently introduced in Congress¹⁹⁶) would be a welcome development but not a necessary one. Whether the President transfers Russian assets pursuant to his existing power under IEEPA or under newly enacted legislation, the resulting transfer must still be consistent with the Constitution. We conclude that it would be. Below, we explain why the proposed transfer of Russian assets to Ukraine would not run afoul of the Due Process Clause or the Takings Clause.

¹⁹² See, e.g., Exec. Order No. 12,978, 60 Fed. Reg. 54579 (Oct. 21, 1995); Exec. Order No. 13,219, 66 Fed. Reg. 34777 (June 26, 2001); see also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13-14 (2005)

¹⁹³ Chesney, *The Sleeper Scenario*, *supra* note 192, 42 HARV. J. ON LEGIS. at 13-14.

¹⁹⁴ See, e.g., Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sep. 23, 2001); Exec. Order No. 13,396, 71 Fed. Reg. 7389 (Feb. 7, 2006); Exec. Order No. 13,694, 80 Fed. Reg. 18077 (Apr. 1, 2015).

¹⁹⁵ See, e.g., *Humanitarian L. Project v. U.S. Treasury Dep’t*, 578 F.3d 1133, 1151 (9th Cir. 2009); *United States v. Tajideen*, 319 F. Supp. 3d 445, 455 (D.D.C. 2018).

¹⁹⁶ Rebuilding Economic Prosperity and Opportunity (REPO) for Ukrainians Act, S. 2003, 118th Cong. 1st Sess. (introduced July 15, 2023), <https://www.congress.gov/bill/118th-congress/senate-bill/2003/text/is?>; Rebuilding Economic Prosperity and Opportunity (REPO) for Ukrainians Act, H.R. 4175, 118th Cong. 1st Sess. (introduced July 15, 2023), <https://www.congress.gov/bill/118th-congress/house-bill/4175/text?>.

1. The Due Process Clause Does Not Bar the Proposed Transfer

On its face, the Fifth Amendment shields only private entities and persons, not sovereign states: “No *person* shall be ... deprived of life, liberty, or property, without due process of law.”¹⁹⁷ In no natural linguistic or conceptual sense is Russia a “person”—and, unlike private persons, Russia’s relations with the United States are generally governed not by domestic law or courts, but by diplomatic relations and treaties negotiated among equal sovereign states.

The Supreme Court has long adopted a similar view of the Due Process Clause, in holding that the separate sovereign states of the Union cannot claim due process protections—and must instead rely on doctrines of inter-sovereign relations, like the constitutional contours of federalism. Nearly sixty years ago, in the landmark civil rights case of *South Carolina v. Katzenbach*, the Court rejected, on both textual and structural grounds, the idea that States themselves have due process rights, explaining that: “The word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union....”¹⁹⁸ This is a first principle that has never wavered.

The Supreme Court has not had occasion to directly consider when a foreign sovereign is a “person” for purposes of the Due Process Clause. But, as several circuits have subsequently explained, the Court has clearly implied that they are not—by: (1) citing *Katzenbach*’s recognition that States do not have such rights while discussing the question;¹⁹⁹ (2) explaining that “in common

¹⁹⁷ U.S. Const. amend. V.

¹⁹⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

¹⁹⁹ See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992); see also *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 398-99 (2d Cir. 2009) (suggesting that *Weltover* possessed the “implication [that] was plain: If the ‘States of the Union’ have no rights under the Due Process Clause, why should foreign states?”).

usage, the term ‘person’ does not include the sovereign;”²⁰⁰ and (3) recognizing that foreign states, of course, “lie[] outside the structure of the Union” altogether.²⁰¹ Guided by such strong and converging indicia of meaning, courts that have confronted this issue have held, without exception, that foreign sovereigns do not possess due process rights.

The D.C. Circuit issued the bellwether decision on this issue, finding that in light of the Supreme Court’s holding that States do not have due process rights, foreign states should not have them either. The opinion first set out the foundational notion that “in common usage, the term ‘person’ does not include the sovereign”—a conclusion supported strongly by the Court’s reasoning in *Katzenbach*.²⁰² Given *Katzenbach*’s explicit and unchallenged holding that the States cannot claim due process protections, the D.C. Circuit explained that it would “be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states,” who “both derive important benefits [from the Constitution] and must abide by significant limitations as a consequence of their participation [in the Union],” and “who help make up the very fabric of that system.”²⁰³

The D.C. Circuit also relied on several structural and historical principles beyond the strong analogy to *Katzenbach*, explaining that “[n]ever has the Supreme Court suggested that foreign nations enjoy rights derived from the Constitution, or that they can use such rights to shield themselves from adverse actions taken by the United States.”²⁰⁴ That was not surprising— “[r]elations between nations in the international community are seldom governed by the domestic

²⁰⁰ *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Indian Tribe*, 422 U.S. 653, 667 (1979)).

²⁰¹ *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

²⁰² *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002).

²⁰³ *Id.* (quoting *Principality of Monaco*, 292 U.S. at 330).

²⁰⁴ *Id.* at 97.

law of one state or the other.”²⁰⁵ To the contrary, “[u]nlike private entities”—and unlike the States—“foreign nations are the juridical equals of the government that seeks to assert jurisdiction over them” and have available “a panoply of mechanisms in the international arena through which to seek vindication or redress.”²⁰⁶ And since “legal disputes between the United States and foreign governments are not mediated through the Constitution,” the court concluded that it would be “quite strange to interpret the Due Process Clause as conferring upon [foreign states] rights and protections *against* the power of federal government.”²⁰⁷ In that regard, “it is not to the due process clause but to international law and to the comity among nations, as codified in part by the FSIA, that a foreign state must look for protection in the American legal system.”²⁰⁸

The D.C. Circuit thus found that granting sovereign foreign states due process rights not only had no grounding in—and indeed was contrary to—the Fifth Amendment’s text and purpose, but would also subvert foundational and long-standing constitutional and international structures and principles. Every other federal court that has confronted the issue since has agreed with the D.C. Circuit.²⁰⁹

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 98; *cf. id.* (“[T]he constitutional law of personal jurisdiction secures interests quite different from those at stake when a sovereign nation such as Libya seeks to defend itself against the prerogatives of a rival government. It therefore follows that foreign states stand on a fundamentally different footing than do private litigants who are compelled to defend themselves in American courts.”).

²⁰⁷ *Id.* at 97.

²⁰⁸ *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 300 (D.C. Cir. 2005).

²⁰⁹ See e.g., *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012) (explicitly agreeing with the D.C. and Second Circuits that that have held that foreign sovereigns lack due process rights); *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393 (2d Cir. 2009) (overruling its previous holding that foreign states did have due process rights and ruling that they do not); *Altmann v. Republic of Australia*, 142 F. Supp. 2d 1187, 1207-08 (C.D. Cal. 2001) (finding implicit support in Ninth Circuit precedent for its holding that foreign sovereigns are not “persons” under the Due Process Clause). Indeed, the States are generally treated more favorably—not less—than foreign nations in doctrines related to sovereign relations with the United States. For instance, *Price* noted, while “Congress lacks the power under Article I to abrogate the sovereign immunity of the States of the Union ... nothing in the Constitution limits congressional authority to modify or remove the sovereign immunity that foreign states otherwise enjoy.” *Price*, 294 F.3d at 99 (citing *Alden v. Maine*, 527 U.S. 706, 712

To be sure, many of the relevant assets are technically under the control not of the Russian Federation but of the CBR.²¹⁰ But that makes no difference. The CBR is a state instrumentality and is indistinguishable from the Russian Federation for purposes of due process. To our knowledge, no court has ever held that a foreign state-owned corporation or state instrumentality has any constitutional rights. It would be anomalous in the extreme for a state-owned and state-directed entity to possess constitutional rights vis-à-vis the United States that the state itself does not enjoy. To be sure, in the context of the Foreign Sovereign Immunities Act, the Supreme Court has treated foreign instrumentalities differently from foreign sovereigns for purposes of liability.²¹¹ But no court has held that a similar distinction applies for purposes of determining due process rights of foreign instrumentalities.²¹²

But even if that distinction were treated as significant, the Due Process Clause would still not apply to the CBR, given how closely it is related to and integrated with Russia as a sovereign.

(1999)); cf. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (“[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”).

²¹⁰ See Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140.

²¹¹ In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), a government-owned bank in Cuba sought to collect a letter of credit by seizing assets of American bank that were located in Cuba. The government-owned bank then sued the American bank in federal court, and the American bank countersued. The question was whether that countersuit was proper, given that the FSIA “immunize[d] an instrumentality owned by a foreign government from suit on a counterclaim based on actions taken by that government.” *Id.* at 619-20. And the Court’s analysis was predicated on the FSIA’s statutory language and congressional intent, two factors that are not similarly present in construing the constitutional question at issue here. See *id.* at 627 (“During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.”); see also *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018) (recognizing that Congress in 2008 amended the FSIA to partially abrogate *Bancec* by limiting a foreign instrumentality’s immunity to attachment, underscoring that *Bancec* was a statutory holding, not a constitutional one).

²¹² The D.C. Circuit has suggested that the *Bancec* test might be used to determine whether a foreign entity is sufficiently independent to be considered a foreign corporation, rather than a foreign instrumentality, for the purposes of due process rights. But it emphasized that “it is far from obvious that even an independent [foreign instrumentality] would be entitled to the protection of the fifth amendment,” since “aliens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.” *TMR Energy Ltd.*, 411 F.3d at 302 n.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

And if the CBR were independent, which it is not, it is unlikely it would possess rights in this context given that the Supreme Court has recently cut back the constitutional protections owed to foreign entities if they operate outside the United States, which describes the CBR precisely.²¹³

Turning to the independence analysis, in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (“*Bancec*”), the Supreme Court clarified that if an entity is independent in both corporate form and in practice, then it will be regarded as a separate entity for purposes of the FSIA, but if it is in form or practice an “agent” or arm of the state, then it will be treated as the sovereign itself.

Applying the *Bancec* test, the D.C. Circuit concluded that the State Property Fund, located in Ukraine, should not be “treated as a legal personality separate from the State of Ukraine.”²¹⁴ That was so because the State Property Fund performed “classic government functions,” such as “implementing national policy, issuing regulations binding on state agencies of executive power,” and “participating in the development and conclusion of international agreements on property and use of state-owned property.”²¹⁵ In addition, the Fund’s chairman was “appointed and discharged by the President of Ukraine subject to the consent of the [legislature],” its other members were approved by the legislature, and its budget was connected to the state budget.²¹⁶ “From these structural features,” it was “apparent” to the D.C. Circuit that the Fund was “an agent of the State, barely distinguishable from an executive department of the government, and should not be treated as an independent juridical entity.”²¹⁷

²¹³ See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082 (2020).

²¹⁴ *TMR Energy Ltd.*, 411 F.3d at 300.

²¹⁵ *Id.* (cleaned up).

²¹⁶ *Id.* at 302.

²¹⁷ *Id.*

This perfectly describes the role of the CBR. The CBR is Russia's central bank, and its responsibilities and powers are detailed in the Russian Constitution.²¹⁸ It coordinates the nation's response to currency and inflation concerns. Russia's president, Vladimir Putin, personally appoints the head of the Bank, exercises significant influence over the Bank's head, and maintains plenary removal power.²¹⁹ The twelve-member committee that directs the CBR's monetary policy and financial regulation is composed of only one member from the CBR itself but includes three representatives from the Finance Ministry, three from the presidential administration, and five representatives from the legislature.²²⁰ However one slices it, there is no question about the connection between the CBR and the Russian state: it is an "integral part of a foreign state's political structure"²²¹ and cannot be considered an independent corporation. Consequently, even if *some* foreign instrumentalities possess due process rights under *Bancec*, the CBR is not one of them since it is not sufficiently independent from Russia.

Tellingly, those who believe that foreign nations deserve due process rights cannot (and do not) dispute that current law holds otherwise. Instead, they argue that current law is wrong, based on a supposedly originalist understanding of the Due Process Clause and its application to foreign states.²²² Whatever the merits of this dubious position, it is highly unlikely that a reviewing court

²¹⁸ See Russian Constitution art. 75, https://www.constituteproject.org/constitution/Russia_2014?lang=en#s495 ("Money emission shall be carried out exclusively by the Central Bank of the Russian Federation. The introduction and emission of other currencies in Russia shall not be permitted. Protecting and ensuring the stability of the rouble shall be the principal function of the Central Bank of the Russian Federation, which it shall fulfil independently of other State governmental bodies.").

²¹⁹ *Russian Central Banker Wanted Out of Ukraine, Putin Said No*, BLOOMBERG NEWS (Mar. 23, 2022), <https://www.bloomberg.com/news/articles/2022-03-23/russia-central-banker-wanted-out-over-ukraine-but-putin-said-no#xj4y7vzkg>.

²²⁰ *National Financial Board*, BANK OF RUSSIA (updated Nov. 11, 2021), https://www.cbr.ru/eng/about_br/nfs/ (listing board members).

²²¹ *TMR Energy*, 411 F.3d at 300.

²²² See Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 635 (2019) ("[M]odern case law generally excludes foreign states and some foreign state-owned corporations from constitutional protections... . The Supreme Court has suggested, and lower courts have held, for

would buck decades of precedent and tradition, particularly in circumstances involving ongoing Russian atrocities against the Ukrainian people.²²³

The broader context of these decisions elucidates why such a marked shift in the law is especially implausible in principle and unlikely in practice. In the foreign affairs context, deference to the political branches is at its highest.²²⁴ As a result, much of foreign affairs is conducted by the political branches—meaning that it can, does, and should evolve to address the evils of the present moment.²²⁵ It would be altogether impractical for a President to constantly assess how the Founders would have thought about a particular sanction, or how their generation would have understood the relevant terms of reference. Indeed, “pragmatic or consequentialist justifications for originalism are potentially weak in the area of foreign affairs, particularly given the profound changes over time in the Presidency as an office, the military and economic strength of the United

example, that foreign states are not ‘persons’ within the meaning of the Due Process Clause of the Fifth Amendment.”).

²²³ For instance, Professor Ingrid (Wuerth) Brunk’s article argues that *Principality of Monaco v. Mississippi*, one of the most foundational federal courts and constitutional cases in American law for well over a century, and *Katzenbach*, a foundational civil rights case which upheld the constitutionality of the Civil Rights Act, are both wrongly decided. *Id.* at 648-49. Applying the Supreme Court majority’s most recent stare decisis test, this would have a high bar to hurdle: showing that the cases were egregiously wrong; that the quality of their reasoning was utterly lacking; that their rules proved wanting in “workability;” that they had worked severe disruption in other areas of law; and that there had been insufficient concrete reliance on their content. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022). Even if Wuerth could show that those decisions were wrongly decided, it seems exceedingly unlikely they would be overturned, given that they have established workable rules upon which decades of sound and administrable doctrine has been built and on which decades of Supreme Court caselaw and countless sovereign and private stakeholders have relied.

²²⁴ *See, e.g., Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (opinion of Kennedy, J.) (explaining that “in the realm of international law,” it is “even more important ... to look for legislative guidance before exercising innovative authority over substantive law.”); *Dep’t of Navy v. Egan*, 484 U. S. 518, 530 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in ... national security affairs.”); *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020) (“The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.”); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016) (“[F]oreign affairs [is] a domain in which the controlling role of the political branches is both necessary and proper.... 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.” (citing *Dames & Moore*, 453 U.S. at 673-74, 679-81)).

²²⁵ Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5, 6, 20-22 (2008).

States, the conduct of war, and the content of international law.”²²⁶ The job of the political branches is to respond to these sorts of changes. For these reasons and others, scholars have acknowledged that originalist-driven arguments hold little weight in the arena of foreign affairs.²²⁷

Courts have agreed.²²⁸ In his highly influential *Youngstown* concurrence, Justice Robert Jackson went to great length to disparage the utility of originalism in such a case.²²⁹ *Dames & Moore* also ignores originalist methods in favor of the pragmatic approach Justice Jackson outlined in *Youngstown*.²³⁰ Even opinions concerning the realm of foreign affairs that facially undertake

²²⁶ *Id.* at 6.

²²⁷ *Id.* (“[A]rguments about originalism are at best underdeveloped and at worst weak when it comes to many constitutional issues that arise in the foreign affairs arena.”); see also Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown’s Shadow*, 53 ST. LOUIS U. L.J. 29, 30 (2008) (“[T]he reason why the case for foreign affairs originalism may ultimately be so unconvincing is the movement toward functionalism as a means of resolving separation-of-powers conflicts, particularly in cases implicating foreign affairs. Thus, whatever may be said about the suitability or theoretical utility of originalism generally, or in the field of foreign affairs specifically, it is hard to square any case for foreign affairs originalism with the methodological framework at the heart of the Supreme Court’s contemporary separation-of-powers jurisprudence.”); Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, Law & Contemp. Probs., Autumn 2004, at 169, 172 (“More systemically, the Founding generation simply left unresolved many central foreign affairs questions, such as whether the President and Senate or the President alone may terminate treaties, thus leaving such matters to be resolved through custom.”).

²²⁸ Andrew Kent, *The New Originalism and The Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 757 (2013) (“[T]here are dozens of important Supreme Court decisions on constitutional foreign affairs issues that pay little or no attention to the original meaning of specific textual provisions of the Constitution.” (compiling the following cases: *Arizona v. United States*, 567 U.S. 387 (2012); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012); *Medellín v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000); *Breard v. Greene*, 523 U.S. 371 (1998); *Regan v. Wald*, 468 U.S. 222 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Haig v. Agee*, 453 U.S. 280 (1981); *DeCanas v. Bica*, 424 U.S. 351 (1976); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Perez v. Brownwell*, 356 U.S. 44 (1958); *United States v. Caltex (Phil.) Inc.*, 344 U.S. 149 (1952); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *MacKenzie v. Hare*, 239 U.S. 299 (1915); *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *Neely v. Henkel*, 180 U.S. 109 (1901); *The Paquete Habana*, 175 U.S. 677 (1900); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *In re Ross*, 140 U.S. 453 (1891); *Jones v. United States*, 137 U.S. 202 (1890); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ker v. Illinois*, 119 U.S. 436 (1886); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850))).

²²⁹ *Youngstown*, 343 U.S. at 634-35 (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.”).

²³⁰ See Vladeck, *Foreign Affairs Originalism*, *supra* note 227, 53 ST. LOUIS U. L.J. at 31 (“[T]here is an inherent incongruity between Jackson’s separation-of-powers functionalism and foreign affairs originalism. Indeed, this incongruity does not just bear out Professor Flaherty’s observation that Jackson’s concurrence in *Youngstown* is

some originalist analysis do so at a “very high level of generality, and end[] up finding that nonhistorical considerations such as precedent, functionalism, and abstract constitutional principles are decisive.”²³¹ Any meaningful deference to the Executive demands a pragmatic and principle-driven approach, a fact that the Supreme Court and lower courts all have recognized. Here, in an area of settled law on an issue of political and international significance, the originalist approach should not (and would not) get litigants very far.

Finally, even assuming Russia could claim entitlement to “due process of law” when “deprived of ... property” by the United States Government, the process due would likely be relatively minimal. As the Supreme Court has held, “[d]ue process is flexible,”²³² and requires the weighing of interests.²³³ Thus, a hearing is not always required prior to the government taking of the property interest, especially when—as is the case here—a pre-deprivation hearing would frustrate if not altogether undermine the government’s ability to advance its obviously legitimate and indeed compelling interest.²³⁴ Indeed, time is of the essence in Ukraine—the country needs assistance now, rather than later, when any delay threatens to undermine the entire purpose of the transfer in the first place: to help Ukraine respond to (and eventually rebuild from) the extraordinary and unusual threat that Russia’s illegal war poses to the country and to the world

‘among the most anti-originalist opinions in the modern canon.’ Rather, it demonstrates how, in *Youngstown*’s shadow, there is exceedingly little room for foreign affairs originalism in any form.”).

²³¹ Kent, *The New Originalism*, *supra* note 228, 82 FORDHAM L. REV. at 758.

²³² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

²³³ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (“[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

²³⁴ *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

while it still can.²³⁵ That interest far outweighs any countervailing considerations for affording pre-deprivation process here. And courts that have addressed due process concerns in the IEEPA context have permitted post-deprivation written statements by the agency administering the President’s directive as satisfying any due process concerns.²³⁶ There is no reason that such a post-deprivation process would not be sufficient in this case too, where Russia would not suffer material harm in allowing that process to unfold, while making Ukraine wait for that process to run its course—which likely could take years—would put at risk its very ability ever to recover. All told, the due process calculus is not close.

2. The Takings Clause Does Not Bar the Proposed Transfer

Russia, as well as the CBR, would fare no better seeking refuge under the Takings Clause (or, as it is sometimes called, the Just Compensation Clause). The Takings Clause prohibits the government from taking “*private* property ... for public use, without just compensation.”²³⁷ To our knowledge, no court has held that foreign sovereigns themselves (or their instrumentalities) possess rights under the Takings Clause. Nor is a court likely to extend such rights.

This conclusion is supported by first principles. *First*, the Takings Clause draws a distinction between foreign and domestic individuals. Although the Clause extends takings rights to domestic individuals from the start, foreign citizens who live outside of the territory of the

²³⁵ See, e.g., Natasha Bertrand, Oren Liebermann & Jennifer Hansler, *US and NATO grapple with critical ammo shortage for Ukraine*, CNN (July 18, 2023), <https://www.cnn.com/2023/07/18/politics/ukraine-critical-ammo-shortage-us-nato-grapple/index.html>; Lara Jakes, Andrew E. Kramer & Eric Schmitt, *After Suffering Heavy Losses, Ukrainians Paused to Rethink Strategy*, N.Y. TIMES (July 15, 2023), <https://www.nytimes.com/2023/07/15/us/politics/ukraine-leopards-bradleys-counteroffensive.html>; Sanya Mansoor, *Why Experts Are Growing Alarmed About Ukraine’s Air Defenses*, TIME (Apr. 13, 2023), <https://time.com/6271538/ukraine-air-defense-shortages-russia/>; Sanya Mansoor, *Why the West Is Getting Nervous About Ammunition Shortages for Ukraine*, TIME (Mar. 16, 2023), <https://time.com/6263802/ukraine-west-ammunition-shortages/>.

²³⁶ See e.g., *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 49-50 (D.D.C. 2005); *Zevallos v. Obama*, 10 F. Supp. 3d 111, 127-28 (D.D.C. 2014).

²³⁷ U.S. Const. amend. V (emphasis added).

United States do not automatically possess such rights under the Constitution and can only assume such rights if they “have come within the territory of the United States and developed substantial connections with this country.”²³⁸

Second, the proposed transfer concerns sovereign property. The Supreme Court has extended Takings Clause protections to States and their municipalities, despite the apparent atextuality of applying the Clause to public property.²³⁹ Foreign governments, however, are not situated similarly to States for purposes of the Fifth Amendment in this regard. Although States are generally understood as possessing certain rights under the Constitution, it bears repeating that the Supreme Court has “*never* suggested that foreign nations enjoy rights derived from the Constitution” in any sense.²⁴⁰

This differing treatment afforded to foreign nations (as compared to States) flows from the Constitution’s design: “The States are integral and active participants in the Constitution’s infrastructure, and they both derive important benefits and must abide by significant limitations as a consequence of their participation.”²⁴¹ A “foreign State,” by contrast, “lies outside the structure

²³⁸ *Verdugo-Urquidez*, 494 U.S. at 271; *see also id.* at 270-72 (“[Respondent] also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. *See, e.g., ... Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment) ... These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” (citing *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982))).

²³⁹ *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (“The text of the Fifth Amendment certainly does not mandate a more favorable rule of compensation for public condemnees than for private parties. To the contrary, the language of the Amendment only refers to compensation for ‘private property,’ and one might argue that the Framers intended to provide greater protection for the interests of private parties than for public condemnees. ... [But] [w]hen the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to ‘private property’ in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.”).

²⁴⁰ *Frontera Resources*, 582 F.3d at 399 (emphasis added) (cleaned up).

²⁴¹ *Price*, 294 F.3d at 96.

of the Union” altogether.²⁴² As one court aptly explained, “the Constitution does not limit foreign states, as it does the States of the Union, in the power they can exert against the United States or its government. Indeed, the Federal Government cannot invoke the Constitution, save possibly to declare war, to prevent a foreign nation from taking action adverse to the interest of the United States or to compel it to take action favorable to the United States.”²⁴³ For that reason, it makes little sense to interpret the Constitution (let alone the Takings Clause) as conferring upon a foreign state “rights and protections *against* the power of federal government.”²⁴⁴

This differing position is also clear from history and tradition. As explained above, disputes between nations are not mediated by the Constitution.²⁴⁵ Rather, “sovereign states interact with each other through diplomacy and even coercion”²⁴⁶ That is why land disputes between sovereigns dating back to the early history of the Nation were never formulated or resolved through the lens of the Takings Clause—it simply did not apply, nor was it ever understood as applying.²⁴⁷ By comparison, questions and disputes between States, and between the States and the Federal Government, over control of land have been central constitutional issues from the start.²⁴⁸ Accordingly, as with individuals, the Constitution applies asymmetrically between domestic and foreign sovereigns, with the latter receiving no protections from it.

²⁴² *Id.* (quoting *Principality of Monaco*, 292 U.S. at 330).

²⁴³ *Id.* at 97.

²⁴⁴ *Id.*

²⁴⁵ *See supra* 55-56.

²⁴⁶ *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 202 (D.C. Cir. 2001).

²⁴⁷ *Cf. Agee*, 453 U.S. at 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *The Amy Warwick*, 67 U.S. 635, 671 (1862) (“The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war.”).

²⁴⁸ *See, e.g.,* THE FEDERALIST NO. 7 (Alexander Hamilton) (describing, at some length, various territorial disputes between States to explain why the Constitution now prevents such dispute resolution moving forward); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 824-25 (1995).

Third, presidential action in response to an international emergency has seldom been understood to be limited by the Takings Clause. That is true even when the action concerned the property of domestic individuals, *i.e.*, the people universally recognized as possessing the strongest automatic takings protections in this area.²⁴⁹ As the Supreme Court declared well over a century ago:

[a] new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? ... [W]as it ever imagined this was taking private property without compensation ... ?²⁵⁰

Moreover, concerning foreign states specifically, “[e]conomic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them.”²⁵¹ These commonsense intuitions behind treating the Takings Clause as having little to say in the foreign-affairs arena are bolstered by the equally compelling concern that conferring such protections to foreign states would raise a host of difficult questions that would thrust our judiciary into the diplomatic fray, resulting in numerous potential

²⁴⁹ Cf. *Pink*, 315 U.S. at 237-38; see also *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (no taking due to shutdown of non-essential gold mines because “[i]n the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income”); *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (Temp. Emer. Ct. App. 1975) (no taking by federal order during the Arab oil embargo that an oil production company must sell oil to a particular refiner); *Paradissiotis v. United States*, 49 Fed. Cl. 16, 23 (2001), *aff’d*, 304 F.3d 1271 (Fed. Cir. 2002) (no taking where sanctioned person lost value of stock investments where “[i]t is unfortunate that plaintiff lost his property outright” because [t]he preservation of the national security interest of the United States nevertheless greatly outweighs plaintiff’s loss”); *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988); *767 Third Avenue Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995); *Miranda v. Sec’y of the Treasury*, 766 F.2d 1 (1st Cir. 1985); *Propper v. Clark*, 337 U.S. 472, 481-82 (1949).

²⁵⁰ *Paradissiotis*, 304 F.3d 1271, 1274 (Fed. Cir. 2002) (quoting *Legal Tender Cases*, 79 U.S. 457, 551 (1870)).

²⁵¹ *Id.* at 1275.

practical and administrative problems, many of which are explored thoroughly in other parts of the report.²⁵²

Regarded as a whole, the foregoing discussion supports the conclusion that the Takings Clause does not offer Russia any basis for claiming compensation or otherwise lodging an objection if the President transfers Russia's sovereign funds to Ukraine under IEEPA or indeed any other federal statute. An alternative outcome would be particularly perverse here. It would empower Russia to invoke the United States Constitution's requirement of just compensation for certain takings of private property to secure compensation to cover the cost of reparations designed specifically to make Russia help rebuild the cities and communities it has destroyed. If Russian operatives were to destroy an American neighborhood and be forced to compensate its occupants for the harm done, it could hardly appeal to the Takings Clause to insist on just compensation for the resulting reduction in its bank deposits. The Constitution does not compel such an absurdity. Just as our Constitution famously is "not a suicide pact,"²⁵³ so too it is not a War Criminals' Reward Certificate. Russia alone must bear the costs of relieving the burdens it has unlawfully inflicted upon Ukraine.

D. There Are No External Statutory Constraints on the President's Authority to Transfer Russian Assets to Ukraine Under IEEPA

No other statute would obstruct the President's transfer of Russian assets pursuant to his

²⁵² See *supra* Section III.A.1, Section III.D.1. In addition, for instance, courts would be forced to determine whether (and if so, the circumstances in which) regulations, tariffs, economic freezes, and occasional uncompensated seizures violate the Takings Clause. But as courts have long recognized, those are issues best left to the political branches. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004). Such judicial restraint "guards against our courts triggering ... serious foreign policy consequences" *Jesner*, 138 S. Ct. at 1390 (quoting *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124 (2013)); see also Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 532 (1987) ("If the Supreme Court were to construe the fifth amendment's takings clause to give foreign states that reject the United States position on just compensation the right to that standard in United States courts over the objection of the political branches, it would deprive the United States of an important tool of leverage in foreign relations: the power to insist on reciprocal treatment.").

²⁵³ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

authority under IEEPA. Below, this report addresses two of the most salient statutory constraints on executive power: the Foreign Sovereign Immunities Act (“FSIA”) and the Administrative Procedure Act (“APA”). Neither statute poses a barrier to the proposed transfer.

1. The FSIA Does Not Apply to the Proposed Transfer

The FSIA is exceedingly unlikely to prohibit the proposed transfer of Russian assets, provided that (as this report recommends) the transfer process constitutes purely executive action and does not involve the courts.

The FSIA was enacted to codify the basic requirements of international treaty obligations and sovereign immunity principles under customary international law. The statute protects foreign states—and their agencies and instrumentalities—from the jurisdiction of federal and state courts, as well as their property from “attachment, arrest, and execution” to satisfy court judgments.²⁵⁴ A purely executive action to seize or freeze foreign assets, such as an executive order or agency order issued pursuant to IEEPA, would neither subject Russia to the jurisdiction of the U.S. Courts nor require court approval. It also would not involve “attachment, arrest, [or] execution,” which are terms that are understood to relate to court proceedings and processes.²⁵⁵ This is one of the principal reasons why the FSIA does not constrain IEEPA’s blocking authorities. On this, critics agree.²⁵⁶

Recent Supreme Court precedent supports this understanding and reading of the FSIA. Just this past term, in *Türkiye Halk Bankası S.A. v. United States* (“*Halkbank*”), the Court held that the FSIA does not apply to criminal proceedings since the statute is exclusively limited to civil actions. 598 U.S. 264 (2023). The Court explained that the FSIA’s text (which used terms like “litigants”

²⁵⁴ See 28 U.S.C. § 1609.

²⁵⁵ *Id.*; see also *Türkiye Halk Bankası S.A. v. United States*, 598 U.S. 264, 272 (2023).

²⁵⁶ E.g., Stephan, *Giving Russian Assets to Ukraine*, *supra* note 90.

and “suits”) strongly “indicate[d] that the statute *exclusively addresses civil suits* against foreign states and their instrumentalities,”²⁵⁷ and found it significant that the FSIA is codified in the civil procedure section of the U.S. Code. “[I]f Halkbank were correct that the FSIA immunizes foreign states and their instrumentalities from criminal prosecution,” the Court concluded, “the subject undoubtedly would have surfaced somewhere in the Act’s text” since “Congress typically does not ‘hide elephants in mouseholes.’”²⁵⁸

The Court’s reasoning in *Halkbank* supports the conclusion that the FSIA does not confer any immunities in the context of an executive transfer—an action that has far less in common with a civil lawsuit than does a criminal action. The civil procedure terms in the statute on which the Court placed significant interpretive weight would be even more foreign to an executive seizure action, as there are no “litigants” or “suits” involved in the President’s invocation of IEEPA to transfer foreign property. So too would the contextual limitation: If Congress intended to extend immunity from executive actions—something that would carry with it significant separation of powers questions given the primacy of the Executive in matters of foreign relations—it is quite unlikely that it would do so implicitly, and in the context of a statute that, as the Court detailed, is clearly focused on civil court actions.

The *Halkbank* Court also offered structural and policy reasons for refusing to extend the FSIA’s protections to criminal proceedings. For instance, the Court found it incredulous that “a purely commercial business that is directly and majority-owned by a foreign state could engage in criminal conduct affecting U.S. citizens and threatening U.S. national security while facing no criminal accountability at all in U.S. courts.”²⁵⁹ “Nothing in the FSIA,” the Court held, required

²⁵⁷ *Türkiye*, 598 U.S. at 273 (emphasis added).

²⁵⁸ *Id.* at 948.

²⁵⁹ *Id.* at 949-50.

that outcome.²⁶⁰ The same holds true here. Nothing in the FSIA supports the equally concerning outcome that a hostile foreign state could, on one hand, engage in conduct that the President has identified as constituting an international emergency adversely affecting the vital interests of the United States and, on the other hand, assert that the foreign state's U.S.-based assets must be shielded from any action that the President might deem necessary to address such an emergency. Ultimately, the FSIA poses no barriers to the proposed transfer.

2. The Proposed Transfer Clears Any Hurdles Erected by the APA

Nor is the APA a potential bar to the proposed transfer. The APA provides that a person “adversely affected or aggrieved by agency action” can seek judicial review of that action.²⁶¹ Presidential action is not subject to the requirements of the APA.²⁶² But executive action administered by agencies is reviewable under the Act.²⁶³ Executive action taken under IEEPA is administered by the Office of Foreign Assets Control (“OFAC”), which sits within the Department of Treasury.²⁶⁴ Despite the fact that OFAC actions arise in the context of international emergencies, IEEPA does not contain a provision expressly precluding judicial review, and courts have thus reviewed agency actions taken pursuant to that enactment.²⁶⁵ Moreover, while the appropriateness of an emergency declaration is a political question entrusted to the Executive

²⁶⁰ *Id.* at 950.

²⁶¹ 5 U.S.C. § 702.

²⁶² *Dalton v. Specter*, 511 U.S. 462, 469 (1994) (“[T]he President’s actions [are] not reviewable under the APA, because the President is not an ‘agency’ within the meaning of the APA.”) (internal citation omitted).

²⁶³ *See, e.g., Chamber of Com. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (“[T]hat the Secretary’s regulations are based on the President’s Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.”).

²⁶⁴ *World Fuel Corp. v. Geithner*, 568 F.3d 1345, 1347 n.1 (11th Cir. 2009); *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1255 (D.C. Cir. 2002).

²⁶⁵ *See, e.g., Holy Land Found.*, 333 F.3d 156 at 162. Even if actions taken pursuant to IEEPA were not reviewable under the APA, a plaintiff could likely secure jurisdiction through *ultra vires* actions. *E.g., Adamski v. McHugh*, 304 F.Supp.3d 227, 236-37 (D.D.C. 2015) (collecting cases); *see also Open Soc’y Just. Initiative v. Trump*, 510 F. Supp. 3d 198, 214 (S.D.N.Y. 2021).

Branch and insulated from judicial challenge, purely legal questions concerning the scope of the Executive's authority under IEEPA are not.²⁶⁶

Challenges under the APA in this context are narrower and more limited on two fronts. The first concerns the kinds of challenges potential plaintiffs can levy. Since OFAC actions pertain to "foreign affairs function[s]," the agency is currently exempt from notice-and-comment requirements.²⁶⁷ The second concerns the level of deference afforded to the Executive action: courts have universally recognized that agency actions taken by virtue of the authority vested by Congress through IEEPA are entitled to far greater deference than what is typical.²⁶⁸ And the typical standard, that a designation should be "should be struck down if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" is already relatively permissive.²⁶⁹ That difference in degree of deference, of course, reflects the foreign affairs context

²⁶⁶ *Holy Land Found.*, 333 F.3d at 162-63; *Chang*, 859 F.2d at 896 n.3. The difference concerns the ability of courts to review Executive Action in the first instance. In *Zivotofsky v. Clinton*, for example, the Supreme Court first held that the legality of the Executive Branch decision to disobey Congress's demand regarding passport designation for children born to U.S. citizens in East Jerusalem (a demand that Jerusalem be designated on each such passport as the capital of Israel) was a justiciable rather than political question. 566 U.S. 189 (2012). Several years later, in *Zivotofsky v. Kerry*, the Court declared that the underlying determination the Executive Branch made regarding the passport designation was entrusted to the President alone and not subject to judicial reversal. 576 U.S. 1 (2015). Although the outcome was the same as it would have been had the Court treated the question as unreviewable political in the first instance, a holding to the latter effect would have left the matter judicially unresolved, leaving the plaintiff in an undefined legal limbo and the State Department in a quandary as to whether its continued defiance of the congressional command regarding this politically explosive matter was constitutionally permissible.

²⁶⁷ 5 U.S.C. § 553(a)(1).

²⁶⁸ See, e.g., *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007) ("[O]ur review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential"); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F.Supp.2d 57, 84 (D.D.C. 2002) ("Blocking orders are an important component of U.S. foreign policy, and the President's choice of this tool to combat terrorism is entitled to particular deference."), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003); see also Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 685 (2008) ("Owing to the placement of anti-terrorist finance at the intersection of administrative law, national security, foreign relations, and counterterrorism, the standard of review employed by the courts to many of the initiatives introduced in this area tends to be light on critical inquiry and heavy on deference."); *Presidential Power to Regulate Domestic Litig. Involving Iranian Assets*, 4A OP. O.L.C. 236, 240 (1980).

²⁶⁹ Chachko, *Administrative National Security*, *supra* note 85, 108 GEO. L.J. at 1100 (quoting 5 U.S.C. § 706(2)(A)).

in which IEEPA arises.²⁷⁰ Accordingly, in practice, potential plaintiffs face significant hurdles to securing relief under the APA by challenging OFAC orders so long as OFAC's actions rest on plausible interpretations of IEEPA.²⁷¹ As explained above, construing Subsection B of IEEPA to allow for the proposed transfer is not just plausible, it is the only reading supported by the plain text of the statute.²⁷²

It is true that courts have recently expressed a growing appetite to second-guess domestic executive action absent clear congressional delegations. The Supreme Court's newly minted "Major Questions Doctrine" ("MQD") reflects this trend. The MQD applies to issues of "economic and political significance" and actions the Court perceives that Congress had failed with sufficient

²⁷⁰ See *Regan*, 468 U.S. at 242 ("Matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (internal citation omitted)).

²⁷¹ Because of a case pending in the Supreme Court as of this report's release, *Loper Bright Enters. v. Raimondo*, No. 22-451 (2023), *cert. granted* May 1, 2023, the correct standard for reviewing an agency's action resting on a contested interpretation of the federal statutes creating the agency and those it administers is unsettled. For nearly four decades, federal agencies have been deemed entitled to what is called "*Chevron* deference" in that respect. At its core, the principle has been that courts, when confronted with a challenge to the legality of agency action, are to ask two questions: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Such *Chevron* deference has increasingly come under question from a variety of perspectives, some going to the very nature of the separation of powers and the ultimate relationships among the Federal Judiciary, Congress, the President, and the alphabet soup of federal agencies. Whatever the Supreme Court does to the *Chevron* doctrine in the pending *Loper Bright Enterprises* case set to be argued in Fall 2023, the considerations canvassed in the text for according the President extraordinary deference in the realm of foreign affairs seem likely to contain the impact of that case to the domestic context—to the degree that domestic and foreign affairs can be disentwined.

²⁷² Russia has threatened to sue the United States in federal court for sanctions in the past. Damien Sharkov, *Russia Will Sue U.S. Over Diplomatic Sanctions, Says Moscow's Top Diplomat*, NEWSWEEK (Jan 15, 2018, 8:28 AM), <https://www.newsweek.com/russia-will-sue-us-over-diplomatic-sanctions-says-moscows-top-diplomat-781412>. Other countries subject to sanctions under IEEPA have sued. See, e.g., *Iran-U.S. Claims Tribunal Decision on Shah's Assets*, 94 AM. J. INT'L L. 677, 704 (Oct. 2000) (explaining that "[a]ll of Iran's lawsuits in U.S. courts [to recover the Shah's assets] were eventually dismissed").

specificity to empower the agency to take.²⁷³ But there is no indication that the MQD applies to purely foreign affairs actions like the proposed transfer of Russian assets.

For good reason. Concerns about overly broad and ambiguous congressional delegations, which animate the MQD's requirement of specificity almost to the point of clairvoyance when Congress is legislating for future exigencies, are at their lowest ebb in the realm of foreign affairs. As discussed above, courts have universally recognized that such delegations are necessary in the foreign affairs context.²⁷⁴ Indeed, the Supreme Court has long acknowledged that it would be “unwis[e]” to require Congress “to lay down narrowly definite standards by which the President is to be governed” in exercising his foreign affairs powers.²⁷⁵ Through IEEPA, Congress has set forth intelligible principles by which the President must exercise his powers to respond to and address international emergencies. When the President exercises those powers, he is acting “pursuant to an express ... authorization of Congress” and his “authority is at its maximum.”²⁷⁶

Applying the MQD here would also disturb the traditional separation of powers. It would require the President to seek the blessing of courts and Congress to act during an emergency related to a foreign nation.²⁷⁷ In *Dames & Moore*, the Court explained that the precisely apposite authorization of Congress would be difficult to expect in “international crises the nature of which Congress can hardly have been expected to anticipate in any detail.”²⁷⁸ Demanding that Congress provide specific authorization before the President's exercise of his authority under IEEPA would

²⁷³ See e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2358 (2023).

²⁷⁴ See *supra* Section III.A.

²⁷⁵ *Curtiss-Wright*, 299 U.S. at 321-22.

²⁷⁶ *Youngstown*, 343 U.S. at 635.

²⁷⁷ See e.g., Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989).

²⁷⁸ *Regan*, 453 U.S. 654 at 669 (1982).

hinder his ability to make decisions in real time to address international emergencies that it would have been impossible to anticipate, certainly not with any specificity, years ahead of time. Given the importance of economic sanctions to foreign affairs, any suggestion that Congress must first approve every “important” economic decision taken pursuant to IEEPA (and similar statutes) would grind American foreign policy to a halt.

At any rate, even if a court were to apply an MQD argument against the proposed transfer, that argument would fail on the merits. Fundamental to the MQD analysis is consideration of the “history ... of the authority” that is being asserted.²⁷⁹ The transfer of foreign assets is an authority Presidents have used numerous times, dating back to TWEA.²⁸⁰ The President’s authority to act in this manner has never been questioned or rejected. Moreover, the role that international treaties and agreements play in any action the President might take further underscores how it would be a category mistake for the Court to apply the MQD to issues like these. In *Murray v. Schooner Charming Betsy*, the Supreme Court explained that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²⁸¹ Here, the law of nations clearly counsels in favor of allowing the transfer of Russian assets because such an action would accord with international obligations and would be conducted as part of a concerted international effort to hold Russia accountable for its atrocities against Ukraine and its people.²⁸²

Thus, neither the MQD nor any other statutory or constitutional constraint prevents the President from doing what Congress has clearly empowered him to do by statute: under IEEPA, he has the unambiguous authority to transfer Russia’s U.S.-based assets to Ukraine.

²⁷⁹ *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) (internal citation omitted).

²⁸⁰ See e.g., *supra* Part III.B.

²⁸¹ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

²⁸² See *infra* Section IV.D.

IV. International Law Permits the United States and Allied Nations to Transfer Russian Assets to Ukraine

A. Overview of International Law Considerations

This report is focused most acutely on the authority that the President already possesses under U.S. law to transfer Russia's frozen assets. We have concluded that the transfer of Russia's assets to Ukraine is fully authorized under the domestic law of the United States as it currently stands and without any change—both in terms of the plain language of all applicable statutory and constitutional provisions and in terms of their history and purposes. But our analysis cannot end at the United States' borders. U.S. officials and governments allied with the United States, especially members of the G7, have expressed genuine concerns about the permissibility of asset transfer under international law as well as under their own domestic legal regimes. This report approaches those concerns respectfully and with the understanding that many details of the law of particular nations other than the United States will need to be studied more closely by experts in those legal regimes just as we have authoritatively analyzed U.S. law.

Addressing the legality of asset transfer under international and foreign legal regimes is crucial to this report for at least three reasons. First, the United States considers itself to be bound by international law and takes with utmost seriousness its commitments to act as a responsible member of the international community. Second, a collective effort among members of the international community to transfer Russia's assets will provide the greatest benefit to Ukraine. The United States possesses only a fraction of Russia's frozen assets; a much larger share is held in other G7 nations including the United Kingdom, Germany, and Japan. If Ukraine is to defend itself and rebuild successfully, every dollar of legally available Russian assets must be brought to bear. Third, an internationally united action would carry far greater political and legal legitimacy than would the United States acting alone. That legitimacy will prove invaluable in building

sustainable support for efforts to transfer frozen Russian assets and to defend the legality of those efforts to whatever degree that should become necessary.

Toward that end, this section of the report analyzes the international and foreign legal issues concerning the transfer of CBR assets. We conclude that international law authorizes the transfer of Russia’s sovereign assets by G7 states as a proportionate countermeasure to Russia’s violations. As defined in the Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”), a “countermeasure” is an action that would otherwise violate international law by one state taken with the aim of inducing another state to resume compliance with international law. The lawfulness of a countermeasure is determined not by any treaty but by customary state practice, state pronouncements of international law, and judgments of international tribunals, all of which approve of countermeasures to enforce international law.

This Part of the report begins in Section A with background context on these international legal issues for American lawyers and decisionmakers. Section B surveys the ecosystem of actors with whom American leaders will need to cooperate to ensure that transfer is a collective international effort.

- First, this report considers key fact-finding entities, which are working in tandem to gather information related to Russia’s war of aggression and its subsequent international law violations. These entities include:
 - European Agency Criminal Justice Cooperation (“Eurojust”),
 - Eurojust’s targeted Joint Investigation Team (“JIT”), and
 - The newly initiated International Centre for the Prosecution of the Crime of Aggression Against Ukraine (“ICPA”).

- Second, we survey the legal forums where the transfer of assets may be challenged on an international legal stage and where Russia itself may be brought to justice.
 - The International Court of Justice (“ICJ”) would be the most likely court to hear challenges to transfer, and it already has cases pending against the Russian Federation.
 - The European Court of Human Rights (“ECHR”) has similar cases pending before it against the Russian Federation.
 - The International Criminal Court (“ICC”) is operating as both a fact-finding entity and a prosecuting arm for individual perpetrators like President Vladimir Putin.
- Third, this report surveys the decisionmakers with whom the United States will need to work closely.
 - At the very highest level is the United Nations, which has already condemned Russia’s actions in several nonbinding resolutions but is rendered largely impotent by Russia’s veto on the Security Council.
 - Recent actions of the G7, the European Commission, and individual governments that are interested in transfer have been promising.

Section C elaborates a long list of international law violations committed by Russia since its 2022 invasion.

- First, this report addresses the respects in which Russia’s war of aggression has violated multiple provisions of the U.N. Charter, ICJ order, Rome Statute, Helsinki Final Act of 1975, and peremptory norms of general international law (i.e., *jus cogens*).
- The report then examines the alleged war crimes and the crime of genocide that Russia has committed in Ukraine, analyzes Russia’s failure to pay reparations for damages dating back

to its 2014 annexation of Crimea, and enumerates several other violations of standing international treaties. In short, the case against Russia is damning.

- There is no question that Russia has violated international law in Ukraine on hundreds of occasions since its February 24, 2022 invasion. This inescapable conclusion lays the necessary legal groundwork for invoking countermeasures in Section D.

Section D analyzes the incontrovertible legal justification for asset transfer under international law and disposes systematically of the central counterarguments.

- This section concludes that G7 countries may transfer CBR assets as a lawful countermeasure to induce Russia to resume compliance with international law.
- It further outlines the clear basis that states have to invoke countermeasures, explains the lawfulness of transfer as a countermeasure under the terms of ARSIWA, and identifies precedent on which transferring actors can rely.
- It also describes an alternative basis for transfer, using the saving clause of ARSIWA Article 54, which reserves to third-party states the authority to use “lawful measures” to remedy violations of international law.
- We refute the key concerns that have been raised about the use of countermeasures, including questions of proportionality and reversibility, as well as concerns of sovereign immunity.

Section E turns to the laws of individual G7 countries to understand where the case for transfer is easier to make under current law, and where domestic legal reform may be needed. The United States and Canada are two examples of countries whose legal regimes clearly authorize transfer now. They can thus serve as useful models for other states looking to reform their laws to clear the legal path for transfer. The United Kingdom, for instance, is an example of a country in

which the legal regime would probably require change to authorize transfer: such change would entail action by Parliament. This section also considers the possibility that G7 countries (aside from the United States) may be constrained by bilateral investment treaties with Russia and offers several arguments as to why these treaties should not prevent G7 countries from transferring Russian assets.

Ultimately, this part of the report provides a handbook to American leaders who might have limited background on the international legal playing field and, against that backdrop, makes the case for transferring CBR assets under international law. The report also highlights the impressive appetite and eagerness of several international bodies, such as the European Commission, that are already committed to action along these lines. As well, the report addresses the policy concerns that some have voiced about the way the asset-transfer actions whose legality we defend here might generate unwelcome collateral consequences on the world stage. Our hope is that this report will allay those policy concerns along with whatever legal concerns these decisionmakers might have.

B. The Ecosystem of Actors

Before embarking on any specific action with regard to transfer, it is important to understand the current players in the field. This section will describe (1) the key fact finders who may be helpful in collecting the evidence needed to make a claim for war crimes, genocide, and other violations of international law; (2) the legal forums in which transferring actors may need to defend their actions under governing international law; and (3) the decisionmakers who need to be committed to transfer in order to make it a collective project. For each of the entities below, this report enumerates which of the countries on which our analysis focuses are parties to that particular treaty or body.

1. Fact Finders

To invoke countermeasures against Russia, countries that are holding Russian assets will need to make a strong showing that Russia has violated fundamental international laws such that countermeasures are appropriate to induce it to comply with its international obligations.²⁸³ Although documenting Russia's war of aggression, which violates a plethora of international laws, is fairly straightforward,²⁸⁴ transferring actors will need the support of fact finders to make an even stronger case for claims like the commission of war crimes and genocide.²⁸⁵ As this report explains, each of these violations of international law serves as an independent justification for the imposition of countermeasures against Russia; taken together, these violations provide an even more compelling basis to impose countermeasures. Ongoing fact-finding efforts will enable the international community to hold Russia accountable for the full scope of its crimes and also provide a more comprehensive evidentiary record that will bolster the credibility and legal validity of the proposed asset transfer.²⁸⁶ This report surveys three key fact-finding entities documenting the progress of the Russia-Ukraine war: Eurojust, the Joint Investigation Team ("JIT"), and the International Centre for the Prosecution of the Crime of Aggression against Ukraine ("ICPA").

²⁸³ See G.A. Res. 56/10, Draft Articles on Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (hereinafter, "ARSIWA"); see *infra* Section IV.D.1.

²⁸⁴ See *infra* Section IV.C.1.

²⁸⁵ See *infra* Sections IV.C.2, IV.C.3.

²⁸⁶ See Shiri Krebs, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 FORDHAM INT'L L.J. 337, 369-76 (2018); see, e.g., Nancy Amoury Combs, *Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law*, 58 HARV. INT'L L.J. 47 (2017) (documenting how inadequate fact finding has resulted in some actors escaping accountability before the International Criminal Court).

a. Eurojust

Relevant Members: Austria, Belgium, France, Germany, Luxembourg; Partners: Switzerland, Ukraine, United Kingdom, United States

The European Union Agency for Criminal Justice Cooperation (“Eurojust”) is a coalition of participating E.U. member states focused on fighting organized cross-border crime in Europe.²⁸⁷ Eurojust was established by the European Union in 2002 with three objectives: (1) to stimulate coordination between member states in investigations and prosecutions, (2) to improve cooperation between member states, and (3) to support otherwise competent authorities of member states to improve investigations and prosecutions.²⁸⁸ Eurojust has jurisdiction over crimes including human trafficking, crimes against personal freedom, crimes against public goods, illegal harm to the environment, and core international crimes like genocide.²⁸⁹

Eurojust is based in The Hague and consists of fifteen members, appointed by member states, who comprise the Eurojust “College.”²⁹⁰ Members of the College are usually public prosecutors.²⁹¹ Of the countries on which this report has focused, Austria, Belgium, France, Germany, and Luxembourg are all members of Eurojust.²⁹² Eurojust also has liaison prosecutors in countries that are not in the European Union, including Switzerland, Ukraine, the United

²⁸⁷ *Who We Are*, EUROJUST, <https://www.eurojust.europa.eu/about-us/who-we-are>.

²⁸⁸ Francesco Lo Voi & Fabio Giuffrida, *The Dual Role of Eurojust in the Fight Against Transnational Crime: An Overview*, STANDING GRP. ON ORGANISED CRIME, <https://standinggroups.ecpr.eu/sgoc/the-dual-role-of-eurojust-in-the-fight-against-transnational-crime-an-overview/>.

²⁸⁹ See Christine Van den Wyngaert, *Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?*, in *EUROPE’S AREA OF FREEDOM, SECURITY, AND JUSTICE* 206 (Neil Walker ed., 2004).

²⁹⁰ See *id.* at 207-08.

²⁹¹ See *id.* at 207.

²⁹² *Member States*, EUROJUST, <https://www.eurojust.europa.eu/states-and-partners/member-states>.

Kingdom, and the United States. These partner prosecutors help work with Eurojust to exchange information and make strategic decisions in relevant investigations.²⁹³

Eurojust's main role in the Russia-Ukraine war has been its creation of a dedicated Joint Investigation Team to investigate alleged "core international crimes" in Ukraine (detailed below).²⁹⁴ Eurojust is also continuing to facilitate the transfer of information about the conflict and these alleged crimes among its member states as well as providing financial support to limit the impact on national budgets for Joint Investigation Team participants (including Ukraine).²⁹⁵

Eurojust has also assisted with data collection, documentation, and analysis surrounding the Russia-Ukraine War. It set up the Core International Crimes Evidence Database to enable on-the-ground reporting of criminal activity, which has helped keep the Joint Investigation Team and other investigatory bodies abreast of the newest allegations.²⁹⁶ National authorities can now report photographs, videos, witness statements, victim testimonies, forensic reports, and many other types of evidence to this one centralized database.²⁹⁷

b. Joint Investigation Team (JIT)

Relevant Members: Ukraine, ICC

Mere days after Russia invaded Ukraine in 2022, Eurojust helped create the JIT to investigate alleged "core international crimes" in Ukraine.²⁹⁸ These core crimes include genocide,

²⁹³ *Liaison Prosecutors*, EUROJUST, <https://www.eurojust.europa.eu/states-and-partners/third-countries/liaison-prosecutors>.

²⁹⁴ *Eurojust supports joint investigation team into alleged core international crimes in Ukraine*, EUROJUST (Mar. 28, 2022), <https://www.eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine>.

²⁹⁵ *Id.*

²⁹⁶ See *Eurojust Annual Report 2022*, EUROJUST at 24 (May 24, 2023), <https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-annual-report-2022-en.pdf>.

²⁹⁷ *Id.* at 22-23.

²⁹⁸ See *Eurojust supports joint investigation team into alleged core international crimes in Ukraine*, *supra* note 294.

crimes against humanity, and war crimes.²⁹⁹ Lithuania, Poland, and Ukraine were the three founding signatories of the initial JIT agreement,³⁰⁰ and Estonia, Latvia, Slovakia, and Romania all joined within the year.³⁰¹ The ICC, which had never before joined a JIT, signed on as a participant in April of 2022.³⁰² And the JIT signed a Memorandum of Understanding with the United States Department of Justice in March of 2023.³⁰³

Once a JIT has been signed, the partners may exchange information, carry out investigative measures on each other's territories, and share human resources.³⁰⁴ This means that Lithuania, Poland, Estonia, Latvia, Slovakia, Romania, and the ICC Office of the Prosecutor may conduct investigations on the ground in Ukraine and provide Ukrainian investigators and prosecutors with additional staff and resources during this investigation. The participation of the ICC is particularly useful because it has significant investigative and prosecutorial expertise, as well as significant authority under the Rome Statute to compel full cooperation by member states.³⁰⁵

During a March 2023 conference in Lviv hosted by Ukrainian authorities, the seven JIT member states and the ICC amended the JIT to outline a role for the newly created International

²⁹⁹ *Core International Crimes*, EUROJUST, <https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/core-international-crimes>.

³⁰⁰ See *Eurojust supports joint investigation team into alleged core international crimes in Ukraine*, *supra* note 294.

³⁰¹ *Fourth JITS Evaluation Report*, EUROJUST, at 42 (Feb. 2023), <https://www.eurojust.europa.eu/sites/default/files/assets/fourth-jits-evaluation-report.pdf>.

³⁰² *Id.* at 42-43.

³⁰³ See *Eurojust Annual Report 2022*, *supra* note 296, at 21.

³⁰⁴ *Joint Investigation Teams*, EUROJUST, <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams>.

³⁰⁵ See Justice Richard Goldstone, *To Strengthen the ICC Office of the Prosecutor, Karim Khan Is on the Right Path*, JUST SEC. (Aug. 25, 2021), <https://www.justsecurity.org/77984/to-strengthen-the-icc-office-of-the-prosecutor-karim-khan-is-on-the-right-path/>.

Centre for the Prosecution of the Crime of Aggression against Ukraine, which was designed to support and augment the JIT's investigations into the crime of aggression.³⁰⁶

c. International Centre for the Prosecution of the Crime of Aggression Against Ukraine (ICPA)

Relevant Members: Eurojust's JIT (above), ICC, U.S. DOJ Criminal Division

In early 2023, Eurojust launched the ICPA, a new arm of investigatory power in the ongoing invasion of Ukraine.³⁰⁷ The ICPA's mandate is to build a case that Russia's invasion of Ukraine is a criminal war of aggression.³⁰⁸ The ICPA is designed to support the ongoing JIT dedicated to investigating core international crimes committed by Russia.³⁰⁹ The ICPA will be financially supported by Eurojust, and its Prosecutors will be based at Eurojust for the time being.³¹⁰ The ICPA officially began its investigative operations on July 3, 2023.³¹¹

2. Legal Forums

International legal forums are important to survey both because of (1) the potential for prosecutorial and investigatory support by these forums and (2) the necessary preparation for potential legal challenges to asset transfer, which includes understanding where these international challenges may be brought. The three key players on which this report focuses are the International

³⁰⁶ *See International Centre for the Prosecution of the Crime of Aggression made official at United for Justice Conference in Ukraine*, EUROJUST (Mar. 5, 2023), <https://www.eurojust.europa.eu/news/international-centre-prosecution-crime-aggression-made-official-united-justice-conference>.

³⁰⁷ *Start of operations of Core International Crimes Evidence Database and new International Centre for Prosecution of the Crime of Aggression to be based at Agency*, EUROJUST (Feb. 23, 2023), <https://www.eurojust.europa.eu/news/start-operations-core-international-crimes-evidence-database-and-new-international-centre>.

³⁰⁸ *See id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *History in the making – the International Centre for the Prosecution of the Crime of Aggression Against Ukraine starts operations at Eurojust*, EUROJUST (July 3, 2023), <https://www.eurojust.europa.eu/news/history-making-international-centre-prosecution-crime-aggression-against-ukraine-starts-operations-at-eurojust>.

Court of Justice (“ICJ”), the European Court of Human Rights (“ECHR”), and the International Criminal Court (“ICC”).

a. International Court of Justice (ICJ)

Members: All 198 Member States of the United Nations

The ICJ is the principal judicial organ of the United Nations. The ICJ emerged from previous versions of international courts after World War II and has had jurisdiction over international legal disputes submitted to it by member states ever since.³¹² The ICJ is made up of fifteen judges with nine-year terms who are elected by a majority vote of both the U.N. General Assembly and the Security Council.³¹³ The current President of the Court is an American judge, while the Vice President is from the Russian Federation.³¹⁴

When a country (including the United States) signs the U.N. Charter, it thereby agrees to be bound by the decisions of the ICJ.³¹⁵ Additionally, when a member state brings a case in front of the ICJ, it is again consenting to its jurisdiction.³¹⁶ The Russian Federation consented to ICJ jurisdiction in 1991 when it continued the Soviet Union’s affiliation dating back to its original U.N. membership in 1945.³¹⁷

There is already one ICJ case pending against Russia for alleged genocide against Ukrainian people and culture under the Convention on the Prevention and Punishment of the Crime

³¹² See *History*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/history>; *Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/jurisdiction/>.

³¹³ *Members of the Court*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/members>.

³¹⁴ *Current Members*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/current-members>.

³¹⁵ *How the Court Works*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/how-the-court-works>.

³¹⁶ *Id.*

³¹⁷ *Russian Federation*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states/russian-federation>.

of Genocide: *Ukraine v. Russian Federation*. In that case, the ICJ made a preliminary determination that it possessed jurisdiction over the parties and the subject matter.³¹⁸ While the case about whether genocide has been committed is still pending, the binding Provisional Order issued by the ICJ on March 16, 2022, is clear: Russia is failing to abide by its international obligations. As the Order states, “The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law.”³¹⁹ By a vote of thirteen to two, with the ICJ judges from Russia and China dissenting, the Order commands that:

The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine [and]... ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations....³²⁰

Unfortunately, the fact that Russia has failed to comply with this ICJ Order from March of 2022 will likely not be addressed any time soon. If a state believes another has failed to comply with an ICJ decision, it can petition the U.N. Security Council to enforce the ICJ’s decision.³²¹ Because Russia has an automatic veto on the Security Council,³²² it is sure to use that veto to override any ICJ order that penalizes it for its war of aggression.

b. European Court of Human Rights (ECHR)

Relevant Members: Austria, Belgium, France, Germany, Italy, Luxembourg, Switzerland, Ukraine, United Kingdom; Observer States: Canada, Japan, United States

³¹⁸ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order on Provisional Measures (Mar. 16, 2022), ¶¶ 48-49, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

³¹⁹ *Id.* ¶ 18.

³²⁰ *Id.* ¶ 86.

³²¹ *How the Court Works*, *supra* note 315.

³²² *Voting System*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/content/voting-system>.

The European Court of Human Rights, which was founded in 1959, is the international court for the Council of Europe and presides over cases under the European Convention on Human Rights. The ECHR has jurisdiction over 46 member states. Canada, Japan, and the United States, having “observer status” with the organization, are closely involved with the Council of Europe, though they are not bound by the European Convention on Human Rights.³²³ Russia was a member of the Council of Europe from February 28, 1996, until March 15, 2022, when the Parliamentary Assembly of the European Council unanimously voted to exclude the Russian Federation from the Council.³²⁴ Russia notified the European Council that same day that it was withdrawing from the Council.³²⁵ However, because of Article 58 of the Convention, which requires a state to give six months’ notice before leaving the Convention after the expiry of five years from the date on which it became a party to it, Russia was still bound by the Convention and thus under the jurisdiction of the ECHR until September 15, 2022.³²⁶ Further, Article 58 states:

[A] denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.³²⁷

On February 28, 2022, the Ukrainian government asked the ECHR to grant an urgent interim measure to direct the Government of the Russian Federation to halt its “massive human rights violations” and “military aggression against the sovereign territory of Ukraine.”³²⁸ On

³²³ *United States // Observer*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/portal/united-states>.

³²⁴ *The Russian Federation is excluded from the Council of Europe*, COUNCIL OF EUROPE NEWSROOM (Mar. 16, 2022), <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

³²⁵ *Id.*

³²⁶ *The European Convention for the Protection of Human Rights and Fundamental Freedoms* art. 58, Nov. 4, 1950, 213 U.N.T.S. 222, https://www.echr.coe.int/documents/d/echr/Convention_ENG.

³²⁷ *Id.*

³²⁸ *The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory*, EUROPEAN COURT OF HUMAN RIGHTS at 1 (Mar. 1, 2022), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764->

March 1, 2022, while Russia was still a member of the Council of Europe, the ECHR issued an urgent interim measure calling on the Russian government to halt military attacks against civilians and civilian objects including residential homes, emergency vehicles, schools, and hospitals.³²⁹ There is no question that Russia was bound by this urgent interim measure, because Russia was still a member of the Council of Europe when it was issued on March 1, 2022. Yet the Russian government has ignored the Court's demands.

The ECHR has since issued other urgent measures including its June 30, 2022 interim measure demanding that the Russian government respect prisoner of war rights under the Convention, including adequate medical assistance.³³⁰ The Russian government has given no indication that it will comply with this measure.

On January 25, 2023, the ECHR issued a decision in the initial case brought by the Ukrainian government (and joined by The Netherlands) against Russia's illegal war of aggression.³³¹ The Court found that Russia had violated several provisions of the Convention, including Articles 2, 3, 5, and 8, which prohibit unlawful military attacks against civilians, the torture of civilian prisoners of war, abductions and unlawful arrest, and interference with the right to private and family life, respectively.³³² However, there is some debate about whether and how long the ECHR can maintain jurisdiction over Russia. Because Russia was required to give six

9905947&filename=The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf.

³²⁹ *Id.*

³³⁰ *See Interim Measures Concerning Ukrainian Prisoners of War*, EUROPEAN COURT OF HUMAN RIGHTS at 1 (July 1, 2022), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7375654-10081123&filename=Interim%20measures%20in%20respect%20of%20Ukrainian%20prisoners%20of%20war.pdf>.

³³¹ *Ukraine and the Netherlands v. Russia*, App. Nos. 8019/16, 43800/14, 28525/20 (Nov. 30, 2022), <https://hudoc.echr.coe.int/eng?i=002-13989>.

³³² *Id.*; *see also Russia in the European Court of Human Rights – Recent Decisions May Impact Rights of Investors*, GIBSON DUNN (May 30, 2023), https://www.gibsondunn.com/russia-in-the-european-court-of-human-rights-recent-decisions-may-impact-rights-of-investors/#_ftn27.

months' notice before leaving the Convention, it was still contractually bound to abide by the Convention until September 16, 2022.³³³ The ECHR maintains that Russia can be held accountable for violations of the Convention that occurred before that date, even if the decision was rendered after the fact.³³⁴ Unsurprisingly, Russia has resisted the Court's jurisdiction.³³⁵

c. International Criminal Court (ICC)

Relevant States that Ratified: Austria, Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, Switzerland, United Kingdom; Signed but never ratified: United States; Russia (withdrew signature in 2016)

The ICC was created by the Rome Statute in 1998 and is a permanent international criminal court focused on the most serious international crimes committed by individuals (e.g., genocide, crimes against humanity, war crimes, and the crime of aggression) when states are unable or unwilling to carry out investigations and prosecutions.³³⁶ The ICC has eighteen judges who are elected by member states and serve terms of three years (and a maximum of two terms).³³⁷ The ICC generally has jurisdiction over states that have ratified the Rome Statute, although non-parties can accept jurisdiction of the ICC at any time according to Article 12(3) of the Statute.³³⁸ Because

³³³ See, e.g., Julia Emtseva, *The Withdrawal Mystery Solved: How the European Court of Human Rights Decided to Move Forward with the Cases Against Russia*, BLOG OF THE EURO. J. INT'L L. (Feb. 8, 2023), <https://www.ejiltalk.org/the-withdrawal-mystery-solved-how-the-european-court-of-human-rights-decided-to-move-forward-with-the-cases-against-russia/>.

³³⁴ *Latest Rulings by the European Court Set Out the Procedure for Future Processing of Applications Against Russia*, EUROPEAN COURT OF HUMAN RIGHTS at 1 (Feb. 3, 2023), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7559628-10388013&filename=Future%20processing%20of%20applications%20against%20Russia.pdf>.

³³⁵ *Russian MPs Vote to Quit European Court of Human Rights*, AL JAZEERA (June 7, 2022), <https://www.aljazeera.com/news/2022/6/7/russia-exits-european-court-of-human-rights-jurisdiction>.

³³⁶ International Criminal Court, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 6 (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

³³⁷ *Id.* at 17.

³³⁸ Stephen P. Mulligan, CONG. RSCH. SERV., LSB10704, THE ROLE OF INTERNATIONAL TRIBUNALS IN THE RESPONSE TO THE INVASION OF UKRAINE at 3 (Mar. 22, 2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10704#:~:text=The%20ICC's%20jurisdiction%20generally%20extends,the%20territories%20of%20either%20country>.

the ICC focuses on individual prosecution, it is not a forum in which an entire state can be brought to justice as is the ICJ.³³⁹

The ICC has 123 members that have ratified the Rome Statute, which is about two-thirds of the entire international community.³⁴⁰ Glaringly, Ukraine, Russia, and the United States have not ratified the Rome Statute. Russia signed the Statute originally, but never ratified it into force, and withdrew its signature in 2016 after the ICC issued a report condemning Russia's illegal actions in annexing Crimea.³⁴¹ The United States has signed the Statute, but never ratified it, as political leaders on both sides of the aisle have been hesitant to delegate such power to an international court.³⁴²

The Prosecutor of the ICC announced on February 28, 2022, that his office was opening an investigation into the invasion of Ukraine.³⁴³ Although neither Ukraine nor Russia are parties to the Rome Statute, Ukraine accepted the ICC's jurisdiction in 2014 and 2015, when the ICC Prosecutor investigated alleged crimes against humanity that had been committed in its territory.³⁴⁴

³³⁹ *Id.* at 3.

³⁴⁰ *Q&A: What the ICC arrest warrants mean for Russia's Putin*, AL JAZEERA (Mar. 17, 2023), <https://www.aljazeera.com/news/2023/3/17/qa-what-the-icc-arrest-warrants-mean-for-russias-putin>.

³⁴¹ Shaun Walker & Owen Bowcott, *Russia withdraws signature from international criminal court statute*, GUARDIAN (Nov. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>.

³⁴² See Michel Martin, *The U.S. does not recognize the jurisdiction of the International Criminal Court*, NPR (Apr. 16, 2022), <https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court>. John Bellinger III, former legal advisor for President George W. Bush to the National Security Council, stated the United States “will certainly open [ourselves] up to some charges of hypocrisy” if the Biden Administration supports the ICC’s investigation of Russia, “because of these traditional concerns that the U.S. has had about the ICC’s investigation of the United States.” *Id.* In fact, the United States did voice its support for the ICC’s actions against Putin and Lvova-Belova in the G7 Statement condemning Russia’s continued aggression in Ukraine. *G7 Leaders’ Statement on Ukraine*, *supra* note 51.

³⁴³ Mulligan, *supra* note 338, at 2.

³⁴⁴ *Id.* at 3.

Thus, the ICC's jurisdiction extends to crimes committed on Ukrainian soil, even if Russia has never ratified the Rome Statute.³⁴⁵

On March 17, 2023, the ICC issued arrest warrants for President Vladimir Putin and Commissioner for Children's Rights, Maria Alekseyevna Lvova-Belova.³⁴⁶ The ICC brought these warrants upon a finding of reasonable grounds to believe that Putin and Lvova-Belova had both committed war crimes under the Rome Statute. The warrants list violations of Article 8(2)(a)(vii) and 8(2)(b)(viii) for the "unlawful deportation of population (children) and ... unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation."³⁴⁷ This means that, according to the Rome Statute, if Putin or Lvova-Belova travel to one of the 120 member states, these governments have the legal obligation to arrest them.³⁴⁸

3. Decisionmakers

The United States is not making the choice with respect to transferring Russian assets in a vacuum. Similar conversations are taking place in nearly every country that houses CBR assets and is not allied with Russia or is at most neutral with respect to Russia's invasion of Ukraine. It is therefore important to consider the power and positions of international decisionmakers who will inevitably be involved in any multilateral action. Indeed, even if the United States were to act

³⁴⁵ Q&A: *What the ICC arrest warrants mean for Russia's Putin*, *supra* note 340.

³⁴⁶ *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INTERNATIONAL CRIMINAL COURT (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

³⁴⁷ *Id.*

³⁴⁸ In fact, because of this outstanding arrest warrant, President Putin withdrew from a summit of the BRICS countries in July 2023 lest South Africa act on its obligation to execute the warrant and arrest Putin after his plane landed in the country. David McKenzie, Catherine Nicholls & Sana Noor Haq, *Putin Will Not Attend BRICS Summit in South Africa, As ICC Arrest Warrant Overshadows Key Talks*, CNN (July 20, 2023), <https://www.cnn.com/2023/07/19/world/putin-brics-summit-south-africa-intl/index.html>; Andrew Roth, *Vladimir Putin To Miss South Africa Summit Amid Row over Possible Arrest*, GUARDIAN (July 19, 2023), <https://www.theguardian.com/world/2023/jul/19/vladimir-putin-to-miss-south-africa-summit-amid-row-over-possible-arrest>.

unilaterally, it would benefit from the support of international decisionmakers in the court of public opinion—and, to the degree it were to become embroiled in litigation, in courts of law as well. There are several levels of international decisionmakers to account for, some of them overlapping. At the highest level is the United Nations, which has several subsidiary arms including the ICJ and ICC discussed above. The United Nations typically enforces its actions through the Security Council, of which Russia is a permanent member with a veto that negates the United Nations' strongest powers. There is the Group of Seven (G7), which has been vocal about its opposition to Russia's war of aggression and its commitment to aiding Ukraine and bringing Russia to justice. The European Commission has worked closely with the G7 on this matter and is another likely ally in any effort to transfer the frozen Russian assets. Finally, it is important to account for individual foreign governments, each of which will have different legal and political calculations when it comes to transfer.

a. United Nations

The United Nations encompasses every player on which this report is focused. And, as the highest profile and most powerful international entity this report discusses, its support of transfer is important. The U.N. has clearly taken a side in the Russia-Ukraine war. It has continued to issue General Assembly Resolutions calling for Russia to halt its hostilities,³⁴⁹ provided billions of dollars of aid to support Ukraine and assist Ukrainian refugees,³⁵⁰ and mobilized many of its humanitarian agencies such as UNICEF, UNCHR, the U.N. World Food Programme, and the World Health Organization to provide crucial assistance to the Ukrainian people.³⁵¹

³⁴⁹ See, e.g., *Resolutions Adopted by the General Assembly – Emergency Special Sessions*, UNITED NATIONS, <https://research.un.org/en/docs/ga/quick/emergency>.

³⁵⁰ *How the UN is Supporting the People of Ukraine*, *supra* note 154.

³⁵¹ *Id.*

The U.N. General Assembly has repeatedly and powerfully condemned Russia's aggression and violation of the U.N. Charter.³⁵² On March 2, 2022, the General Assembly denounced Russia's "special military operation" in Ukraine and demanded that Russia "immediately cease its use of force against Ukraine"³⁵³ The vote was 141 countries in favor, 35 abstaining, and 5 votes against. Since then, the United Nations has adopted several other similar Resolutions continuing to call for Russia to cease its hostilities.³⁵⁴

The shortfall of the U.N. General Assembly Resolutions is that they are not binding on member states—only resolutions of the U.N. Security Council are formally binding.³⁵⁵ And because Russia has veto power as a permanent member of the Security Council,³⁵⁶ there is no hope of a binding Resolution from that body unless the Council's rules change.³⁵⁷

Despite this lack of binding force, U.N. General Assembly Resolutions serve important fact-finding, signaling, and organizing functions.³⁵⁸ For our purposes, some of these Resolutions

³⁵² See, e.g., G.A. Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022); G.A. Res. ES-11/2, Humanitarian Consequences of the Aggression Against Ukraine (Mar. 24, 2022); G.A. Res. ES-11/3, Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council (Apr. 7, 2022).

³⁵³ G.A. Res. ES-11/1, Aggression Against Ukraine, at 2, 3 (Mar. 2, 2022).

³⁵⁴ E.g., G.A. Res. ES-11/5, Furtherance of Remedy and Reparation for Aggression Against Ukraine (Nov. 14, 2022); G.A. Res. ES-11/6, Principles of the Charter of the United Nations Underlying a Comprehensive, Just and Lasting Peace in Ukraine (Feb. 23, 2023).

³⁵⁵ See U.N. Charter art. 10.

³⁵⁶ See *The UN Security Council*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/un-security-council>.

³⁵⁷ See, e.g., *Can Russia's UN Veto be Removed?*, INST. FOR WAR & PEACE REPORTING (Oct. 11, 2022), <https://iwpr.net/global-voices/can-russias-un-veto-be-removed>; Shelby Magrid & Yulia Shalomov, *Russia's veto makes a mockery of the United Nations Security Council*, ATL. COUNCIL (Mar. 15, 2022), <https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/>; Jeffrey Sonnenfeld, Richard Blumenthal & Jon Huntsman, *Just say NO and Veto Putin From Taking Over U.N. Security Council*, TIME (Mar. 28, 2023), <https://time.com/6266543/veto-putin-taking-over-u-n-security-council/>.

³⁵⁸ E.g., Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879 (2005); Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439 (2010); *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion (July 8, 1996), ¶ 70, <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> ("The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in

offer strong language supportive of transfer. The General Assembly’s February 23, 2023 Resolution, for example, calls for member states “to cooperate in the spirit of solidarity to address the global impacts of the war” and “[e]mphasizes the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine ... to ensure justice for all victims and the prevention of future crimes.”³⁵⁹ This mandate to third-party states opens the door to countermeasures, including asset transfer.

b. Group of Seven (G7)

Members: Canada, France, Germany, Italy, Japan, United Kingdom, United States, European Union (non-enumerated member)

The G7 dates to 1975 when democratic countries wanted a forum for noncommunist world powers to meet to address shared economic concerns. That mission has grown today to encompass organizing and aligning the economic and political might of some of the world’s most powerful countries.³⁶⁰ The G7 is an informal body, but it does have a presidency that rotates annually among members. As of August 2023, the position is held by Japan. The group’s original members were the United States, France, Italy, Japan, the United Kingdom, and West Germany. Today, Canada is included. Russia joined the G7 in 1998, making it the G8, but the group suspended Russia’s membership in 2014 following the illegal annexation of Crimea.³⁶¹ Russia’s removal has left the group better aligned and more ready to take action as a unit.³⁶²

certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”).

³⁵⁹ G.A. Res. ES-11/1, Aggression Against Ukraine, at 2 (Mar. 2, 2022).

³⁶⁰ *What Does the G7 Do?*, COUNCIL ON FOREIGN RELS. (June 28, 2023), <https://www.cfr.org/background/what-does-g7-do>.

³⁶¹ *Id.*

³⁶² *Id.*; James Dobbins, *Why Russia Should Not Rejoin the G7*, RAND (June 13, 2018), <https://www.rand.org/blog/2018/06/why-russia-should-not-rejoin-the-g-7.html>.

The G7 has consistently been at the forefront of demanding that Russia be held accountable. Since the beginning of the war, the G7 has pledged significant military support to Ukraine, led the way with sanctions, imposed hundreds of tariffs, and targeted Russia's supply lines to impose economic punishment.³⁶³ On May 19, 2023, the G7 issued a statement reaffirming the group's commitment "to stand together against Russia's illegal, unjustifiable, and unprovoked war of aggression against Ukraine."³⁶⁴ That statement identified Russia's war of aggression as a "manifest violation of the Charter of the United Nations," and underscored the U.N. General Assembly's February 2023 Resolution that supported a "just and lasting peace in Ukraine."³⁶⁵

Importantly, the G7 statement says that the group "will continue our efforts to ensure that Russia pays for the long-term reconstruction of Ukraine," and that the G7 countries will "continue to take measures available within our domestic frameworks to find, restrain, freeze, seize, and, where appropriate, confiscate or forfeit the assets of those individuals and entities that have been sanctioned in connection with Russia's aggression."³⁶⁶ G7 countries "are taking steps to fully map holdings of Russia's sovereign assets immobilized in our jurisdictions" and ensuring that these assets "will remain immobilized until Russia pays for the damage it has caused to Ukraine."³⁶⁷ This statement suggests significant appetite within the G7 to transfer Russia's frozen assets to Ukraine to the extent such transfer can be justified legally.

³⁶³ See, e.g., *Fact Sheet: The United States and G7 to Take Further Action to Support Ukraine and Hold the Russian Federation Accountable*, WHITE HOUSE (June 27, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/27/fact-sheet-the-united-states-and-g7-to-take-further-action-to-support-ukraine-and-hold-the-russian-federation-accountable/>.

³⁶⁴ *G7 Leaders' Statement on Ukraine*, *supra* note 51.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

c. European Commission

Members: All 27 E.U. countries

The European Commission is the European Union's politically independent executive arm.³⁶⁸ It proposes new legislation for the E.U. Parliament, and it implements the decisions of that body and of the Council of the European Union. It also proposes the European Union's budget and supervises how the money is spent.³⁶⁹

The European Commission has shown significant interest in seizure. On March 17, 2022, the European Commission began a “‘Freeze and Seize’ Task Force” which operates closely in line with the Russian Elites, Proxies, and Oligarchs (i.e., “REPO”) Task Force created by the European Union, the G7, and Australia.³⁷⁰ While that task force initially focused on sanctioning oligarchs and freezing and seizing their assets, the European Commission has since considered the transfer of Central Bank assets as well. On November 30, 2022, the Commission proposed the creation of a structure to “manage the frozen public funds, invest them and use the proceeds in favour of Ukraine.”³⁷¹ While the underlying assets would still be Russia's property and could be returned to Russia once hostilities end, the investment income would produce significant funds for Ukraine in

³⁶⁸ *European Commission: Overview*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-commission_en.

³⁶⁹ *Id.*

³⁷⁰ *‘Freeze and Seize Task Force’: Almost €30 billion of assets of Russian and Belarussian oligarchs and entities frozen by the EU so far*, EUROPEAN COMMISSION (Apr. 8, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2373.

³⁷¹ *See Ukraine: Commission presents options to make sure that Russia pays for its Crimes*, EUROPEAN COMMISSION (Nov. 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311.

the short term.³⁷² In January 2023, the E.U. Council announced that it would consider this proposal.³⁷³

d. Foreign Governments

Finally, it is crucial to account for the legal regimes, policies, and politics of individual foreign governments. While some G7 countries, like Canada,³⁷⁴ seem ready to do what they can to push for transferring Russia's assets to Ukraine, others, like Germany,³⁷⁵ have shown more reticence. A country's willingness to commit to transfer will likely have to do with a combination of factors including its basic legal structure and the particular laws currently in force; political appetite among the population; economic dependence on Russian resources like natural gas; international power and reputation that may make a country more concerned about backlash and other countries pulling their reserves out of their banks; and the amount and form of CBR assets a country has within its borders.

C. Russia Has Committed Numerous Violations of International Law

It is undeniable that Russia has violated numerous international laws since its 2014 invasion of Crimea.³⁷⁶ With its 2022 full scale invasion of Ukraine, these violations have increased

³⁷² See Eleanor Runde, *Why the European Commission's Proposal for Russian State Asset Seizure Should be Abandoned*, JUST SEC. (Mar. 23, 2023), <https://www.justsecurity.org/85661/why-the-european-commissions-proposal-for-russian-state-asset-seizure-should-be-abandoned/>.

³⁷³ See Sam Fleming & Henry Foy, *EU to examine seizing confiscated Russian assets for reconstruction*, FIN. TIMES (Jan. 23, 2023), <https://www.ft.com/content/dab0fe80-dae0-4973-88ea-de2d95cd9a4a>.

³⁷⁴ See Anton Moiseienko, *Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets*, JUST SEC. (Aug. 17, 2022), <https://www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets/>.

³⁷⁵ See, e.g., Martin Arnold et al., *Germany pushes back against EU plan to raid frozen Russian assets*, FIN. TIMES (June 26, 2023), <https://www.ft.com/content/1d54ceae-c41e-41e8-b7f0-790fd148880f>.

³⁷⁶ See G.A. Res. 68/262, *Territorial Integrity of Ukraine* (Apr. 1, 2014); see also Ambassador James S. Gilmore III, *Address to the Permanent Council: Ongoing Violations of International Law by the Russian Federation in Ukraine* (Nov. 19, 2020), <https://osce.usmission.gov/ongoing-violations-of-international-law-by-the-russian-federation-in-ukraine/> (stating the U.S. government's position that "Russia seized Crimea in violation of international law").

exponentially.³⁷⁷ This section will survey some of those violations, including the commencement of a war of aggression; the perpetuation of war crimes and genocide; and the ongoing failure to pay reparations. As Section D explains, a violation of any one of the following obligations to the international community (that is, an obligation *erga omnes*) is sufficient to justify the imposition of countermeasures by the United States and other G7 nations in the form of transferring Russia’s frozen assets. When these violations are considered in their totality, the case for transfer—and the argument that *refraining* from transfer but deliberately leaving the frozen assets idle is irresponsible—becomes all the more compelling.

1. War of Aggression

Russia’s February 24, 2022 full-scale invasion of Ukraine was an act of aggression that violated multiple articles of the U.N. Charter, the ICJ’s commands, the Rome Statute, the 1975 Helsinki Final Act, and fundamental international law norms. While Russia had previously violated these international laws with its illegal annexation of Crimea in 2014, this section will focus on the 2022 invasion and subsequent war, which in and of itself provides ample justification under international law for transferring Russian sovereign assets to Ukraine.

a. Violations of the U.N. Charter

The U.N. Charter is a binding instrument for all U.N. member states, including Russia.³⁷⁸ Article 2(4) of the U.N. Charter states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,

³⁷⁷ See, e.g., *Russia’s invasion of Ukraine is a violation of the UN Charter, UN Chief tells Security Council*, UNITED NATIONS SUSTAINABLE DEVELOPMENT GROUP (May 5, 2022), <https://unsdg.un.org/latest/announcements/russias-invasion-ukraine-violation-un-charter-un-chief-tells-security-council> (“Russia’s invasion of Ukraine is a violation of its territorial integrity and of the Charter of the United Nations.”).

³⁷⁸ See U.N. Charter art. 2(2) (“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”).

or in any other manner inconsistent with the Purposes of the United Nations.”³⁷⁹ Russia undoubtedly violated this prohibition with its invasion (euphemistically labeled by Russia a “special military operation”) of Ukraine on February 24, 2022. Russia’s forces violated Ukraine’s sovereignty and territorial integrity, and that violation is ongoing.³⁸⁰ As Stanford Law Professor Allen Weiner put it, “[I]f this were an international law class, I would say that Russia’s invasion of Ukraine would not be a very challenging exam question for my students because it is a quite blatant violation of Article 2(4) of the UN charter.”³⁸¹

Russia also violated Article 2(3), which states: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”³⁸² Even if President Putin’s concerns about Ukraine exercising its sovereign right to join NATO were legitimate, the proper avenue under international law would be to resolve such concerns and settle the resulting disputes peacefully. Putin could have negotiated diplomatically with President Zelenskyy or even used Russia’s economic weight to influence Ukraine’s foreign policy choices. Russia’s full-scale invasion flies in the face of the U.N. Charter.

b. Violation of the ICJ’s Commands

Russia’s war of aggression also violates explicit commands of the ICJ. In its March 2022 decision in *Ukraine v. Russian Federation*, the ICJ issued a preliminary order that Russia halt its

³⁷⁹ U.N. Charter art. 2(4).

³⁸⁰ See Rachel Treisman, *Putin’s claim of fighting against Ukraine ‘neo-Nazis’ distorts history, scholars say*, NPR (Mar. 1, 2022), <https://www.npr.org/2022/03/01/1083677765/putin-denazify-ukraine-russia-history>.

³⁸¹ Allen S. Weiner & Sharon Driscoll, *Stanford’s Allen Weiner on Russia’s Invasion of Ukraine and the Laws of War*, SLS BLOGS (Feb. 21, 2023), <https://law.stanford.edu/2023/02/21/stanfords-allen-weiner-on-russias-invasion-of-ukraine-and-the-laws-of-war/>.

³⁸² U.N. Charter art. 2(3).

military action in Ukraine.³⁸³ Specifically, the ICJ ordered that Russia “must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine” and that “the Russian Federation must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.”³⁸⁴

Since March 2022, Russia has only increased its military and paramilitary actions in Ukraine, blatantly violating its obligation to obey ICJ’s commands under the U.N. Charter.³⁸⁵ Unfortunately, if another state has failed to comply with an ICJ command, the only available enforcement mechanism is for the U.N. Security Council to enforce the ICJ measure.³⁸⁶ Because of Russia’s decisive veto power as a permanent member of the Security Council, Ukraine cannot secure official enforcement of this or any other ICJ Order.³⁸⁷ The Order, however, adds among the strongest possible arguments that Russia has indeed violated international law with its continued war of aggression and powerfully bolsters the case for countermeasures under well settled international law principles.

³⁸³ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order on Provisional Measures (Mar. 16, 2022), ¶¶ 81-82, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

³⁸⁴ *Id.* ¶ 81.

³⁸⁵ See, e.g., Matthew Mpoke Bigg, *How Russia’s war in Ukraine has unfolded, month by month.*, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/article/ukraine-russia-war-timeline.html>.

³⁸⁶ See *How the Court Works*, *supra* note 315.

³⁸⁷ See *id.*; Molly Callahan, *The shackles of the United Nations Security Council veto, explained*, NE. GLOB. NEWS (Apr. 14, 2022), <https://news.northeastern.edu/2022/04/14/united-nations-security-council-veto/>.

c. Violation of the Rome Statute of the International Criminal Court

Russia's invasion of Ukraine also violates the Rome Statute, although the actual jurisdiction of the Rome Statute and of the ICC that the Statute created presents a more complex issue. Article 8 *bis* of the Rome Statute prohibits a "crime of aggression," which is defined as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."³⁸⁸ The embedded reference to an "act of aggression," which might make the definition seem circular, avoids that problem by further specification: Russia has committed an "act of aggression" as defined by the Rome Statute, which explains that such an act is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."³⁸⁹

Without doubt, Russia's war of aggression against Ukraine qualifies as both a crime and an act of aggression under the Rome Statute. There is some debate, however, about whether the ICC has jurisdiction over Russia, given the history of Russia's and Ukraine's involvement with the Rome Statute.³⁹⁰ The spokeswoman for the Russian Ministry of Foreign Affairs has stated that "Russia is not a party to the Rome Statute of the International Criminal Court and bears no obligations under it."³⁹¹ But Ukraine has accepted the ICC's jurisdiction on multiple occasions,

³⁸⁸ Rome Statute of the International Criminal Court, art. 8 *bis*, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90.

³⁸⁹ *Id.* ¶ 2. Acts of aggression include: "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of another State or part thereof.... [And] [t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed [in Article 8]." *Id.* ¶¶ 2(a), (g).

³⁹⁰ See *supra* Section IV.B.2.c.

³⁹¹ See *Q&A: What the ICC arrest warrants mean for Russia's Putin*, *supra* note 340.

and the President of the ICC, Piotr Hofmanski, has stated that, because of Ukraine's past acceptance, the ICC has jurisdiction over crimes committed in Ukraine "regardless of nationality of the alleged perpetrators."³⁹² Especially if Ukraine again recognizes the ICC's jurisdiction with respect to the recent crimes committed by Russia on Ukrainian soil, a strong argument can be made that Russia's leaders may be held accountable under the Rome Statute.³⁹³

d. Violation of *Jus Cogens*

In addition to the enumerated violations of specific international treaties, Russia's war against Ukraine has violated fundamental, peremptory international legal norms, known as *jus cogens*. The U.N. International Law Commission ("ILC") has defined *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted," noting that these norms "reflect and protect fundamental values of the international community" and therefore "are hierarchically superior to other rules of international law and are universally applicable."³⁹⁴ Although *jus cogens* are not codified explicitly in

³⁹² *Id.*

³⁹³ Russia's war also violates dozens of provisions in the Helsinki Final Act of 1975, an agreement that has bound Russia's foreign policy since the late days of the Soviet Union. For example, Russia's invasion and occupation violates Article 1(a)(I)'s requirement that states "respect each other's sovereign equality and individuality as well as the right of every State ... to territorial integrity and to freedom and political independence." Helsinki Final Act of 1975, art. 1(a)(I), ¶ 1. It also violates Article 1(a)(II), which states that states "will refrain ... from the threat or use of force against the territorial integrity or political independence of any State," *id.* art. 1(a)(II), ¶ 1, as well as the similar requirements to respect states' territorial integrity, to abide by the U.N. Charter, and to abstain from military occupations, *id.* art. 1(a)(IV). The list of violations goes on—a shocking reminder of how unprecedented Russia's actions are given that Soviet leaders Brezhnev, Andropov, Chernenko, and Gorbachev abided by the Helsinki Final Act while President Putin has disregarded it. *See, e.g.,* Christian Ostermann, *Helsinki 1975 and the Transformation of Europe*, WILSON CENTER (Sept. 23, 2008), <https://www.wilsoncenter.org/event/helsinki-1975-and-the-transformation-europe> ("The collapse of the Soviet Union and of the communist regimes in Eastern Europe brought forth the challenges of national identity and state borders. ... Yet the ensuing Helsinki-process between 1975 and 1989 provided an example for a successful multilateral approach on how current conflicts between Russia and the European Union, Russia and the United States, conflicts like in Georgia or in Kosovo could be resolved peacefully.").

³⁹⁴ U.N. GAOR, 71st Sess., U.N. Doc. A/CN.4/L.936 (May 29, 2019), <https://legal.un.org/ilc/sessions/71/docs.shtml>.

international treaties, they are nevertheless binding—as recognized, for example, in the Vienna Convention on the Law of Treaties³⁹⁵ and in numerous ICJ opinions.³⁹⁶

An unprovoked invasion of another state’s sovereignty is a quintessential violation of *jus cogens*.³⁹⁷ The ILC’s 2019 draft conclusions on *jus cogens*, for example, lists “[t]he prohibition of aggression” as the very first enumerated category in its non-exhaustive list of peremptory norms.³⁹⁸ The breach of *jus cogens* against one country is a violation of “obligations owed to the international community as a whole ... in which all States have a legal interest,” which means that “[a]ny State is entitled to invoke the responsibility of another State for a breach” of *jus cogens*.³⁹⁹ Because Russia has clearly violated *jus cogens* with its invasion of Ukraine, other states (including the United States) are authorized to hold Russia accountable.

³⁹⁵ Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 (“A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised 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.”).

³⁹⁶ See, e.g., *Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.)*, ICJ Judgment (Nov. 28, 1955) (separate opinion of Quintana, J.), <https://www.icj-cij.org/sites/default/files/case-related/33/033-19581128-JUD-01-03-EN.pdf>; *Right of Passage Over Indian Territory (Port. v. India)*, ICJ Judgment (Apr. 12, 1960) (dissenting opinion of Fernandes, J.), <https://www.icj-cij.org/sites/default/files/case-related/32/032-19600412-JUD-01-12-EN.pdf>; *South West Africa Case, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.)*, ICJ Judgment (July 18, 1966) (dissenting opinion of Tanaka, J.), <https://www.icj-cij.org/sites/default/files/case-related/47/047-19660718-JUD-01-06-EN.pdf>; *North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.)*, ICJ Judgment (Feb. 20, 1969) (separate opinion of Nervo, J.), <https://www.icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-05-EN.pdf>.

³⁹⁷ See, e.g., Stanislaw E. Nahlik, *Book Reviews and Notes: Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status* by Lauri Hannikainen, 84 AM. J. INT’L L. 771, 779-82 (1990); Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW 46, 216 (2008).

³⁹⁸ U.N. GAOR, 71st Sess., U.N. Doc. A/CN.4/L.936 at 6 (Annex) (May 29, 2019), <https://legal.un.org/ilc/sessions/71/docs.shtml>.

³⁹⁹ *Id.* at 4.

e. Russia's Pretextual Legal Justifications Have No Merit

Russia has offered two responses to the accusations that its invasion of Ukraine has violated international law.⁴⁰⁰ Both are rooted in Article 51 of the U.N. Charter, which enshrines each member state's right of self-defense if it is the victim of "an armed attack."⁴⁰¹ Yet Russia fails to make even a plausible case that the right of self-defense was ever triggered.

First, Russia has claimed that it was threatened by Ukraine's intention to join NATO.⁴⁰² Russia has argued that Ukraine's membership would mean nuclear weapons would be stationed on Russia's borders, which would constitute an act of aggression by Ukraine. Although some countries have recognized a right to "anticipatory self-defense," the existence of any right so potentially unlimited has long been a contentious issue in international law, and even those who recognize the right in principle have usually considered it to be viable only in cases of "imminent" armed attack.⁴⁰³ Even if Russia did perceive the stationing of nuclear weapons on its border with Ukraine as an act of aggression,⁴⁰⁴ it would be absurd to suggest that Ukraine's mere interest in joining NATO, a process that can take years, was sufficiently imminent to trigger Article 51's self-

⁴⁰⁰ See Mark Fisher, *Putin's Case for War, Annotated*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html>.

⁴⁰¹ U.N. Charter art. 51.

⁴⁰² See Fisher, *Putin's Case for War*, *supra* note 400.

⁴⁰³ See, e.g., Michael Schmitt, *Russia's 'Special Military Operation' and the (Claimed) Right of Self-Defense*, LIEBER INST. AT WEST POINT (Feb. 28, 2022) (noting that, under the "more traditional approach to self-defense," the "legitimacy of preemption" is "often conditioned ... on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack" (internal citation omitted)); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 557 (2003).

⁴⁰⁴ For example, some critics blame the United States for Russia's aggression towards Ukraine because the United States advocated for Ukraine to join NATO even when Russia made it clear that it saw Ukrainian NATO membership as an existential threat and "a line in the sand" by which they would not abide. But even these critics, such as Professor John Mearsheimer, do not go so far as to argue that Ukraine's interest in joining NATO justified a war of aggression under international law. See Isaac Chotiner, *Why John Mearsheimer Blames the U.S. for the Crisis in Ukraine*, NEW YORKER (Mar. 1, 2022), <https://www.newyorker.com/news/q-and-a/why-john-mearsheimer-blames-the-us-for-the-crisis-in-ukraine>.

defense provision. Moreover, treating Ukraine's interest in joining NATO as a sufficient provocation to justify what would otherwise be a criminal war of aggression would expose Finland, just to name a conspicuous example, to Russian military occupation inasmuch as it became a member of NATO on April 4, 2023.

Second, President Putin defended Russia's invasion of Ukraine under the auspices of protecting ethnic Russians from genocide at the hands of the Ukrainian government.⁴⁰⁵ But this is a fantasy. There is absolutely no credible evidence of any such crimes by Ukrainians.⁴⁰⁶ Russia nonetheless filed briefs in the ICJ accusing Ukraine of committing genocide. Once the final decision has been announced in that case, there will be even more official proof that Russia's claims are merely a thin veil for the crimes it has itself committed against the Ukrainian people.⁴⁰⁷

⁴⁰⁵ See Fisher, *Putin's Case for War*, *supra* note 400.

⁴⁰⁶ See 'Smells of genocide': How Putin justifies Russia's war in Ukraine, AL JAZEERA (Mar. 9, 2022), <https://www.aljazeera.com/news/2022/3/9/smells-of-genocide-how-putin-justifies-russias-war-in-ukraine> (quoting Alexander Hinton, director of the Center for the Study of Genocide and Human Rights at Rutgers University, stating: "[T]here is no credible evidence that genocide is taking place. None. Russia has made vague references to mass graves and civilian attacks. If it had proof, you can be sure Russia would have provided it long ago."); President Putin's related public justifications for unlawful invasion have been repeatedly and exhaustively rebutted by a sea of relevant experts. See, e.g., *Statement on Ukraine by scholars of genocide, Nazism and World War II*, JEWISH NEWS SYNDICATE (Feb. 28, 2022), <https://www.jns.org/statement-on-ukraine-by-scholars-of-genocide-nazism-and-world-war-ii/> ("We strongly reject the Russian government's cynical abuse of the term genocide, the memory of World War II and the Holocaust, and the equation of the Ukrainian state with the Nazi regime to justify its unprovoked aggression. This rhetoric is factually wrong, morally repugnant and deeply offensive"); Grzegorz Rossoliński-Liebe & Bastiaan Willems, *Putin's Abuse of History: Ukrainian 'Nazis', 'Genocide', and a Fake Threat Scenario*, 35 J. SLAVIC MIL. STUDS. 1 (2022), https://lisa.gerda-henkel-stiftung.de/putins_abuse_of_history ("Putin's equation of all Ukrainians with 'Nazis' or 'fascists' is an ahistorical and cynical one. Neither was fascism a major component of Ukrainian history, nor can Volodymyr Zelenskyi's current Ukrainian government or the Ukrainian people as such be characterized as 'Nazis' or 'fascists'."); George Packer, *This Is Not 1943*, ATLANTIC (Feb. 3, 2023), <https://www.theatlantic.com/ideas/archive/2023/02/putin-stalingrad-russia-ukraine-war-nazi-germany-propaganda/672934/> ("Putin raises the Nazi ghost as a way not just to discredit his enemies with a false charge, but to immunize himself from having a far more plausible charge flung at him. This is propaganda as projection—a common technique of demagogues."); Anton Troianovski, *Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/world/europe/ukraine-putin-nazis.html>; Olivia B. Waxman, *Historians on What Putin Gets Wrong About 'Denazification' in Ukraine*, TIME (Mar. 3, 2022), <https://time.com/6154493/denazification-putin-ukraine-history-context/>; *Ukraine war: President Putin speech fact-checked*, BBC (Feb. 21, 2022), <https://www.bbc.com/news/64718139>.

⁴⁰⁷ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order on Provisional Measures (Mar. 16, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

Russia is not acting in self-defense. It was not provoked. It is, in short, the aggressor and not the victim. As such, Russia cannot cite Article 51 of the U.N. Charter, or any other legal cover, for its invasion of Ukraine.

2. War Crimes

From the very beginning of Russia's war against Ukraine, there have been reports of alleged war crimes by Russian soldiers and officials alike. From the harrowing execution at close range of several men in Bucha on March 4, 2022,⁴⁰⁸ to the attack on the Kremenchuk shopping center full of innocent civilians on June 27, 2022,⁴⁰⁹ the reports of Russia's war crimes have only grown over the year and a half that this conflict has raged.⁴¹⁰ If these alleged reports are validated—and many of them have already been confirmed by the Independent International Commission of Inquiry on Ukraine, an independent investigatory body backed by the United Nations⁴¹¹—Russia has clearly violated protections enumerated by the Geneva Convention of 1949, the Additional Protocol I to the Geneva Conventions, and provisions of the Rome Statute that define war crimes.

Although further investigation yielding additional documentation will surely take place after the conflict is over, several authoritative decisionmakers, including the Independent

⁴⁰⁸ Yousur Al-Hlou, Masha Froliak, Evan Hill, Malachy Browne & David Botti, *New Evidence Shows How Russian Soldier Executed Men in Bucha*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/world/europe/russia-bucha-ukraine-executions.html>.

⁴⁰⁹ Valerie Hopkins, Ivan Nechepurenko, Megan Specia & Dan Bilefsky, *A missile strike hits a crowded shopping center in central Ukraine*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/world/europe/kremenchuk-shopping-center-ukraine.html>.

⁴¹⁰ See, e.g., *Ukraine: Events of 2022*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2023/country-chapters/ukraine> (chronicling and categorizing the many alleged war crimes committed by Russia and Russian soldiers in 2022).

⁴¹¹ Independent International Commission of Inquiry on Ukraine: Note by the Secretary General, U.N. Doc. A/77/533 (Oct. 18, 2022), <https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary>.

International Commission of Inquiry on Ukraine,⁴¹² the ICC,⁴¹³ the ICJ,⁴¹⁴ and entities from top to bottom of the Biden administration,⁴¹⁵ have already labeled many of these acts as war crimes or described them in a way that authoritatively qualifies them as war crimes under the Geneva Convention. Thus, Ukraine and other impacted third-party states have a solid basis to justify countermeasures against Russia based on its past and ongoing war crimes in Ukraine.

a. Violations of the Geneva Convention of 1949 and the Additional Protocol I to the Geneva Conventions

The Geneva Convention of 1949, which the Russian Federation joined in 1992, governs international humanitarian law during armed conflicts, “even if the state of war is not recognized by one of [the contracting parties].”⁴¹⁶ The Additional Protocol I to the Geneva Conventions, which entered into force in 1979, updated and supplemented the 1949 treaty.⁴¹⁷ There are numerous provisions of both the original Geneva Convention and the Additional Protocol that Russia has likely violated over the past year and a half. Below are a few of the most obvious and thoroughly documented violations.

⁴¹² *See id.*

⁴¹³ *See Situation in Ukraine*, *supra* note 346.

⁴¹⁴ *See Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order (Mar. 16, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

⁴¹⁵ *See* Charlie Savage, *Biden Orders U.S. to Share Evidence of Russian War Crimes With Hague Court*, N.Y. TIMES (July 26, 2023), <https://www.nytimes.com/2023/07/26/us/politics/biden-russia-war-crimes-hague.html>; Jeff Mason & Simon Lewis, *Biden says Putin committed war crimes, calls charges justified*, REUTERS (Mar. 18, 2023), <https://www.reuters.com/world/europe/us-says-no-doubt-russia-is-committing-war-crimes-ukraine-after-icc-issues-putin-2023-03-17/>.

⁴¹⁶ Geneva Convention, art. 2 (Aug. 12, 1949), <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf>.

⁴¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (June 8, 1977), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf.

Russia's March 9, 2022 attack on Mariupol maternity hospital⁴¹⁸ violated Article 18 of the 1949 Geneva Convention, which provides: "Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict."⁴¹⁹

Further, the numerous instances of Russian soldiers raping civilians violates Article 27 of the 1949 Geneva Convention: "Women shall be especially protected against any attack on their honour, in particular against rape ... or any form of indecent assault."⁴²⁰ Human Rights Watch has convincingly documented several allegations of rape, including one by a woman in the Kharkiv region, who alleges that a Russian soldier cut her with a knife and brutally raped her on March 13, 2022.⁴²¹

Russia's June 27, 2022 attack on the Kremenchuk shopping center,⁴²² its February 25, 2022 strike on a preschool and surrounding neighborhoods,⁴²³ its attack on agreed-upon humanitarian corridors,⁴²⁴ and many other actions have violated Additional Protocol I, Article 48, which requires parties to "at all times distinguish between the civilian population and combatants and between

⁴¹⁸ Bill Chappell & Lauren Frayer, *A direct Russian strike devastated a maternity hospital in Mariupol, Zelenskyy says*, NPR (Mar. 9, 2022), <https://www.npr.org/2022/03/09/1085450946/maternity-hospital-mariupol-russian-strike>.

⁴¹⁹ Geneva Convention art. 18.

⁴²⁰ Geneva Convention art. 27.

⁴²¹ *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUMAN RIGHTS WATCH (Apr. 3, 2022), <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>.

⁴²² Hopkins, Nechepurenko, Specia & Bilefsky, *A missile strike hits a crowded shopping center in central Ukraine*, *supra* note 409.

⁴²³ *Ukraine: Cluster munitions kill child and two other civilians taking shelter at a preschool*, AMNESTY INT'L (Feb. 27, 2022), <https://www.amnesty.org/en/latest/news/2022/02/ukraine-cluster-munitions-kill-child-and-two-other-civilians-taking-shelter-at-a-preschool/>.

⁴²⁴ David Matyas, *Humanitarian Corridors in Ukraine: Impasse, Ploy or Narrow Passage of Hope?*, JUST SEC. (Mar. 8, 2022), <https://www.justsecurity.org/80576/humanitarian-corridors-in-ukraine-impasse-ploy-or-narrow-passage-of-hope/>.

civilian objects and military objects and accordingly ... direct their operations only against military objectives.”⁴²⁵

The murder of at least six men in Staryi Bykiv, numerous men in Bucha, and a woman and fourteen-year-old child in Vorzel⁴²⁶ are all likely violations of Article 3 of the Geneva Convention of 1949, which prohibits “murder of all kinds, mutilation, cruel treatment and torture.”⁴²⁷ Unfortunately, this list could (and does) fill volumes. Human Rights Watch has documented many of these atrocities and is an excellent resource for all of Russia’s war crimes.

b. Violations of the Rome Statute

On February 22, 2023, ICC issued pre-trial warrants for both President Putin and Maria Alekseyevna Lvova-Belova, Putin’s Orwellian-named Commissioner on Children’s Rights. The ICC found “there are reasonable grounds” to support the accusation that Putin and Lvova-Belova have both committed “the war crime of unlawful deportation” and “unlawful transfer of population.”⁴²⁸ Putin and Lvova-Belova are both implicated in the large-scale kidnapping of Ukrainian children and re-settlement with Russian families in Russia.⁴²⁹ These crimes are prohibited by Article 8 the Rome Statute.

Article 8(1) of the Rome Statute states that the ICC “shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁴³⁰ President Putin’s masterminding of a brutal war that has

⁴²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949 art. 48.

⁴²⁶ *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, *supra* note 421.

⁴²⁷ Geneva Convention art. 3.

⁴²⁸ *Situation in Ukraine*, *supra* note 346.

⁴²⁹ See, e.g., Sarah El Deeb, Anastasiia Shvets & Elizaveta Tilna, *How Moscow grabs Ukrainian kids and makes them Russians*, AP (Mar. 17, 2023), <https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6>.

⁴³⁰ Rome Statute art. 8(1).

continually targeted civilians⁴³¹ and that has utilized mercenary troops known for their brutality certainly fits this description.⁴³²

The Rome Statute defines “war crimes” to mean “[g]rave breaches of the Geneva Conventions,” including “wilful killing,” “[t]orture or inhuman treatment,” “wilfully causing great suffering,” “[e]xtensive destruction and appropriation of property, not justified by military necessity,” and “[u]nlawful deportation or transfer” of people.⁴³³ As detailed above, Russia’s actions easily qualify under these standards.⁴³⁴

c. Official Bodies Acknowledging War Crimes or Describing Their Occurrence.

Several official bodies have already labeled Russia’s actions in Ukraine as “war crimes,” and others have described Russia’s actions in detailed terms that would qualify as war crimes under the Geneva Convention or Rome Statute. Thus, there is significant official support for the categorization of these actions as “war crimes,” which could in itself justify countermeasures by Ukraine and other impacted states.

The Independent International Commission of Inquiry on Ukraine, an independent investigatory body set up by the United Nations, stated unequivocally: “During this first phase of its investigations, the Commission has found that war crimes and violations of human rights and international humanitarian law have been committed in Ukraine since 24 February 2022. Russian armed forces are responsible for the vast majority of the violations identified.”⁴³⁵ Erik Møse, the

⁴³¹ See, e.g., Jim Garamone, *Russia Trying Terror Attacks on Ukrainian Civilians*, U.S. DEP’T OF DEFENSE (Oct. 17, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3190982/russia-trying-terror-attacks-on-ukrainian-civilians/>.

⁴³² See, e.g., *Brutality of Russia’s Wagner gives it lead in Ukraine war*, AP (Jan. 27, 2023), <https://apnews.com/article/russia-ukraine-wagner-group-yevgeny-prigozhin-803da2e3ceda5dace7622cac611087fc>.

⁴³³ Rome Statute art. 8(2).

⁴³⁴ See *supra* Section IV.C.1.c.

⁴³⁵ See Independent International Commission of Inquiry on Ukraine, *supra* note 411.

Chair of this Commission, spoke in front of the U.N. High Commission on Human Rights to describe the findings of the Commission. Chair Møse described attacks “carried out without distinguishing between civilians and combatants” including “attacks with cluster munitions or multi-launch rocket systems and airstrikes in populated areas.”⁴³⁶ The Commission was also concerned by “the large number of executions in the areas that we visited,” which they plan to investigate further.⁴³⁷ Finally, the Commission witnessed evidence of torture, sexual violence, and “cruel and inhuman treatment,” with victims aged four to eighty-two.⁴³⁸ With all these atrocities properly documented, Chair Møse stated: “Based on the evidence gathered by the Commission ... war crimes have been committed in Ukraine.”⁴³⁹

As already detailed, the ICC, in issuing an arrest warrant for President Putin and his Presidential Commissioner for Children’s Rights, Lvova-Belova, found reasonable grounds for accusing both of violating the Rome Statute.⁴⁴⁰

The ICJ, in its preliminary Order in *Ukraine v. Russian Federation*, described the impact the conflict has had on civilians in terms that would qualify as war crimes under the Geneva Convention:

The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The “special military operation” being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most

⁴³⁶ See *Update by the Chair of the Independent International Commission of Inquiry on Ukraine, at the 51st session of the Human Rights Council*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER (Sept. 23, 2022), https://www.ohchr.org/en/statements/2022/09/update-chair-independent-international-commission-inquiry-ukraine-51st-session?utm_source=PassBlue+List&utm_campaign=5832bcd60a-RSS_PassBlue&utm_medium=email&utm_term=0_4795f55662-5832bcd60a-55025633.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ See *id.*

⁴⁴⁰ See *supra* Section IV.B.2.c.

basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.⁴⁴¹

Finally, President Biden has publicly stated that Russia has “clearly committed war crimes” in Ukraine.⁴⁴² In sum, the fact that so many official bodies have either explicitly named Russia’s actions as “war crimes,” or described them in sufficient detail to trigger the Geneva Convention, makes for a straightforward case that Ukraine and other third-party states have a right to pursue countermeasures to induce Russia to stop these international humanitarian law violations as soon as possible.

3. Genocide

Ukraine and the Russian Federation are both parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).⁴⁴³ As such, they are bound by the Convention, which recognizes genocide as “a crime under international law which they undertake to prevent and to punish.”⁴⁴⁴ Thus, if Russia is committing genocide of Ukrainians either in conjunction with its criminal war of aggression or independent of that war, parties to the Convention including Ukraine and third-party nations like the United States, the

⁴⁴¹ See *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order (Mar. 16, 2022), at 19, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

⁴⁴² Mason & Lewis, *Biden says Putin committed war crimes*, *supra* note 415. Vice President Kamala Harris, in her remarks to the Munich Security Conference described the actions taken by Russia, including “gruesome acts of murder, torture, rape ... [e]xecution-style killings, beatings, and electrocution[s]” of the Ukrainian civilian population, as “horrendous atrocities and war crimes.” See *Remarks by Vice President Harris at the Munich Security Conference*, WHITE HOUSE (Feb. 18, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/18/remarks-by-vice-president-harris-at-the-munich-security-conference-2/>.

⁴⁴³ *The Genocide Convention: Background*, U.N. OFF. OF GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=The%20Genocide%20Convention%20was%20the,during%20the%20Second%20World%20War.>

⁴⁴⁴ Convention on the Prevention and Punishment of the Crime of Genocide art. 1, G.A. Res. 3/260 (Dec. 9, 1948), <http://un-documents.net/a3r260.htm>.

United Kingdom, Germany, and others bound by the treaty,⁴⁴⁵ have committed themselves to do what they can to prevent further genocide and punish those who have perpetrated it.

Although genocide is often named only in hindsight, there are strong arguments that Russia is currently committing genocide in Ukraine. The Genocide Convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group,” including “[k]illing members of the group,” “[c]ausing serious bodily harm to members of the group,” “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” and “forcibly transferring children of the group to another group.”⁴⁴⁶ Since its annexation of Crimea in 2014, and with increasing intensity since the 2022 full scale invasion of Ukraine, Russia has committed all of these acts. A November 2022 Helsinki Commission policy panel engaged a group of genocide experts who also agreed with this assessment: Russia is violating the Genocide Convention.⁴⁴⁷

The Russian government has not tried to hide its goal of “Russifying” Ukraine.⁴⁴⁸ Since the 2014 invasion of Crimea, there have been concerted efforts to spread Russian control at the expense of Ukrainian culture and sovereignty.⁴⁴⁹ President Putin and other Russian leaders have

⁴⁴⁵ While 150 countries are parties to the Convention, not all countries in the G-7 are. Japan is neither a signatory nor a party to the Genocide Convention. *The Genocide Convention: Background*, *supra* note 443.

⁴⁴⁶ Convention on the Prevention and Punishment of the Crime of Genocide art. 2.

⁴⁴⁷ *Helsinki Commission Briefing on Russia’s Genocide in Ukraine*, COMMISSION ON SECURITY AND COOPERATION IN EUROPE (Nov. 14, 2022), <https://www.csce.gov/international-impact/press-and-media/press-releases/helsinki-commission-briefing-russias-genocide>.

⁴⁴⁸ See, e.g., Christopher Miller, Alexander Ward & Quint Forgey, *Putin’s ‘Russification’ of Ukraine*, POLITICO (May 26, 2022), <https://www.politico.com/newsletters/national-security-daily/2022/05/26/putins-russification-of-ukraine-00035500>.

⁴⁴⁹ See, e.g., Anya Free, *Putin’s Crimea Mythmaking*, WILSON CTR. (Mar. 2, 2023), <https://www.wilsoncenter.org/blog-post/putins-crimea-mythmaking>.

used terminology to demean Ukrainian people as subhuman,⁴⁵⁰ stated that there is no such thing as a distinct Ukrainian identity but rather insisted that all Ukrainian nationals are Russian,⁴⁵¹ and have perpetuated propaganda to portray Ukrainians as Nazis and criminals.⁴⁵² These are textbook signs of leaders laying the groundwork for genocide.⁴⁵³

Additionally, there have been independently validated reports of children being forcibly taken to Russia and adopted by Russian families.⁴⁵⁴ Presidential Commissioner for Children's Rights Lvova-Belova, who is currently wanted by the ICC for war crimes, states that she herself has "adopted" one of these Ukrainian children from Mariupol.⁴⁵⁵

There is a strong case that Russia has violated multiple provisions of the Genocide Convention. As such, Ukraine and other parties to the Convention have the obligation to do what they can to stop these actions and hold Russia accountable for committing them, including by transferring Russia's frozen sovereign assets.

4. Failure to Pay Reparations

ARSIWA reflects an obligation on states that commit an internationally wrongful act "to make full reparation for the injury caused by the intentionally wrongful act."⁴⁵⁶ Relying on that obligation of customary international law, the U.N. General Assembly's November 14, 2022

⁴⁵⁰ See, e.g., Tom Porter, *Kremlin propaganda is directly responsible for Russia's genocide in Ukraine, war-crime investigators say*, BUSINESS INSIDER (May 20, 2022), <https://www.businessinsider.com/russia-shifted-propaganda-amid-ukraine-setbacks-fuel-genocide-investigators-2022-5>.

⁴⁵¹ Steven Erlanger, *Putin's War on Ukraine Is About Ethnicity and Empire*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/world/europe/putin-war-ukraine-recolonization.html>.

⁴⁵² Troianovski, *Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine*, *supra* note 406.

⁴⁵³ See, e.g., Samantha Power, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2012).

⁴⁵⁴ Veronika Melkozerova, *Inside the operation to rescue Ukraine's abducted children*, POLITICO (June 10, 2023), <https://www.politico.eu/article/save-ukraine-children-abduction-russia-war-rescue-operation/>.

⁴⁵⁵ See Valerie Hopkins, *The Children's Rights Advocate Accused of Russian War Crimes*, N.Y. TIMES (Apr. 2, 2023), <https://www.nytimes.com/2023/04/02/world/europe/maria-lvova-belova-russia.html>.

⁴⁵⁶ ARSIWA art. 31.

Resolution declared that Russia “must bear the legal consequences of all its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.”⁴⁵⁷

Even if it is too early to realistically expect Russia to pay reparations for the current conflict, considering that the war is ongoing, it bears noting that Russia first invaded Crimea in 2014. There has been more than enough time since then for Russia to pay Ukraine back for the billions of dollars Ukraine has lost from this illegal annexation and Russian-mercenary powered conflict.⁴⁵⁸ In fact, there has already been official action to tally how much Russia owes Ukraine from that original invasion. The Hague’s Arbitration Tribunal has ordered Russia to pay \$5 billion to the Ukrainian state-owned gas company alone as compensation for expropriating assets since Russia’s invasion of Crimea in 2014.⁴⁵⁹ This sum is just a drop in the bucket of the damage done to the Ukrainian economy by having a lucrative port illegally occupied by Russian mercenary troops.

Thus, Russia’s failure to pay for any of the extensive damage caused to Ukraine since 2014, and to third-party countries impacted by the resulting international refugee migration,⁴⁶⁰ constitutes yet another clear violation of international law and thus another independent

⁴⁵⁷ G.A. Res. ES-11/5, Furtherance of Remedy and Reparation for Aggression Against Ukraine (Nov. 14, 2022).

⁴⁵⁸ E.g., Cynthia Buckley et al., *The war in Ukraine is more devastating than you know*, WASH. POST (Apr. 9, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/09/the-war-in-ukraine-is-more-devastating-than-you-know/>.

⁴⁵⁹ *Ukraine’s Naftogaz says Russia told to pay \$5 billion for seizing Crimea assets*, REUTERS (Apr. 13, 2023), <https://www.reuters.com/world/europe/ukraines-naftogaz-says-russia-told-pay-5-bln-arbitration-case-2023-04-13/>.

⁴⁶⁰ *Operational Data Portal: Ukraine Refugee Situation*, U.N.H.C.R., <https://data2.unhcr.org/en/situations/ukraine> (registering 5,830,500 Ukrainian refugees in Europe and 6,199,700 globally) (last visited Sept. 15, 2023).

justification under international law for the transfer of Russia’s frozen assets to Ukraine to satisfy Russia’s obligation to make full reparations.

D. International Law Authorizes the Transfer of Russia’s Sovereign Assets by G7 States Other than Ukraine

International law not only makes clear that Russia’s abhorrent actions are outside the bounds of acceptable state action but also establishes that those actions have very substantial legal consequences. As described above, Ukraine is already pursuing its rights against Russia in the ICJ, the ECHR, and other international forums.⁴⁶¹ But those tribunals can take years to reach a final resolution, and they lack the independent authority to impose and enforce a punishment. For example, Russia has for more than a year flouted the ICJ’s order that it “shall *immediately* suspend” its military operations in Ukraine.⁴⁶²

As a matter of sheer necessity, international law does not limit its remedies to formal court-like procedures. There is a rich history of self-help remedies under international law that permit one state to respond to another state’s violation of international law with a reciprocal act of noncompliance.⁴⁶³ Relevant here, one state may employ countermeasures to induce another state to cease its violation of international law. If that violation is of a legal obligation owed to the international community as a whole—that is, obligations *erga omnes*—then a countermeasure is authorized for any state, whether or not it is a direct victim of that violation.

⁴⁶¹ See also, e.g., *Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.)*, Case No. 26, Order of May 25, 2019, ITLOS Rep., <https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/>.

⁴⁶² *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order (Mar. 16, 2022), at 19, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> (emphasis added).

⁴⁶³ E.g., *Naulilaa Incident Arbitration (Port. v. Ger.)*, II R.I.A.A. 1012 (1928).

This section outlines the governing principles of international law and applies them to Russia's ongoing violations of international law. It explains why the transfer of Russia's sovereign reserves to Ukraine is a permissible countermeasure, why objections premised in the law of countermeasures are incorrect, and why principles of sovereign immunity are not a barrier to lawful transfer.

1. Transfer of Russia's Sovereign Assets to Ukraine Is a Permissible Countermeasure

a. Countermeasures by Third Parties

Under international law, the legality of self-help remedies like countermeasures is not reduced to a single convention or treaty but is instead the product of either issue-specific treaties (like the WTO's Dispute Settlement Understanding) or of customary international law—that is, settled state practices undertaken with the belief that they are obligatory.⁴⁶⁴ Most relevant here, proponents and opponents of asset transfer alike ground their arguments about the lawfulness of transfer as a countermeasure in the International Law Commission's ARSIWA. That is the correct starting point. Although ARSIWA is not a treaty or convention, the ICJ has repeatedly relied on it as reflecting certain principles of customary international law defining states' wrongful acts and

⁴⁶⁴ See *North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.)*, ICJ Judgment (Feb. 20, 1969), ¶¶ 71, 77, <https://www.icj-cij.org/sites/default/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Judgment (Nov. 26, 1984), ¶ 73, <https://www.icj-cij.org/sites/default/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>; *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ Judgment (Feb. 3, 2012), ¶ 55, <https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>.

the use of countermeasures in response.⁴⁶⁵ And the U.N. General Assembly has repeatedly recommended ARSIWA to its member states.⁴⁶⁶

A countermeasure is an action that would violate international law but its wrongfulness is “precluded” because the action is taken against another state for an internationally wrongful act.⁴⁶⁷ Although the analogy is imperfect, countermeasures operate much like justifications or excuses found in U.S. criminal law.⁴⁶⁸ Under ARSIWA, a valid countermeasure has several key characteristics.⁴⁶⁹ First, the aggressor state must be provided notice of its breach of international law.⁴⁷⁰ Second, the countermeasure must be undertaken only to induce the violating state to comply with its obligation under international law.⁴⁷¹ Third, it may not continue after the violating state has resumed compliance with its obligations under international law.⁴⁷² Fourth, and consistent with the two preceding requirements, the countermeasure shall “as far as possible” take a form that

⁴⁶⁵ E.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Judgment (Feb. 9, 2022), ¶ 70, <https://www.icj-cij.org/sites/default/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> (ARSIWA “reflects customary international law”); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Advisory Opinion (Feb. 25, 2019), ¶ 177, <https://www.icj-cij.org/sites/default/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (July 9, 2004), ¶ 140, <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Judgment (Sept. 25, 1997), ¶¶ 50, 83, <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>.

⁴⁶⁶ E.g., G.A. Res. 56/83 (Dec. 12, 2001); G.A. Res. 59/35 (Dec. 2, 2004); G.A. Res. 62/61 (Dec. 6, 2007); G.A. Res. 65/19 (Dec. 6, 2010).

⁴⁶⁷ ARSIWA arts. 22, 49.

⁴⁶⁸ ARSIWA ch. V, cmt. 2 (explaining that countermeasures and related doctrines “provide a justification or excuse for non-performance while the circumstance in question subsists”); *see also* ARSIWA ch. V, cmt. 7 (“In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems ...”). Like affirmative defenses under U.S. criminal law, in a legal proceeding, the burden is placed on the state that invokes the use of countermeasures. ARSIWA Ch. V, cmt.8.

⁴⁶⁹ NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 15-16.

⁴⁷⁰ ARSIWA art. 43.

⁴⁷¹ ARSIWA art. 49(1).

⁴⁷² ARSIWA art. 49(2).

permits the violating state to resume its compliance.⁴⁷³ As the ILC's comments further explain, the third and fourth requirements mean that countermeasures must be "temporary" and should be "reversible" in their effects.⁴⁷⁴ Fifth, a countermeasure must be proportional to the injury suffered and the gravity of the violation of international law.⁴⁷⁵ And sixth, a countermeasure cannot impair certain other "sacrosanct" obligations under international law, including the U.N. Charter's prohibition on the use of force, obligations to protect human rights, and peremptory norms of international law, nor can a countermeasure excuse obligations under dispute settlement procedures or to respect diplomatic and consular agents.⁴⁷⁶

Typically, countermeasures are invoked by the state directly injured by the violation of international law. But ARSIWA also permits other states to invoke a violating state's responsibility to comply with international law if that state is in breach of an obligation owed to the international community as a whole.⁴⁷⁷ This authorization to "third-party" states to enforce obligations owed to the international community finds ready support in settled state practice.⁴⁷⁸ ARSIWA, drafted in 2001, itself acknowledges several examples of third-party states expressly enforcing international obligations.⁴⁷⁹ These include high-profile examples like the wide range of boycott and sanction measures imposed by the international community against South Africa in the 1980s and trade

⁴⁷³ ARSIWA art. 49(3).

⁴⁷⁴ ARSIWA ch. II, cmt. 6; art. 49, cmts. 7-9.

⁴⁷⁵ ARSIWA art. 51.

⁴⁷⁶ ARSIWA art. 50 & cmt.1.

⁴⁷⁷ ARSIWA art. 48(1)(b) & cmts. 8-10; *see also* arts. 33, 42(b).

⁴⁷⁸ As many have noted, the term "third party" is a misnomer here because it improperly suggests that the third-party state has no legal interest in the preservation of international law. *See* Anton Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation: The Case of Central Bank Assets* at 28 n.197 (Apr. 17, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4420459. For example, although a state like the United States may not be the direct victim of Russia's aggression in the same way that Ukraine is, Russia's violation of an international obligation *erga omnes* by definition violates an obligation owed to the United States just as much as it is owed to Ukraine.

⁴⁷⁹ ARSIWA art. 54 cmt.3.

embargoes imposed on Iraq by the European Commission in 1990.⁴⁸⁰ But even ARSIWA's accounting in 2001 was incomplete, and the practice of enforcing international obligations by third-party states has only become more entrenched in the last two decades.⁴⁸¹ There is, in short, a more than adequate foundation of state practice, and accompanying *opinio juris*, to establish authority to pursue countermeasures under customary international law to induce compliance with obligations *erga omnes*.⁴⁸² That authority is particularly weighty where the country most directly injured by the violation of international law has expressly requested countermeasures in its support.⁴⁸³

b. Countermeasures Are Justified Against Russia

As detailed above, since February 2022 alone, Russia has repeatedly and flagrantly violated the most fundamental tenants of international law. Without question, Russia has violated the U.N. Charter's prohibition on the use of the force. It has violated Ukraine's sovereignty and territorial integrity. It has unlawfully targeted civilians and committed war crimes. And as the war has deepened, Russia's leaders have made clear that their aims include ethnic cleansing and even genocide of the Ukrainian people.

⁴⁸⁰ *Id.*

⁴⁸¹ Martin Dawidowicz, *THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW*, ch. 4 (2017); Alina Miron & Antonios Tzanakopoulos, *Unilateral Coercive Measures and International Law*, THE LEFT IN THE EUROPEAN PARLIAMENT at 19 (Nov. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4235572 (“[I]t is probably now established in the practice of states that resort to countermeasures ‘in the general interest’ is available under international law. ARSIWA’s silence on this point seems to be compensated by considerable practice, which as such met with little opposition. The EU has resorted to such countermeasures in the general interest on a number of occasions, mainly in response to serious human rights violations occurring in third states. In fact, it has provided a significant amount of international practice in this most problematic area of countermeasures.” (footnotes omitted)); *id.* at 19-21 (collecting examples of E.U. practice since 1970).

⁴⁸² NEW LINES INSTITUTE, *MULTILATERAL ASSET TRANSFER*, *supra* note 31, at 16-18, 27.

⁴⁸³ See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Judgment (June 27, 1986), ¶ 199, <https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>.

Russia's contempt for international law is made even clearer considering its ongoing occupation of Ukraine's territory since 2014. In that time, Russia has inflicted unimaginably vast damage on Ukraine. International law makes plain that Russia has a duty to compensate Ukraine in the form of reparations for that unthinkable great damage.⁴⁸⁴ This accounting of Russia's crimes reflects the findings of a near-unanimous U.N. General Assembly, of the ICJ, of the ICC, and of the ECHR.⁴⁸⁵

This conduct not only violates the rights of Ukraine and its people, but also violates Russia's obligations *erga omnes* to the international community as a whole.⁴⁸⁶ It also triggers states' inherent right of collective self-defense under Article 51 of the U.N. Charter.⁴⁸⁷ And it still further imposes on Russia an obligation to pay to Ukraine reparations for the harm that it has caused.⁴⁸⁸ In March 2022, soon after Russia's invasion, the General Assembly urged its member states to work to end Russia's aggression against Ukraine.⁴⁸⁹ And the U.N. General Assembly in November 2022 specifically declared states' commitment to ensure that Russia paid reparations owed to Ukraine.⁴⁹⁰

⁴⁸⁴ ARSIWA arts. 31, 34-36.

⁴⁸⁵ See G.A. Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022); G.A. Res. ES-11/5, Furtherance of Remedy and Reparation for Aggression Against Ukraine (Nov. 14, 2022); *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Order on Provisional Measures (Mar. 16, 2022), ¶¶ 81-82, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>; *European Court Grants Urgent Interim Measures*, *supra* note 328.

⁴⁸⁶ E.g., *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Judgment (Feb. 5, 1970), ¶¶ 33-34, <https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>.

⁴⁸⁷ Pavel Doubek, *War in Ukraine: Time for a Collective Self-Defense?*, OPINIO JURIS (Mar. 29, 2022), <http://opiniojuris.org/2022/03/29/war-in-ukraine-time-for-a-collective-self-defense/>.

⁴⁸⁸ See G.A. Res. 60/147 (Dec. 16, 2005).

⁴⁸⁹ G.A. Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022).

⁴⁹⁰ G.A. Res. ES-11/5, Furtherance of Remedy and Reparation for Aggression Against Ukraine (Nov. 14, 2022) (declaring that Russia "must be held to account for any violations of international law" and "must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including

This legal authority may be exercised, and the moral duty to assist Ukraine discharged, by transferring Russia's sovereign assets held in G7 countries to Ukraine. In effect, this countermeasure would constitute a narrowly limited abrogation of Russia's property interest in certain sovereign assets.⁴⁹¹ The international community has already put Russia on notice—indeed, has done so repeatedly—that it is in breach of obligations owed to the international community. And the G7's notice of intent to transfer Russia's sovereign assets and the legal basis for that transfer can be provided contemporaneously with the decision to begin the transfer of assets to Ukraine.⁴⁹²

Opponents have argued that a targeted transfer of Russia's sovereign assets would not satisfy two characteristics of a valid countermeasure under ARSIWA, the principle of proportionality and that of being reversible and temporary in nature. These concerns should be taken seriously, as ARSIWA's limits on the use of countermeasures play an important role in limiting the abuse of this valuable mechanism by other countries.⁴⁹³ But upon careful inspection, neither the proportionality nor the reversibility requirements prevent the transfer of Russia's sovereign assets proposed in this report.

any damage, caused by such acts" and further recognizes the "need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation").

⁴⁹¹ See generally Daniel Franchini, *State Immunity As A Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets*, 60 VA. J. INT'L L. 433 (2020).

⁴⁹² ARSIWA art. 43; NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 22-23.

⁴⁹³ See, e.g., Lori Fisler Damrosch, *The Legitimacy of Economic Sanctions As Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 249, 259-60 (2019).

c. Transfer of Russia's Sovereign Assets Satisfies the Proportionality Requirement.

Some have raised concerns about whether the transfer of Russia's sovereign assets would satisfy ARSIWA's proportionality requirement as defined in ARSIWA Article 51.⁴⁹⁴ Article 51 describes customary international law to require that a countermeasure be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."⁴⁹⁵ The proportionality requirement acts as an "essential limit" on the scope of countermeasures,⁴⁹⁶ but how it applies to any given countermeasure is relatively uncertain.⁴⁹⁷ Because a state's countermeasure will frequently implicate different interests from the initial violation of international law to which it responds, proportionality often requires an apples-to-oranges comparison.⁴⁹⁸ How should, for example, a court decide if one state's economic countermeasure is "commensurate" to the injury caused by another state's unauthorized use of deadly force?

Recognizing the difficulty of such questions, the ICJ has articulated a flexible and realistic test for proportionality, asking only whether a countermeasure is "clearly disproportionate" to the violation of international law.⁴⁹⁹ Thus, for example, the ICJ concluded that a U.S. decision to bar

⁴⁹⁴ E.g., *Policy Planning White Paper: Repurposing Frozen Russian Assets*, PUB. INT'L L. & POL'Y GRP. at 10-11 (Mar. 2023), <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/6465185dd082d849e8030588/1684346973782/2023-05-17+White+Paper+on+Repurposing+Frozen+Russian+Assets+%281%29+%281%29.pdf>.

⁴⁹⁵ ARSIWA art. 51.

⁴⁹⁶ ARSIWA art. 51 cmt. 1.

⁴⁹⁷ ARSIWA art. 51 cmts. 2-3.

⁴⁹⁸ In this sense, the proportionality requirement is "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

⁴⁹⁹ *Air Service Agreement (United States of America v. France)*, ICJ Judgment (Dec. 9, 1978), ¶ 83, https://legal.un.org/riaa/cases/vol_XVIII/417-493.pdf (alternatively phrasing proportionality as requiring that the countermeasure "have some degree of equivalence with the alleged breach").

French flights to U.S. airports was a proportionate countermeasure to a similar decision by France, even though it was widely understood that the U.S. response inflicted much more severe economic harm than did the initial French decision.⁵⁰⁰ But, on the other hand, the ICJ held Czechoslovakia's decision to permanently reroute the Danube river was entirely out of proportion with Hungary's alleged violation of a bilateral water-usage treaty.⁵⁰¹ In short, proportionality is a common-sense concept designed to ensure that states do not overreact to violations and inflict suffering that is gratuitous to inducing technical compliance with international law.⁵⁰²

While proportionality plays a crucial role in many analyses of countermeasures, it actually has little logical relevance to the present situation. Russia's conduct strikes at the core of the international order. Its violations of international law are grave, numerous, ongoing, and lacking even a facially plausible justification. Where violations of law inflict so much damage on other states (Ukraine most of all) and implicate such fundamental interests of the international community and the basic premises of the very existence of international law, proportionality is almost certainly satisfied before the precise nature of any property-focused countermeasure is even considered.⁵⁰³

Transfer of Russia's sovereign assets is especially well calibrated to induce Russia's compliance with international law. As an initial matter, the assets to be transferred are uniquely

⁵⁰⁰ ARSIWA art. 51 cmt. 3.

⁵⁰¹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Judgment (Sept. 25, 1997), ¶¶ 85-87, <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> (permanent diversion of river was not proportionate, considering both quantitative and qualitative effects).

⁵⁰² Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 763-67 (2008).

⁵⁰³ Paul R. Williams & Alexandra Koch, *Invoicing Russia for Ukraine's Recovery: The Complexities of Repurposing Frozen Russian Assets*, OPINIO JURIS (May 12, 2023), <http://opiniojuris.org/2023/05/12/invoicing-russia-for-ukraines-recovery-the-complexities-of-repurposing-frozen-russian-assets/> ("Due to the scale of Russia's illegal acts, the proportionality requirement is likely to be easily met.").

the property of the Russian state. Transferring its sovereign assets is therefore a far more targeted response to Russia's unlawful behavior than are more traditional sanctions measures such as transferring the personal property of Russian oligarchs,⁵⁰⁴ limiting the sale of Russian oil and gas,⁵⁰⁵ or restricting business with Russian banks.⁵⁰⁶ The point is not that these latter efforts should end—by all means, they should be strengthened further—but that targeting Russia's sovereign assets has the clearest possible connection to those entities actively deciding to continue the unlawful occupation of Ukrainian territory.⁵⁰⁷

Moreover, although the transfer of Russia's sovereign assets is likely to weaken Russia's war footing and to push Russian leaders to reconsider their positions, there is no serious contention that the transfer of currently frozen assets would inflict immediate harm on the Russian civilian population or otherwise function as an improper punishment inflicted on innocent individuals or entities.⁵⁰⁸ As described earlier in this report, even under a strictly monetary accounting, the harm Russia has caused Ukraine already runs well into the hundreds of billions of dollars. That figure

⁵⁰⁴ E.g., Tal Yellin, *From yachts to lavish estates, tracking Russian assets seized so far*, CNN (Apr. 27, 2022), <https://www.cnn.com/interactive/business/russian-oligarchs-yachts-real-estate-seizures/index.html>.

⁵⁰⁵ E.g., Andrew Duehren, Laurence Norman & Joe Wallace, *Group of Seven Agrees to Expand Sanctions on Russian Oil Industry*, WALL ST. J. (Feb. 3, 2023), <https://www.wsj.com/articles/eu-agrees-to-expand-sanctions-on-russian-oil-industry-11675447845>.

⁵⁰⁶ E.g., Philip Blenkinsop, *EU bars 7 Russian banks from SWIFT, but spares those in energy*, REUTERS (Mar. 2, 2022), <https://www.reuters.com/business/finance/eu-excludes-seven-russian-banks-swift-official-journal-2022-03-02/>.

⁵⁰⁷ Anders Åslund, *How to Reconstruct Ukraine*, 24(2) ECONPOL FORUM 16, 17 (2023); Anders Åslund, *Preparing for Ukraine's Reconstruction*, PROJECT SYNDICATE (June 13, 2023), <https://www.project-syndicate.org/commentary/how-to-organize-postwar-reconstruction-of-ukraine-by-anders-aslund-2023-06> ("These reserves are the indisputable property of the Russian state, which bears responsibility for the war crimes committed in Ukraine.").

⁵⁰⁸ See Michael Emerson & Steven Blockmans, *The \$300 Billion Question—How to get Russia to Pay for Ukraine's Reconstruction*, STOCKHOLM CENTRE FOR E. EUR. STUD. at 6 (Dec. 14, 2022), [https://www.ui.se/globalassets/ui.se-eng/publications/sceeus/the-\\$300-billion-question---how-to-get-russia-to-pay-for-ukraines-reconstruction.pdf](https://www.ui.se/globalassets/ui.se-eng/publications/sceeus/the-$300-billion-question---how-to-get-russia-to-pay-for-ukraines-reconstruction.pdf); Jeffrey J. Schott, *Economic sanctions against Russia: How effective? How durable?*, PETERSON INST. FOR INT'L ECONS. at 3, 8-9 (Apr. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4431076.

does not begin to include the human and moral toll of Russia's crimes, which are also relevant in a calculation of permissible reparations.⁵⁰⁹ In short, there is no genuine risk that the transfer for Ukraine's benefit of Russia's roughly \$300 billion in sovereign assets held in G7 countries would exceed the amount that Russia owes to Ukraine under settled principles of international law.⁵¹⁰

Finally, were there doubt about the proportionality of asset transfer, it is resolved conclusively by considering the alternative measures available to G7 countries.⁵¹¹ Russia's invasion in February 2022 was not the beginning of its violations of international law but only an escalation of its occupation of Ukraine's sovereign territory that began in 2014. In that time, G7 countries have imposed a series of sanctions that include the transfer of property belonging to private Russian citizens, sanctions on critical industries in Russia, and heavy restrictions on Russia's access to global financial markets.⁵¹² Further, since February 2022, G7 countries have frozen the same sovereign assets that are now the object of the asset transfer. Despite these actions, Russia has continued and even escalated its campaign against the Ukrainian people. The inadequacy of these prior actions provides a straightforward legal justification for G7 countries to implement more muscular countermeasures.⁵¹³

Some have argued that a more proportional countermeasure would be to continue to freeze Russia's assets with the aim of inducing Russia to pay reparations voluntarily.⁵¹⁴ But, at bottom,

⁵⁰⁹ See ARSIWA art. 31.

⁵¹⁰ See NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 24.

⁵¹¹ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (July 9, 2004), ¶ 136, <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (requiring consideration of less intrusive means to achieve purpose of countermeasure).

⁵¹² See *supra* notes 504-506.

⁵¹³ Summers, Zelikow & Zoellick, *The Other Counteroffensive*, *supra* note 32.

⁵¹⁴ Evan Criddle, *Rebuilding Ukraine Will Be Costly. Here's How to Make Putin Pay.*, POLITICO (Mar. 30, 2022), <https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649>.

this proposal simply advocates continuing the status quo against Russia in hopes of producing a different result.⁵¹⁵ Yet every passing day demonstrates the inadequacy of the status quo. While G7 countries would of course have legal authority to condition the unfreezing of Russia's sovereign assets on its agreement to pay Ukraine reparations, the principle of proportionality does not prevent them from doing more. Ukraine needs Russia's assets now, and other countries need not stand by and hope that Russia will simply accept its obligation to pay reparations.⁵¹⁶

d. Transfer of Russia's Sovereign Assets Satisfies the Reversibility Requirement.

The objection most frequently made to the validity of transferring Russia's sovereign assets as a countermeasure is that it would not satisfy the requirements of being temporary and reversible. As these critics argue, once Russia's sovereign assets have been transferred, liquidated, and expended for the benefit of Ukraine, those same assets can no longer be returned to Russia, rendering the countermeasure of asset transfer permanent.⁵¹⁷

The reversibility objection commits two missteps that result in its improper conclusion. First, this objection misapprehends what satisfies the reversibility principle, over which there is some understandable confusion. As a first principle, countermeasures may not themselves prevent the violating country from resuming its compliance with international law.⁵¹⁸ After all, as the ILC explains in its commentary, the reversibility principle comes from the fundamentally

⁵¹⁵ The G7 has stated clearly that Russia's assets will remain frozen until Russia pays reparations to Ukraine. *G7 Japan 2023 Foreign Ministers' Communiqué*, at 2 (Apr. 18, 2023), <https://www.mofa.go.jp/files/100492731.pdf>; Patrick Wintour, *UK to keep Kremlin assets frozen until Russia pays compensation to Ukraine*, *GUARDIAN* (May 25, 2023), <https://www.theguardian.com/politics/2023/may/25/uk-to-keep-kremlin-assets-frozen-until-russia-pays-compensation-to-ukraine>.

⁵¹⁶ Emerson & Blockmans, *The \$300 Billion Question*, *supra* note 508, at 6.

⁵¹⁷ Evan J. Criddle, *Turning Sanctions into Reparations: Lessons for Russia/Ukraine*, *HARV. INT'L L.J. ONLINE* at 14 (2023), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3164&context=facpubs>; Stephan, *Response to Philip Zelikow*, *supra* note 145.

⁵¹⁸ ARSIWA art. 49(3).

“instrumental” nature of countermeasures—they are intended to induce compliance with international law, not themselves act as punishments for violations.⁵¹⁹ Accordingly, customary international law’s primary aim in this regard is that countermeasures “be as far as possible reversible in their effects *in terms of future legal relations*.”⁵²⁰

This report’s proposal readily satisfies the ARSIWA’s legal-relations conception of reversibility: the asset transfer operates as a temporary and narrow suspension of the normal legal relations (including the principles of comity and reciprocity) between the United States and its allies (on one hand) and Russia (on the other).⁵²¹ Once Russia resumes compliance with international law, that suspension would be reversed and Russia’s legal relations with G7 countries would be normalized.⁵²² In particular, its sovereign assets still located in those countries, whether frozen or not, would again be shielded by principles of international law that would constrain the United States and its allies from transferring those assets against Russia’s will.

Alternatively, some skeptics of asset transfer emphasize that Russia would be permanently deprived of particular assets and thereby focus on whether the *economic effects* (rather than legal relations) of a countermeasure can be reversed.⁵²³ But even if this economic-effect formulation of reversibility embodied the correct conception (it does not), this report’s transfer proposal would still satisfy it. As James Crawford (later Special Rapporteur for ARSIWA) observed, financial damage is “rarely irreversible” because money that is owed can be repaid.⁵²⁴ In this case, the reversibility of financial damage to Russia is largely hypothetical. Russia has imposed damages

⁵¹⁹ ARSIWA art. 48 ch. II, cmt. 6.

⁵²⁰ *Id.* (emphasis added).

⁵²¹ Franchini, *State Immunity As A Tool of Foreign Policy*, *supra* note 491, 60 VA. J. INT’L L. at 475-76.

⁵²² NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 23.

⁵²³ PUB. INT’L L. & POL’Y GRP., *supra* note 494, at 10-11.

⁵²⁴ James Crawford, *Counter-Measures as Interim Measures*, 5 EUR. J. INT’L L. 65, 68 (1994).

on Ukraine—and so incurred an obligation to pay reparations—that vastly exceed the total value of its sovereign assets subject to transfer. The economic damage of transfer can therefore be “reversed” by effectively crediting Russia’s “debt” to Ukraine.⁵²⁵ And in the unlikely event that Russia fully and voluntarily satisfies its reparations obligation to Ukraine, Russia could of course be repaid by the unspent assets that were transferred.⁵²⁶

Second, the reversibility objection incorrectly casts the reversibility principle in ARSIWA as an ironclad and inflexible requirement. Yet ARSIWA itself (in describing the state practices that make up customary international law) states that a countermeasure should be reversible “as far as possible.”⁵²⁷ In its commentary, the ILC explains that this language reflects a requirement that if the state “has a *choice* between a number of lawful *and* effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.”⁵²⁸ But because it “may not be possible in all cases to reverse all of the effects of countermeasures,” that duty to choose measures that are reversible is “not absolute.”⁵²⁹ In short, the ILC’s explanation of the reversibility principle is far less categorical than the opponents of transfer have suggested.⁵³⁰

Accordingly, even if transfer of Russia’s sovereign assets did not fully comport with the reversibility principle, this would be a prime example in which the expectation of reversibility

⁵²⁵ Anton Moiseienko, *Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options*, INT’L LAWS. PROJ. at 30 (July 2022), <https://www.wrmcouncil.org/wp-content/uploads/2022/07/Frozen-Russian-Assets-Ukraine-Legal-Options-Report-WRMC-July2022.pdf>; NEW LINES INST., MULTILATERAL ASSET TRANSFER, *supra* note 31, at 24; Anton Moiseienko, *Trading with a Friend’s Enemy*, 116 AM. J. INT’L L. 720, 727 (2022).

⁵²⁶ Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation*, *supra* note 478, at 30.

⁵²⁷ ARSIWA art. 49(3).

⁵²⁸ ARSIWA art. 49 cmt. 9 (emphasis added).

⁵²⁹ *Id.*

⁵³⁰ Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation*, *supra* note 478, at 30.

must yield to the more pressing need to pursue a countermeasure that would effectively induce Russia's compliance with international law. As explained, Russia has brazenly violated international law for years, and the international community has responded with a series of escalating sanctions, including temporary and plainly reversible asset freezes. Russia's continued aggression in the face of these responses manifestly demonstrates their inadequacy, and G7 countries have few lawful responses available to them. In such a situation, ARSIWA's preference for reversibility (albeit a strong one) plainly does not bar G7 countries from reaching for one of the most effective tools for forcing a belligerent country back into international order.

2. Article 54's Saving Clause

For the reasons explained, the transfer of Russia's sovereign assets comports with the familiar and well-established characteristics of countermeasures under customary international law. Yet the ILC in drafting ARSIWA also understood that the state practice of countermeasures would further evolve (in turn shaping the scope of international law), and that situations would arise that the ILC could not anticipate.⁵³¹ It therefore drafted Article 54, the "saving clause," which states that the Articles do not prejudice the "right of any State ... to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."⁵³²

The international community confronts an unprecedented situation in Russia's recent actions—unprecedented, that is, since the end of the Second World War. Russia has invaded a neighboring state's sovereign territory without justification, it has refused to abide by the laws of

⁵³¹ Menno T. Kamminga, *Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?*, NETH. INT'L L. REV. at 10-11 (Apr. 18, 2023).

⁵³² ARSIWA art. 54; Daniel Bodansky, John R. Crook & James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 875 (2002) (referring to Article 54 as a "saving clause").

war and targeted civilians, and its permanent seat on the U.N. Security Council permits it to veto any binding orders from the United Nations. If such conduct does not justify action under the saving clause, it is difficult to see what would.⁵³³

It is hard to overstate the stakes of this moment. In defining the scope of state countermeasures under customary international law (of which ARSIWA is only an incomplete summary),⁵³⁴ Russia's conduct must be framed not only as a potentially lethal threat to the international legal order, but also as an opportunity for dramatic and badly needed improvement. International norms rarely develop at a steady and incremental pace. Rather, norms of accepted state practice arise suddenly during moments at which the system is under great stress.⁵³⁵ This is undeniably one such moment, a moment of opportunity as well as a time of tragedy. Already, the U.N. General Assembly has spoken in a clear voice that Russia must be held accountable and that Ukraine is entitled to reparations.⁵³⁶ If the international community invokes its authority to issue effective countermeasures in the form of asset transfer, customary international law will reflect

⁵³³ Kamminga, *Confiscating Russia's Frozen Central Bank Assets*, *supra* note 531, at 11 ("The exceptional circumstances of a war of aggression waged by a permanent member of the Security Council (so that the Security Council is unable to act) combined with the availability of its financial assets on the territory of third states may be regarded as sufficient ground for such a 'future development' anticipated by the ILC."); Kathryn Allinson, *Can Russia be held responsible for their invasion of Ukraine?*, U. BRISTOL L. SCH. BLOG (Apr. 4, 2022), [https://legalresearch.blogs.bris.ac.uk/2022/04/can-russia-be-held-responsible-for-their-invasion-of-ukraine/#:~:text=Article%2054%20ARSIWA%20also%20outlines,elucidated%20under%20Article%2048%20ARSIWA;NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER](https://legalresearch.blogs.bris.ac.uk/2022/04/can-russia-be-held-responsible-for-their-invasion-of-ukraine/#:~:text=Article%2054%20ARSIWA%20also%20outlines,elucidated%20under%20Article%2048%20ARSIWA;NEW%20LINES%20INSTITUTE,MULTILATERAL%20ASSET%20TRANSFER,), *supra* note 31, at 27 ("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.").

⁵³⁴ Daniel Bodansky, John R. Crook & David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 868 (2002) ("In attempting to interpret and apply the ILC articles on state responsibility, it must be constantly borne in mind that they are not part of a treaty, and that it is inappropriate to approach them as if they were. ... [T]here is the problem of false concreteness and false consensus. The treaty form lends an air of certainty and authority that belies the division of opinion on certain issues even within the ILC itself. ... Indeed, what is required is to analyze, perhaps even rewrite, the work of the ILC as though it were a narrative study.").

⁵³⁵ See Scharf, *Seizing the "Grotian Moment"*, *supra* note 358, 43 CORNELL INT'L L.J. at 448-49 (explaining that U.N. General Assembly resolutions can "crystallize emerging customs" and serve as "evidence of a new rule of customary international law").

⁵³⁶ See *General Assembly adopts resolution on Russian reparations for Ukraine*, *supra* note 156.

that precedent. But if states instead decide that customary international law ties their hands in the face of wanton aggression, then international law will also reflect that self-imposed limitation.⁵³⁷ Whichever decision is made, it will become a defining precedent whenever future aggression is confronted—and a decisive factor in the frequency with which such aggression again threatens civilization.

3. Objections Based in Terms of Sovereign Immunity

One of the most strident objections to transferring Russia's sovereign assets is that doing so would violate Russia's "sovereign immunity." This objection, unlike those addressed above, is premised not in the language of ARSIWA or countermeasures but instead in overlapping doctrines found in conventions, customary international law, and states' own domestic laws.

Some versions of the sovereign-immunity objection are much weaker than others. For starters, some prominent criticisms of transfer simply assert the principle of sovereign immunity without identifying a legal foundation, as if merely invoking it excuses any need for explanation.⁵³⁸ Other critics have objected to transfer of Russia's sovereign assets on the basis that it would violate specific provisions of the 2004 U.N. Convention on Jurisdictional Immunities of States and Their Property.⁵³⁹ But that Convention has too few signatories to be binding on any state. And possibly even more fatal to arguments that rely on the Convention is the fact that its scope is expressly cabined to defining those immunities that apply to a state and its property in "the courts of another

⁵³⁷ See Ingrid (Wuerth) Brunk, *Countermeasures and the Confiscation of Russian Central Bank Assets*, LAWFARE (May 3, 2023), <https://www.lawfareblog.com/countermeasures-and-confiscation-russian-central-bank-assets>.

⁵³⁸ See, e.g., *Should Ukraine Get Russia's Frozen Reserves?*, ECONOMIST (July 20, 2023), <https://www.economist.com/leaders/2023/07/20/should-ukraine-get-russias-frozen-reserves>; *Why the EU Will Not Seize Russian State Assets to Rebuild Ukraine*, ECONOMIST (July 20, 2023), <https://www.economist.com/europe/2023/07/20/why-the-eu-will-not-seize-russian-state-assets-to-rebuild-ukraine> ("It would be a clear breach of international law to seize Russian assets unilaterally.").

⁵³⁹ E.g., PUB. INT'L L. & POL'Y GRP., *supra* note 494, at 12, 15.

State.”⁵⁴⁰ Accordingly, even if the Convention were in effect, its provisions would not materially limit the authority of states to transfer Russia’s sovereign assets through executive action.⁵⁴¹

Other arguments from sovereign immunity turn on the particularities of states’ individual domestic laws that grant sovereign immunity. The specifics of every G7 state’s sovereign immunity law are beyond the scope of this report, though they are addressed in part in Section E. But two observations should be made in this connection. First, much like the U.N. Convention, domestic grants of sovereign immunity generally apply only to court proceedings and so do not limit transfers of sovereign property effectuated through legislative or executive action.⁵⁴² And second, G7 countries can and should amend their sovereign-immunity statutes to remove any doubt that a state like Russia is not entitled to the protections of sovereign immunity when it so blatantly violates international law.⁵⁴³

The strongest sovereign-immunity objection to asset transfer is premised on customary international law, which is informed in part by the U.N. Convention on Jurisdictional Immunities and by states’ domestic laws. As Professor Ingrid (Wuerth) Brunk has documented, state practice increasingly reflects a uniform principle of international law that states’ central bank assets are immune from judicial execution (at least if those assets are being used for truly sovereign, and not

⁵⁴⁰ U.N. Convention on Jurisdictional Immunities of States and Their Property art. 1, Dec. 2, 2004, https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

⁵⁴¹ NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 20.

⁵⁴² *Id.* at 30 (“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.”).

⁵⁴³ See Michael McFaul et al., *Strengthening Sanctions against the Russian Federation*, INT’L WORKING GRP. ON RUSS. SANCTIONS AT STAN. UNIV. (Apr. 24, 2023), https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf.

commercial, purposes).⁵⁴⁴ Many argue that transferring Russia's sovereign assets is forbidden under international law because it would violate that principle of immunity.⁵⁴⁵

This report recognizes the importance of respecting states' sovereign assets and honoring states' basic rights to equal sovereignty. Indeed, it is deep concern for Ukraine's fundamental right to exist as a sovereign state, as well as concern for the human suffering that Russia has inflicted on Ukraine's people and the flourishing of Ukrainians as individuals and communities, that motivates this report's undertaking. But there is no inconsistency between presumptively respecting states' equal sovereignty and advocating the transfer of Russia's sovereign assets as reparations for its wrongs to Ukraine and its people and to help repair the damage Russia has done to Ukraine as a sovereign state in its own right. There is, in fact, very good reason to conclude that such asset transfer would be fully consistent with international legal norms.

As an initial matter, deploying "sovereign immunity" as a defense to the proposed transfer of Russian assets reflects a basic misunderstanding of principles of international law. As a conceptual and practical matter, Russia enjoys no "immunity" from the formal actions of another equal sovereign. Sovereign immunity is instead a doctrine that arose solely in the context of *judicial* action and, as experts like Professor (Wuerth) Brunk and Professor Tom Ruys have documented, the doctrine is relevant to a state's central bank assets only in another state's court proceedings.⁵⁴⁶ Outside the judicial context, it is "firmly accepted" that sovereign immunity has

⁵⁴⁴ See, e.g., Ingrid (Wuerth) Brunk, *Immunity from Execution of Central Bank Assets*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019); Ingrid (Wuerth) Brunk, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?*, LAWFARE (Mar. 7, 2022), <https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks>.

⁵⁴⁵ E.g., Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140; Criddle, *Turning Sanctions into Reparations*, *supra* note 517.

⁵⁴⁶ Brunk, *Immunity from Execution of Central Bank Assets*, *supra* note 544; Tom Ruys, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW at 708-09 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

no applicability,⁵⁴⁷ a basic reality of international law confirmed by the ICJ’s own descriptions, and applications, of the doctrine.⁵⁴⁸ As Professor Ruys explained, “the rules pertaining to the immunity of States and State officials were created primarily to avoid the courts of one State sitting in judgment on another State, and to prevent private persons from litigating against foreign States before domestic courts. By contrast, immunity law was not created to curtail the foreign policy powers of States’ executive or legislative branches, whether by imposing restrictions on the recourse to general economic sanctions or on the more recent ‘targeted’ version of the sanctions tool.”⁵⁴⁹

The United States and its allies are not limited by dint of Russia’s so-called “sovereign immunity” when they act as coequal sovereigns using executive and legislative authorities.⁵⁵⁰ Rather, those countries are constrained from interfering with another sovereign’s property by distinct principles and norms that govern the relations between foreign countries—including the interrelated principles of reciprocity, comity, and fair compensation for expropriation.⁵⁵¹ But those

⁵⁴⁷ Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation*, *supra* note 478, at 17.

⁵⁴⁸ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, ICJ Judgment (Feb. 3, 2012), ¶ 93, <https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> (describing the customary international law norm of sovereign immunity as “procedural in character” and “confined to determining whether or not *the courts of one State* may exercise jurisdiction in respect of another State,” and concluding that Italian courts could not levy reparations through German sovereign assets (emphasis added)).

⁵⁴⁹ Ruys, *Immunity, Inviolability and Countermeasures*, *supra* note 546, at 708-09.

⁵⁵⁰ NEW LINES INSTITUTE MULTILATERAL ASSET TRANSFER, *supra* note 31, at 20-22; Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 25-26; Ingrid (Wuerth) Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, 91 GEO. WASH. L. REV. at 27 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4363261 (“Current proposals to turn Russian central banks assets over to Ukraine would likely violate foreign sovereign immunity unless structured to avoid any judicial action.”).

⁵⁵¹ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 205, 402 cmt. c (Am. L. Inst. 1987); 17 FLETCHER CYCLOPEDIA OF CORPORATIONS § 8331 (2023) (“In its broadest sense, comity may be said to be a principle or rule whereby personal and property rights arising from laws or judicial proceedings of a foreign state are recognized and enforced in the courts, provided that doing so will not be inconsistent with any statute or public policy of the state in which the principle is invoked. It is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other in considering the effect of their official acts. Its source is a sentiment of reciprocal regard founded on identity

principles and norms are not absolute or unyielding, particularly where, under the doctrine of countermeasures, Russia's blatant and repeated violations of international law justify the suspension of normal legal relations that would otherwise constrain a sovereign from transferring another sovereign's assets.⁵⁵²

Properly understood, then, the sovereign-immunity objection invoked as a defense against transferring Russian assets is simply a more specific version of the proportionality objection. Put another way, the sovereign-immunity objection argues that Russia's crimes do not justify a suspension of the normal foreign relations as between Russia and the United States and its allies that would otherwise constrain one sovereign from confiscating the assets of another.⁵⁵³ For the reasons explained above, however, that objection simply fails to grapple with the scale of Russia's wrongdoing, the close connection between that wrongdoing and Russia's sovereign assets, and the targeted nature of the proposed transfer. That calculus—which weighs the importance of respecting Russia's sovereign interest in a narrow class of assets against the international community's interest in inducing compliance with fundamental obligations of international law—should be enough to end the discussion.

This conclusion is bolstered by several additional considerations. In Article 50, ARSIWA defines those norms of international law that a countermeasure “shall not affect.”⁵⁵⁴ That list includes the U.N. Charter's prohibition on the use of force and fundamental human rights of individuals, as well as immunities granted to diplomatic and consular individuals and premises.⁵⁵⁵

of position and similarity of institutions.”); John G. Sprankling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464, 467 & n.10 (2014).

⁵⁵² See *supra* Part IV.D.1.

⁵⁵³ Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation*, *supra* note 478, at 28.

⁵⁵⁴ ARSIWA art. 50.

⁵⁵⁵ *Id.*

Notably absent from this list is a provision that affords similar protection for sovereign property (or for comity or sovereign immunity more generally). Under familiar legal and linguistic principles, the contrast between a specific enumeration of some individual immunities and the exclusion of sovereign immunities strongly suggests that the latter category *may* be infringed by a lawful countermeasure.⁵⁵⁶ That conclusion is confirmed by the fact that the exclusion of sovereign immunity from the list was no mere accident. During the drafting of Article 50, language that broadly protected state immunity was indeed suggested.⁵⁵⁷ But the ILC rejected that language as being too broad because it was effectively a “quasi-prohibition of countermeasures.”⁵⁵⁸

An additional consideration is relevant precedent, particularly after ARSIWA was drafted in 2001. Although the ICJ has not issued any decisions that speak precisely to the present question about countermeasures that permissibly abrogate sovereign property rights,⁵⁵⁹ state practice offers

⁵⁵⁶ See *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Feb. 13, 2019) (Separate Opinion by Bower, J.), ¶ 15, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20190213-JUD-01-05-EN.pdf> (applying the *expressio unius* canon of interpretation to conclude that “express grants of immunities for the purposes of consular and diplomatic relations ... strongly indicate that, had Iran and the United States intended for the Treaty of Amity also to grant immunity to State entities, they would have done so expressly”); see also Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 30 (“Countermeasures cannot impinge on diplomatic inviolability. No such limitation attaches to the observance of sovereign immunity rules.” (internal citations omitted)).

⁵⁵⁷ Patricia Tarre Moser, *Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case*, 4 GOETTINGEN J. INT’L L. 809, 830 (2012).

⁵⁵⁸ *Id.*

⁵⁵⁹ Opponents of asset transfer have pointed to two ICJ decisions in support of their position, but neither is persuasive here. First, the ICJ in 2012 held that Italian courts could not abrogate Germany’s sovereign immunity and attach its property on the basis of crimes committed by the Nazi regime. *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, ICJ Judgment (Feb. 3, 2012), <https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>. In so holding, the ICJ stated that “the applicability of the customary international law on State immunity was not affected” even by violations of *jus cogens* rules of international law. *Id.* ¶ 97. The ICJ’s holding did not, however, cast doubt on one state’s authority to seize another state’s property as sovereign to sovereign through executive or legislative means. See *supra* text accompanying notes 546-550. Moreover, Italy did not (and could not) invoke the doctrine of countermeasures, and the ICJ had no reason to consider the application of countermeasures. Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 30 n.83. Second, the ICJ continues to hear Iran’s challenge to the United States’s sanctions imposed on Iran’s central bank. There, Iran has expressly argued that countermeasures may not abrogate sovereign immunity. But the ICJ dismissed that challenge for lack of jurisdiction. *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Feb. 13, 2019), ¶ 74, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>; *Case Study of Certain Iranian Assets (Iran v. USA)*, PUB. INT’L L. & POL’Y GRP. at 6 (Mar. 2023),

strong evidence. For decades, state practice (and the associated *opinio juris*) has offered powerful support for treating as lawful certain countermeasures that indisputably infringe on states' property interest, including even property interests in states' own central bank assets. The latest relevant precedent is the very act of freezing Russia's Central Bank in response to the invasion of Ukraine. That precedent is bolstered by the passage of Canada's new law, which specifically authorizes the transfer of Russia's frozen central bank assets, but which has not drawn any significant claims by other states that the law violates any international law norm of sovereign immunity.⁵⁶⁰

Before the current crisis, the United States has frozen the central bank assets of Syria, Iran, and Venezuela, among other states,⁵⁶¹ as responses to such violations. Most relevant here, the United States froze the assets of the Afghanistan Central Bank and then transferred approximately \$3.5 billion of those assets for humanitarian purposes.⁵⁶² That precedent is persuasive evidence in favor of asset transfer.⁵⁶³

<https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/6414b16404575f4d90043c10/1679077732926/2023-03+PILPG++Case+Study+of+Certain+Iranian+Assets+%28ICJ%29.pdf>.

⁵⁶⁰ Martin Sandbu, *What to do with Russia's blocked reserves*, FIN. TIMES (Mar. 2, 2023), <https://www.ft.com/content/76639fc6-ac13-4f41-9b7c-9b0a0f75038a>; Kamminga, *Confiscating Russia's Frozen Central Bank Assets*, *supra* note 531, at 14 ("[T]he new provisions of Canada's Special Economic Measures Act specifically authorising the authorities to confiscate a foreign state's property to repair injury suffered by another state, represent evidence of *opinio juris* supporting such a permissive rule of customary international law.").

⁵⁶¹ (Wuerth) Brunk, *Central Bank Immunity*, *supra* note 550, at 10; *e.g.*, *Treasury Targets Syrian Regime Officials and the Central Bank of Syria*, U.S. DEP'T TREASURY (Dec. 22, 2020), <https://home.treasury.gov/news/press-releases/sm1220>; *Treasury Sanctions Iran's Central Bank and National Development Fund*, U.S. DEP'T TREASURY (Sept. 20, 2019), <https://home.treasury.gov/news/press-releases/sm780>.

⁵⁶² Michael McFaul et al., *Why and How the West Should Seize Russia's Sovereign Assets to Help Rebuild Ukraine*, INT'L WORKING GRP. ON RUSS. SANCTIONS AT STAN. UNIV. at 6-7 (Sept. 4, 2023), https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-09/workingpaper15_-_confiscating-reserves_09-04-23.pdf; Michael McFaul et al., *Why and How to Confiscate Russia's Sovereign Assets to Help Rebuild Ukraine*, INT'L WORKING GRP. ON RUSS. SANCTIONS AT STAN. UNIV. at 4-5 (Oct. 11, 2022), https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_6_confiscating_reserves.pdf.

⁵⁶³ Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 43-44; *see also* Sam Fleming, *EU should seize Russian reserves to rebuild Ukraine, top diplomat says*, FIN. TIMES (May 9, 2022), <https://www.ft.com/content/82b0444f-889a-4f3d-8dbc-1d04162807f3>.

The European Union has similarly frozen the central bank assets of Syria and Iran.⁵⁶⁴ Those freezes of sovereign assets are consistent with the “rich body of jurisprudence” by the European Court of Justice upholding asset freezes of sovereign and state-owned assets, even where those freeze orders have lasted for years.⁵⁶⁵ For example, the Grand Chamber of the E.U. Court of Justice in 2017 preliminarily upheld Germany’s oil sanctions against Russia for its invasion of Crimea.⁵⁶⁶

To be sure, these actions by the United States, the European Union, and the other G7 countries have not received universal praise or been implemented without criticism, particularly by those states whose assets are affected. One would hardly expect otherwise. But with the singular exception of Iran’s case filed in the ICJ (which will not decide the issue of sovereign immunity),⁵⁶⁷ no state has objected to the sanctions on central bank assets *on the grounds that they violate an international norm of sovereign immunity*.⁵⁶⁸ Even Venezuela, while zealously protesting U.S. sanctions on its central bank assets, never once mentioned a sovereign-immunity objection.⁵⁶⁹ Given this overwhelming silence even by states whose assets are directly affected by sanctions, “[i]t would be surprising to conclude that ... asset freezes violated customary international [law], especially considering prior examples of asset freezes that also raised no protests based upon

⁵⁶⁴ (Wuerth) Brunk, *Central Bank Immunity*, *supra* note 550, at 15; e.g., *Syria: Council extends sanctions against the regime for another year*, COUNCIL OF THE EUR. UNION (May 31, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/05/31/syria-council-extends-sanctions-against-the-regime-for-another-year/>; *Iran: EU restrictive measures*, COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/policies/sanctions/iran/>.

⁵⁶⁵ Emerson & Blockmans, *The \$300 Billion Question*, *supra* note 508, at 3.

⁵⁶⁶ See *PJSC Rosneft Oil Company v. Her Majesty’s Treasury*, Case C-72/15, 2017 E.C.R. I-236.

⁵⁶⁷ See *supra* note 559.

⁵⁶⁸ (Wuerth) Brunk, *Central Bank Immunity*, *supra* note 550, at 15-18 (“Sanctions imposed by the U.S., Europe, Canada, and other countries restrain the use of property by foreign states, with no diplomatic protests other state practice suggesting that doing so violates international law of immunity. For example, sanctions imposed by the European Union include asset freezes on the central banks of Iran and Syria that apparently generated no protests based on immunity.... Venezuela has protested – but not based upon immunity.... Japan, for example, has frozen an estimated \$33 billion[] of Russian foreign exchange reserves, with no murmur about immunity.”).

⁵⁶⁹ *Id.* at 16.

purported immunity.”⁵⁷⁰ This silence suggests the absence of a sovereign-immunity objection not only to the *freezing* of central-bank assets but also to the *transfer* of those same assets.⁵⁷¹

Last, the U.N. Security Council in 1991 created the precedent that Iraq pay reparations to Kuwait for its unlawful military invasion.⁵⁷² To effectuate Iraq’s payments of reparations, President George H.W. Bush in October 1992 issued an executive order that “directed and compelled” every U.S. bank holding Iraqi sovereign assets to “transfer” those assets to the Federal Reserve.⁵⁷³ These efforts in the United States and around the world resulted in \$50 billion in Iraqi sovereign funds being paid out, which was done without need for Iraq’s permission.⁵⁷⁴

Finally, even if sovereign immunity principles applied here, the United States and other G7 countries would already have infringed Russia’s sovereign immunity when they immediately acted to freeze CBR assets after Russia invaded Ukraine in February 2022.⁵⁷⁵ Of course, as critics of transfer argue, there is a distinction between freezing a state’s sovereign assets and transferring

⁵⁷⁰ *Id.* at 18.

⁵⁷¹ Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation*, *supra* note 478, at 16-20.

⁵⁷² Kamminga, *Confiscating Russia’s Frozen Central Bank Assets*, *supra* note 531, at 2-3; Maria Shagina, *Enforcing Russia’s Debt to Ukraine: Constraints and Creativity*, SURVIVAL at 32 (2023).

⁵⁷³ Exec. Order No. 12,817, 57 Fed. Reg. 48433 (Oct. 23, 1992).

⁵⁷⁴ Lawrence H. Summers, Philip D. Zelikow & Robert B. Zoellick, *The moral and legal case for sending Russia’s frozen \$300 billion to Ukraine*, WASH. POST (Mar. 20, 2023), <https://www.washingtonpost.com/opinions/2023/03/20/transfer-russian-frozen-assets-ukraine/>. Some critics suggest that Iraq consented to reparations by its general acceptance of the terms of the 1991 U.N. ceasefire resolution. *See* U.N. Security Council Resolution 687 (1991) (recognizing that Iraq is “liable under international law for any direct loss, damage ... or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”); *e.g.*, Tetiana Khutor & Andrii Mikheiev, *The Possible Scenarios of Seizure of Russian Sovereign Assets*, INST. LEGIS. IDEAS at 13-14 (Sept. 2022). But that position is mistaken. Iraq was forced to assent to the terms of Resolution 687 at gunpoint after losing the Gulf War, and Iraq later resisted the payment of reparations and asked the Security Council to reduce its obligation to compensate Kuwait, *see* Louis Charbonneau, *Iraq asks UN to cut reparations to Kuwait, others*, REUTERS (June 18, 2009), <https://www.reuters.com/article/iraq-kuwait-reparations-idUSN1827039120090618>. It therefore cannot be said that Iraq meaningfully consented to the transfer of its assets to Kuwait. *See* McFaul et al., *Why and How to Confiscate Russia’s Sovereign Assets*, *supra* note 562, at 3 (“At the end of that war, Iraq was forced to pay substantial reparations to Kuwait.”).

⁵⁷⁵ Kamminga, *Confiscating Russia’s Frozen Central Bank Assets*, *supra* note 531, at 6-9.

them.⁵⁷⁶ But for purposes of the sovereign-immunity analysis, that distinction makes little difference: States around the world have uniformly acted in ways that properly overrode (and in that limited sense “infringed”) Russia’s property rights to its Central Bank assets, and that infringement was deemed permissible as a lawful countermeasure.⁵⁷⁷ As far as international law is concerned, these “states have already crossed the Rubicon with their massive freezing of Russia’s assets.”⁵⁷⁸ They cannot now suddenly point to sovereign immunity as a justification for failing to take the next logically and logistically necessary step in holding Russia accountable.⁵⁷⁹

E. Legal Regimes of Countries Other than the United States

Since Russia’s unlawful invasion of Ukraine in February 2022, there has been a groundswell of interest by countries in the G7, and by non-G7 European countries that hold Russia’s sovereign assets, to determine how to lawfully transfer CBR assets to Ukraine. As just explained, the transfer of Russia’s sovereign assets would not face any prohibition under international law. States are also rightfully focused on their own legal regimes to ensure that any transfer of assets would comply with all requirements of domestic law.

The European Commission in particular has studied the possibility of transferring Russia’s assets, though it has raised some questions about whether individual European countries’ laws

⁵⁷⁶ Stephan, *Giving Russian Assets to Ukraine*, *supra* note 90 (“I think it clear that the assets of a sovereign central bank enjoy some kind of international legal immunity from confiscation, as opposed to freezing, by the state in which they are found.”).

⁵⁷⁷ Matthias Goldmann, *Hot War and Cold Freezes*, VERFASSUNGSBLOG (Feb. 28, 2022), <https://verfassungsblog.de/hot-war-and-cold-freezes/>.

⁵⁷⁸ Philip Zelikow & Simon Johnson, *How Ukraine Can Build Back Better*, FOREIGN AFFS. (Apr. 19, 2022), <https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better>.

⁵⁷⁹ Similarly, some who have argued that sovereign immunity bars transferring Russia’s frozen assets advocate that G7 nations should instead funnel the investment returns from those same assets to Ukraine. *E.g.*, *Should Ukraine Get Russia’s Frozen Reserves?*, *supra* note 538. Yet this position does not identify any principled distinction between Russia’s principal and the returns on that principal, which under familiar legal principles are just as much the property of the Russian state and so should be, if the logic of the sovereign-immunity objection were consistent, afforded the same protection from transfer.

would permit across-the-board transfer or might instead require cumbersome individualized criminal proceedings.⁵⁸⁰ The United Kingdom has arguably demonstrated even greater motivation than the European Union to transfer Russia’s sovereign assets in a genuine effort to induce Russia’s compliance with international law.⁵⁸¹

Fortunately, there are no lasting legal barriers to transferring to Ukraine the assets it needs to defend itself and to rebuild. The laws of the United States and of Canada provide a practical model for confirming states’ authorities to transfer Russia’s sovereign assets. Now, all that is needed is the political will to take bold and necessary action—including the prompt enactment of legislation confirmatory of the legality of such action where existing laws are deemed insufficiently clear on the matter.

1. Models for Legal Reforms Beyond the United States

Already, at least two G7 countries have domestic legal regimes that authorize the transfer of Russia’s sovereign assets and the transfer of those assets to Ukraine: The United States and Canada. As this report has already explained, the President today has legal authority to transfer Russia’s assets to Ukraine under the plain language of IEEPA.⁵⁸² There is also a bipartisan proposal pending in the U.S. Congress that would confirm the President’s existing authority and establish a

⁵⁸⁰ See EUROPEAN COMMISSION, *Options paper by the European Commission on the use of frozen assets to support Ukraine’s reconstruction* (Nov. 2022), <https://club.bruxelles2.eu/wp-content/uploads/2022/11/confiscationavoirsrussesgelesprop@e221130en.pdf>; Anton Moiseienko, *The EU Proposal on Sanctions and Confiscation: Good, But Not Fit-for-Purpose?*, ECON. CRIME L. BLOG (May 26, 2022), <https://economiccrimelaw.com/2022/05/26/the-eu-proposal-on-sanctions-and-confiscation-good-but-not-fit-for-purpose/>; Shagina, *Enforcing Russia’s Debt to Ukraine*, *supra* note 572, at 30, 32.

⁵⁸¹ *Seizing Corrupt Russian Wealth to Support the Ukrainian War Effort*, ALL-PARTY PARLIAMENTARY GROUP ON ANTI-CORRUPTION AND RESPONSIBLE TAX (July 26, 2022), <https://anticorruption-responsibletax.org/news/seizing-russia-assets>.

⁵⁸² See *supra* Part III.

mechanism by which those assets would be efficiently transferred for Ukraine's immediate use.⁵⁸³

Other G7 states should look to the United States' legal regime, which has been in place for more than four decades, as an established and tested model for reforming their own laws.

A more recent model for G7 and non-G7 states is that of Canada. In June 2022, in direct response to Russia's invasion, Canada passed its Special Economic Measures Act, which expressly authorizes the Government of Canada to seize the assets of a foreign state.⁵⁸⁴ Canada's law includes several procedural limits that U.S. law does not. For example, it requires the approval of a judge, prior notice to the affected property owner, and consultation with the Ministers of Finance and of Foreign Affairs.⁵⁸⁵ The law further requires that assets may be transferred to another state only if there has been a "grave breach of international peace and security" or "gross and systematic human rights violations" and if the assets would fund the reconstruction of a state that was the victim of that grave breach and restore international peace.⁵⁸⁶

Canada's law offers a template that other countries should seriously consider adopting, modifying it as needed to fit within their respective governmental structures and legal and political traditions.⁵⁸⁷ The law's procedural limits, including prior notice and consultation with several different bodies of government, should assuage concerns expressed in some G7 countries that an asset-transfer authority could be deployed in an inconsistent or capricious manner. Further, the

⁵⁸³ McCaul, Risch, Kaptur, *Whitehouse Reintroduce Legislation to Repurpose Sovereign Russian Assets for Ukraine*, FOREIGN AFFAIRS COMMITTEE (June 15, 2023), <https://foreignaffairs.house.gov/press-release/mccaul-risch-kaptur-whitehouse-reintroduce-legislation-to-repurpose-sovereign-russian-assets-for-ukraine/>.

⁵⁸⁴ Special Economic Measures Act, Bill C. 19 (assented to June 23, 2022), enacted at S.C. 1992 c. 17, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/royal-assent>.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.*; Shagina, *Enforcing Russia's Debt to Ukraine*, *supra* note 572, at 31.

⁵⁸⁷ Ivan Timofeev, *Sanctions and the Confiscation of Russian Property. The First Experience*, MODERN DIPLOMACY (Jan. 25, 2023), <https://modern diplomacy.eu/2023/01/25/sanctions-and-the-confiscation-of-russian-property-the-first-experience/>.

law's requirements that there be a "grave breach of international peace and security" or "gross and systematic human rights violations" and that the funds go toward the victims of those breaches to restore international peace ensure that the law's transfers fit neatly within the doctrine of countermeasures.⁵⁸⁸ These requirements similarly hedge against some observers' concerns that transferring Russia's sovereign assets in response to its grave violations of international law will kick off a slippery slope of transfers for even technical violations of international law.⁵⁸⁹

2. The United Kingdom

Although this report has not analyzed the laws of every European country in the G7, the United Kingdom offers a prime example of a state where readily adopted legislation could clearly establish the authority to transfer CBR assets. Despite "broad support" for action, there are continuing doubts about how best to accomplish asset transfer under U.K. law.⁵⁹⁰ Currently, U.K. law authorizes the freezing of central bank assets, but it does not expressly set out a process by which assets can be transferred except through individualized criminal proceedings.⁵⁹¹

Parliament could with relative ease accomplish its stated goal of authorizing the transfer of Russian assets that the United Kingdom has already frozen. Already, legislation has been proposed in the House of Commons (but not yet made into law) that would provide clear authority.⁵⁹² Similar

⁵⁸⁸ Robert J. Currie, *Seizing Russian Assets: Canada has the Spirit of International Law on its Side*, POLICY (June 27, 2022), <https://www.policymagazine.ca/seizing-russian-assets-canada-has-the-spirit-of-international-law-on-its-side/>.

⁵⁸⁹ Moiseienko, *Politics, Not Law*, *supra* note 374; Criddle, *Turning Sanctions into Reparations*, *supra* note 517, at 18.

⁵⁹⁰ Claire Mills, Philip Brien & Patrick Butchard, *Post-Conflict Reconstruction Assistance to Ukraine*, HOUSE OF COMMONS LIBRARY at 6 (June 15, 2023), <https://researchbriefings.files.parliament.uk/documents/CBP-9728/CBP-9728.pdf>; *see also* ALL-PARTY PARLIAMENTARY GROUP ON ANTI-CORRUPTION AND RESPONSIBLE TAX, *supra* note 581.

⁵⁹¹ Mills, Brien & Butchard, *supra* note 590, at 21-23; Elisabeth Braw, *Freeze—Don't Seize—Russian Assets*, FOREIGN POL'Y (Jan. 13, 2023), <https://foreignpolicy.com/2023/01/13/putin-sanctions-oligarchs-freeze-seize-assets/>.

⁵⁹² Seizure of Russian State Assets and Support for Ukraine Bill 2022-23, HC Bill 245, (providing for the vesting of CBR assets in a U.K. trustee and defining proper uses for those funds).

efforts could look to other common law countries as successful models especially to set limits on the use of such authorities.⁵⁹³ First, the United Kingdom would need to amend its law to define the conditions under which a state's sovereign immunity could be infringed to permit the transfer of assets. Dr. Anton Moiseienko proposes several conditions that the United Kingdom (or any country, for that matter) could require to limit the instances in which a state's sovereign immunity is abrogated:

- A state whose armed activities have been found to violate international law by the ICJ, ECHR, or another international court;
- A state whose armed activities have been condemned by a majority vote of the General Assembly and who, in the absence of a permanent member's veto, would have been denounced by the U.N. Security Council; or
- Russia, specifically, if it initiates a large-scale military invasion of another country in violation of international law.⁵⁹⁴

Second, Parliament would need to establish a mechanism for efficiently transferring the assets without a cumbersome criminal proceeding and for then transferring the assets to Ukraine. Here, because of their shared parliamentary system, the United Kingdom might do well to look to Canada, particularly for its requirements of consultation between Ministers possessing subject-matter expertise.⁵⁹⁵ Parliament might further require, as Canada does, that the assets transferred must be allocated to aid the state that was the victim of the violation of international law.

⁵⁹³ E.g., Tom Tugendhat, HC Debate Feb. 6, 2023 c656, <https://hansard.parliament.uk/Commons/2023-02-06/debates/6CD584-13D0-4B1C-95E0-8F2D4F7FB3FF/TopicalQuestions#contribution-6EEE21E0-EDF9-4354-970E-6238E72D1D22> ("Going from freezing to seizing, as the hon. Gentleman knows, is a slightly difficult procedure under our laws, due to the rights that people have. We have looked at that matter with partners, particularly in common law jurisdictions, and I hope to have further conversations on the subject with the United States when I go there tomorrow.").

⁵⁹⁴ Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 22.

⁵⁹⁵ Tom Keatinge & Maria Nizzero, *From Freeze to Seize: Creativity and Nuance is Needed*, ROYAL UNITED SERVS. INST. (June 7, 2022), <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-creativity-and-nuance-needed> (identifying U.S. and Canadian law as models for U.K. reform).

3. Bilateral Investment Treaties

All G7 members, save the United States, have a bilateral investment treaty (“BIT”) with Russia.⁵⁹⁶ Described at a high level of abstraction, BITs protect the investments of each state’s investors from arbitrary expropriation by another state; and they further require that each state treat the other state’s investments no less favorably than it treats the investments of any other state.⁵⁹⁷ BITs prescribe their own remedies in the form of confidential arbitration (referred to as investor-state dispute settlement or “ISDS”).⁵⁹⁸

As some have noted, the transfer of Russia’s sovereign assets could constitute a facial violation of G7 countries’ BITs with Russia.⁵⁹⁹ But states have at least three separate defenses that would likely prevail if Russia were to challenge the transfer of its Central Bank assets under its BITs with G7 Countries.

First, as Dr. Moiseienko has noted, there are substantial doubts about whether transfer of Russia’s sovereign assets would even implicate a BIT’s protections for investments.⁶⁰⁰ G7 states could argue, for example, that Russia’s reserves do not fit the definition of “investments” in their BITs or that the transfer of those reserves to Ukraine does not constitute “expropriation” as defined in the BITs.

⁵⁹⁶ *Russian Federation*, International Investment Agreements Navigator, INVEST. POLICY HUB <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation> (last visited Sept. 15, 2023).

⁵⁹⁷ See Eric Chang, *Lawfare in Ukraine: Weaponizing International Investment Law and the Law of Armed Conflict Against Russia’s Invasion*, INSS STRATEGIC PERSPECTIVES at 11-12 (2022), <https://inss.ndu.edu/Portals/68/Documents/stratperspective/inss/strategic-perspectives-39.pdf>.

⁵⁹⁸ *Id.* at 1.

⁵⁹⁹ Moiseienko, *Politics, Not Law*, *supra* note 374; LUPICINIO INT’L L. FIRM, *The Intended Confiscation of Russian Assets* (Nov. 24, 2022), <https://lupicinio.com/en/the-intended-confiscation-of-russian-assets/>.

⁶⁰⁰ Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 40.

Perhaps most persuasive, G7 states could argue that Russia is not an “investor” entitled to the protections of BITs. In Russia’s BIT with Japan, for example, “investor” is defined to mean only “physical persons” and “companies,” a term that includes “corporations, partnerships, companies and associations whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit.”⁶⁰¹ Russia’s BIT with the United Kingdom similarly defines “investor” to mean “natural persons” or “any companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the territory.”⁶⁰²

The CBR is certainly not a “physical” or “natural” person, and it is very likely not a “company” either. The ICJ recently issued a judgment in which it confronted the issue of whether Iran’s central bank, Bank Markazi, was a “company” entitled to the investment protections of the U.S.–Iran Treaty of Amity, which protects the property of “natural persons” and “companies.”⁶⁰³ In its 2019 preliminary judgment establishing jurisdiction over the case, the ICJ explained that whether a central bank was a “company” required a fact-intensive inquiry into whether the bank “is engaged in activities of a commercial nature, even if they do not constitute its principal

⁶⁰¹ Agreement Between the Government of Japan and the Government of the Russian Federation Concerning the Promotion and Protection of Investments (1998), art. 1(4), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1734/download>.

⁶⁰² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (Apr. 6, 1989), art. 1(d), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2235/download>. As another example, Russia’s BIT with Germany defines investor to mean “an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments.” Federal Republic of Germany and Union of Soviet Socialist Republics Agreement concerning the promotion and reciprocal protection of investments (with protocol). (June 13, 1989), art. 1(1)(c), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download>.

⁶⁰³ *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Mar. 30, 2023), ¶ 34, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf>.

activities.”⁶⁰⁴ Because the ICJ lacked sufficient facts at the time of its preliminary judgment, it deferred that determination to the merits.⁶⁰⁵ In its 2023 merits judgment, the ICJ concluded that Bank Markazi “cannot be characterized as a ‘company,’” despite the fact that it earned revenue from bonds held in a U.S. commercial bank and even paid taxes to the Iranian government on that revenue.⁶⁰⁶ Although a factual determination of whether the CBR is similarly not a “company” within the meaning of Russia’s BITs cannot be made with certainty at this time, this recent holding by the ICJ provides powerful precedent for concluding that it is not and so cannot seek the protections of BITs that use similar language.⁶⁰⁷

Second, Russia could face significant difficulties in enforcing its BITs against states that transfer Russian assets because of Russia’s own repeated violations of those same BITs since February 2022. For example, Russia’s invasion has caused the destruction of other states’ investors’ property located in Ukraine.⁶⁰⁸ The Russian Federation has also indiscriminately seized property in Russia belonging to foreign companies that have chosen to close operations or that the Russian government has determined belongs to “unfriendly states.”⁶⁰⁹ Further, the Russian Federation has restricted the ability of foreign companies and persons to move capital out of Russia.⁶¹⁰ These actions plainly violate the RF’s obligations under its BITs with other states,

⁶⁰⁴ *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Feb. 13, 2019), ¶ 92, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>.

⁶⁰⁵ *Id.* ¶ 97.

⁶⁰⁶ *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Mar. 30, 2023), ¶¶ 49-54, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf>.

⁶⁰⁷ See text accompanying *supra* notes 218-221 (concluding that the CBR is likely a sovereign instrumentality of the Russian Federation under U.S. law).

⁶⁰⁸ Ashraf M.A. Elfakharani, *The Fate of Bilateral Investment Treaties during Armed Conflict: The Russia Ukraine Conflict Perspective as Per the International Laws*, 15 *BALTIC J.L. & POLS.* 87, 96 (2022), <https://versita.com/menuscrypt/index.php/Versita/article/view/300/470>.

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

including those belonging to the G7. At the least, these facts could provide transferring states a strong “unclean hands” defense if Russia pursues arbitration.⁶¹¹

And *third*, G7 states could persuasively argue that Russia’s conduct toward Ukraine excuses their obligations to abide by their BITs with Russia. As an initial matter, a state could argue that it was not observing its obligations to Russia under their BIT as a form of countermeasure.⁶¹² A precedent such a state might well cite is *Archer Daniels Midland v. Mexico*, where the arbitration panel held that a valid countermeasure (*i.e.*, one that is proportional and aimed toward inducing another state’s compliance with international law) could excuse Mexico’s obligations to the United States under NAFTA.⁶¹³ States could also consider arguing that their obligations under their BITs with Russia are inconsistent with their superseding obligation under international law, including the obligation to obtain reparations for victims and the U.N. Charter’s right to collective self-defense.⁶¹⁴

V. The Practical and Moral Imperative for Action

A. Transferring Russian Sovereign Assets to Ukraine Is Morally Obligatory and Pragmatically Wise

Part III and Part IV of this report explained why the United States and its allies in the G7 and elsewhere have the authority under settled principles of domestic and international law to

⁶¹¹ See, e.g., *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Feb. 13, 2019), ¶¶ 122-23, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>; *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Mar. 30, 2023), ¶¶ 82-83, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf> (requiring that an “unclean hands” defense establish a “nexus” between one state’s wrong and the claim, such as mutual violations of the same treaty).

⁶¹² See, e.g., Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT. Y.B. INT’L L. 264 (2008); N. Jansen Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 GEO. J. INT’L L. 233 (2011).

⁶¹³ *ADM v. Mexico*, ICSID Case No. ARB(AF)/04/5, ¶¶ 177-80 (Nov. 21, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf.

⁶¹⁴ See Vienna Convention on the Law of Treaties (1969), art. 53, 1155 U.N.T.S. 331 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”).

transfer the Russian sovereign assets within their borders from Russia to Ukraine. This report concludes by setting those technical legal questions aside and making the case for confiscating Russia's frozen assets as a matter of moral and ethical principle as well as hard-headed pragmatism—considerations that might be gathered under the broad rubric of “sound policy.”

The stakes are clear. Russia has occupied Ukraine's sovereign territory in clear violation of international law since 2014. Since February 2022, Russia has waged a full-scale war on Ukrainian soil with the express goal that Ukraine should not exist as a separate country. That war has killed tens of thousands, if not hundreds of thousands of Ukrainians, a great many of whom were civilians.⁶¹⁵ Hundreds of thousands more Ukrainians have lost their homes. Upwards of eight million Ukrainians have been forced to flee their country as refugees.⁶¹⁶

Just as one need not have a fully developed theory of the good in order to recognize evil when one sees it,⁶¹⁷ so too one need not have a theory of just war⁶¹⁸ to recognize an unjust war

⁶¹⁵ *Ukraine: civilian casualty update 19 June 2023*, U.N. OHCHR (June 19, 2023), <https://www.ohchr.org/en/news/2023/06/ukraine-civilian-casualty-update-19-june-2023>; Bel Trew, *100,000 Ukrainian civilian deaths: Shocking toll of Putin's bloody invasion*, INDEPENDENT (Feb. 23, 2023), <https://www.independent.co.uk/news/world/europe/ukraine-war-anniversary-war-crimes-b2288037.html>; Guy Faulconbridge, *Ukraine war, already with up to 354,000 casualties, likely to last past 2023 - U.S. documents*, REUTERS (Apr. 12, 2023), <https://www.reuters.com/world/europe/ukraine-war-already-with-up-354000-casualties-likely-drag-us-documents-2023-04-12/>.

⁶¹⁶ Léonie Chao-Fong, *Russia-Ukraine war: counteroffensive not yet launched, says senior official; UK 'cannot yet say Russia responsible for dam destruction' – as it happened*, GUARDIAN (June 7, 2023), <https://www.theguardian.com/world/live/2023/jun/07/russia-ukraine-war-live-updates-nova-kakhovka-dam-collapse-kherson-oblast-floods-evacuations-flood-flooding-latest-news>; Alisa Sopova & Anastasia Taylor-Lind, *Ukraine refugees face uncertainty and precarity as displacement persists*, NPR (Apr. 20, 2023), <https://www.npr.org/sections/pictureshow/2023/04/20/1160074401/ukraine-russia-war-refugees-displaced-people>; Omer Karasapan, *Ukrainian refugees: Challenges in a welcoming Europe*, BROOKINGS INST. (Oct. 14, 2022), <https://www.brookings.edu/articles/ukrainian-refugees-challenges-in-a-welcoming-europe/>.

⁶¹⁷ “As things now stand, everything is up for grabs. Nevertheless: Napalming babies is bad. Starving the poor is wicked. Buying and selling each other is depraved. Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation. Those who acquiesced deserve to be damned. There is in the world such a thing as evil.” Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979).

⁶¹⁸ See generally James Turner Johnson, *The Just War Idea: The State of the Question*, 23 SOC. PHIL. & POL'Y 167 (2006).

when it stares one in the face. Russia has waged such a war against Ukraine, and it would be the height of folly to engage in any course of action—or inaction—that would amount to appeasement. And we need not channel Winston Churchill or revile Neville Chamberlain anew to know what comes of appeasement.

In addition to this staggering human toll, Russia’s aggression has devastated Ukraine’s infrastructure and economy. Russia’s destruction has already erased 15 years of economic growth in Ukraine and has pushed millions of Ukrainians into poverty.⁶¹⁹ The cost to rebuild Ukraine is at least \$400 billion, an amount that is several times greater than the entire value of Ukraine’s pre-war gross domestic product.⁶²⁰ That figure is expected to rise substantially as the war continues, even surpassing \$1 trillion.⁶²¹ And in the meantime, Ukraine’s forces are fighting for the survival of their country against one of the largest militaries in the world. That struggle requires expending billions of dollars every month on military equipment.⁶²²

In short, Ukraine is in desperate need of resources. Although the United States and its allies have already provided generous support and have made further pledges to assist Ukraine in

⁶¹⁹ Mark A. Green, *Ukraine Reconstruction Costs “Hopefully” to Rise*, WILSON CTR. (June 27, 2023), <https://www.wilsoncenter.org/blog-post/ukraine-reconstruction-costs-hopefully-rise>.

⁶²⁰ *Id.*; Patricia Cohen, *The World Bank estimated the cost of rebuilding Ukraine at \$411 billion. Support is growing to use Russian funds for it.*, N.Y. TIMES (Mar. 27, 2023), <https://www.nytimes.com/2023/03/27/world/europe/the-world-bank-estimated-the-cost-of-rebuilding-ukraine-at-411-billion-support-is-growing-to-use-russian-funds-for-it.html>.

⁶²¹ Masters, *How Frozen Russian Assets Could Pay for Rebuilding in Ukraine*, *supra* note 49; Patricia Cohen & Liz Alderman, *‘The World’s Largest Construction Site’: The Race Is On to Rebuild Ukraine*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/business/economy/ukraine-rebuilding.html>; Adam Taylor, Anastacia Galouchka & Kostiantyn Khudov, *Ukraine Dreams of Rebuilding But Russia’s Destruction Continues*, WASH. POST (June 21, 2023), <https://www.washingtonpost.com/world/2023/06/21/ukraine-recovery-reconstruction-economy-kharkiv/>.

⁶²² Jonathan Masters & Will Merrow, *How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts*, COUNCIL ON FOREIGN RELS. (July 10, 2023), <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>.

rebuilding, far more is needed.⁶²³ And while public support for Ukraine remains strong in the United States and Europe, there are also signs that taxpayers in these countries will not indefinitely support funding at the levels Ukraine needs.⁶²⁴ There is one obvious source of additional funds for Ukraine: the sovereign Russian assets frozen in the United States and allied countries. That those assets are located where they are is no happenstance. At the same time that Russia has desecrated Ukraine in violation of nearly every basic tenet of international law and human morality, Russia has benefitted from and indeed strategically exploited the stability of the international financial system by storing a large portion of its sovereign assets in accounts maintained by the United States and its allies. As explained in Part II, the total value of these funds is approximately \$300 billion. Those assets have grown under, and because of, the protection of countries that, unlike Russia, respect the rule of law. To treat the presence of those sovereign assets in this set of countries as anything but an invitation to transfer them to the victims of Russia's disrespect of law and morality would be inexcusable, especially because it is that disrespect that has triggered the freezing of those assets by the countries that now give them safe haven.

Virtually every legal system known to humankind embodies a principle of redressing unjust enrichment.⁶²⁵ Those who benefit from exploiting a system built by others thereby acquire

⁶²³ Lisa O'Carroll, *How much has been pledged to help rebuild Ukraine – and is it enough?*, GUARDIAN (June 21, 2023), <https://www.theguardian.com/world/2023/jun/21/how-much-has-been-pledged-to-help-rebuild-ukraine-and-is-it-enough>.

⁶²⁴ See, e.g., William Galston, *Republicans are turning against aid to Ukraine*, BROOKINGS INST. (Aug. 8, 2023), <https://www.brookings.edu/articles/republicans-are-turning-against-aid-to-ukraine/>; Ivan Krastev & Mark Leonard, *Fragile unity: Why Europeans are coming together on Ukraine (and what might drive them apart)*, EUR. COUNCIL ON FOREIGN RELS. (Mar. 16, 2023), <https://ecfr.eu/publication/fragile-unity-why-europeans-are-coming-together-on-ukraine/>; Mark Temnycky, *One year on, US support remains strong for Ukraine*, HILL (Apr. 12, 2023), <https://thehill.com/opinion/international/3945889-one-year-on-us-support-remains-strong-for-ukraine/>.

⁶²⁵ E.g., John W. Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087, 1087 (1968); Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011); 26 Williston on Contracts § 68:5 (4th ed. 2023); Lon L. Fuller, *THE MORALITY OF LAW* (1964); Francesco Giglio, *THE FOUNDATIONS OF RESTITUTION OF WRONGS* (2007).

a duty to repay. Some of the international law doctrines we have canvassed reflect just such a principle.⁶²⁶ But the international legal order has not yet matured far enough to transform that principle into a practically enforceable obligation. That is why so much of what this report has presented in discussing the international legal basis for seizing Russia’s frozen assets has out of necessity been couched in terms of “may” rather than “must.” But we deal in this part of our report with considerations that are both pragmatic and aspirational even if not yet built into a globally operational rule of law. Accordingly, we proceed in terms that are candidly cast in terms of “shoulds” and “oughts” even if not quite “musts.”

But there is an additional feature of this situation that makes it unique. The issue is not whether countries like the United States bear a legal or at least moral obligation to come to the rescue of an ally under siege from a third party. Such a generalized duty might entail an obligation to expend their own wealth and resources to the degree they can in order to help a third party being victimized by an aggressor. And questions about the shape and magnitude of any such generalized duty would surely be affected by the difficulty of demanding of any individual or enterprise that it sacrifice of itself to rescue another, a demand that some philosophers have analyzed under the rubric of supererogatory acts.⁶²⁷

No, the situation here is altogether different. The countries that confront the question of what to do with Russia’s assets frozen within their borders do not face a choice between meeting the needs of their own people and those of the Ukrainian victims of Russia’s illegal aggression, for the issue relates only to *what those countries are to do with assets that do not belong to them and are not available to meet those internal needs*. The frozen assets in question belong as a matter

⁶²⁶ See *supra* Section IV.D (discussing the doctrine of countermeasures under international law).

⁶²⁷ Hadley Arkes, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* (1986).

of legal title to the aggressor and must either be frozen in place for the aggressor's eventual reclamation and use or seized so that they may be released for the use by and benefit of the victim's defense and recovery. No moral or ethical theory of which we are aware makes that a close question. If a person holds an assailant's assets and must decide between letting the assets remain idle and releasing those assets to help the assailant's victim, that person is morally blind if more than one permissible course of action seems available.

Seen in those terms, the United States and its allies face a simple choice. Should the hundreds of billions of dollars of CBR assets the United States and its allies have lawfully frozen by virtue of Russia's unlawful attack on Ukraine go to Ukraine, which can put them to immediate use remedying the humanitarian crisis that Russia has caused, or should those assets be controlled (even if not available for current use) by Russia, which will continue to murder civilians and flout the basic rules of the international order?

Neutrality is not a viable option in the face of this crisis. A decision to deny Ukraine's plea for Russia's frozen assets is a decision to grant Russia the benefit of retaining them, including perhaps using them as collateral for further adventures. It would be an especially cruel irony to deny Ukraine control of those assets and the lifesaving benefit using them can provide by invoking respect for Russia's "sovereignty" and "property rights" when Russia has chosen to trample on the sovereignty and property rights of the Ukrainian people with tanks and guns.

The need to act in this way and the indefensibility of not doing so become clearer still when one considers the broader geopolitical landscape on which Russia's illegal actions have unfolded. Every global leader is watching to see whether and how that crisis is resolved. Subjecting Russia to real, material consequences for its war of aggression against Ukraine by permanently depriving it of the sovereign assets it parked around the globe and by turning those assets into resources to

be used, in effect, against Russia as the aggressor—even if not to purchase guns but to subsidize the purchase of butter, if you will—would be manifestly just and would, in terms of incentives created and avoided, strengthen the international norm against aggression and discourage countries from violating that norm in the future.⁶²⁸ But if the United States and its allies continue to shelter Russia’s financial assets while the Russian state continues to wage its deadly and unlawful war, that choice in itself sends a dangerous signal to the rest of the world that aggression, war crimes, and genocide will go unpunished. Appeasement sends the signal that crime pays, whether one views the refusal to transfer Russia’s frozen assets to Ukraine as a pardon for the grave crimes Russia has committed or simply as a refusal to treat those crimes, as international law clearly permits, as the occasion for what would be tantamount to just reparations.

Given these immediate stakes, and the remarkable clarity of authority to act under existing domestic and international law, the United States has no excuse for its hesitation. It should seize this moment and lead.

This Part continues in Section B by identifying the key characteristics of a mechanism to transfer Russia’s frozen assets to Ukraine in a manner that is efficient as well as just. This report advocates, as other experts have, a system under which all the countries involved set up escrow accounts that can then be pooled into an international fund managed by an independent committee. Appropriate measures should be put in place to address the ever-present risk of corruption. And the funds should then be provided to the government of Ukraine for use in defending and rebuilding that country.

After outlining the proposed transfer mechanism, the report addresses the primary policy and practical objections observers have made when confronting the obvious option of seizing and

⁶²⁸ See *supra* Section IV.D.2, text accompanying notes 534-537.

transferring Russia's frozen assets to Ukraine. Section C addresses the concern expressed by some critics that holding Russia accountable would set an unfavorable precedent that could subject other countries' assets to seizure. Those fearful that such a precedent could come back to bite them are especially vociferous in invoking that concern. As explained below, however, the concern, however genuine at least on the part of some, is vastly overblown as a matter of realpolitik: Russia's conduct is obviously sui generis, and there are readily identifiable limits on the authority to transfer assets that can and should be invoked to prevent abuse or overuse of this authority. Section C also considers the ostensible compromise that proposes sending to Ukraine the investment returns on Russia's frozen assets but leaving the underlying principal frozen in place. Although that half-measure would be preferable to a wholesale refusal to transfer any Russian assets to Ukraine, it would raise many of the same legal difficulties as would a complete transfer of Russia's assets—without providing the full relief that Ukraine desperately needs.

Section D responds to the alarming-sounding but demonstrably ungrounded objection that seizing Russia's frozen assets will put at risk the international financial system by undermining the U.S. dollar's dominant position in that system since the Second World War. Although Russia has chosen to abandon the dollar, it is unlikely any country will be motivated to follow it, least of all because of a decision to transfer Russia's assets in response to exceptional violations of international law. The U.S. dollar retains the same advantages that have made it indispensable for decades, and it is unlikely any other currency will replace its position as a reserve currency. At the least, speculative concerns about the dollar, and speculation about the benefits of the dollar's status, should not supersede the clear moral case for holding Russia accountable.

Section E returns to the theme of appeasement by addressing objections to seizure premised on responses that Russia may take as retribution for transferring its assets to Ukraine—responses

that Russia, like other criminal states and individuals, has every reason to threaten but ultimately very little reason actually to carry out. For example, Russia could, in theory, respond to the transfer of its frozen assets by announcing an intent to retaliate by seizing assets belonging to the United States and its allies. Or Russia might express an intent to wreak retribution against the countermeasures taken against its illegal war on Ukraine by escalating its operations on the battlefield. Neither avenue for retaliation should dissuade states from action, both because Russia has largely exhausted its capacity to escalate on both these fronts and because there is good reason to believe that seizing Russia's frozen assets could persuade President Putin to move toward de-escalation rather than the other way around. However many missteps Putin has taken thus far in his decision to annex Crimea and his attempt to overrun Ukraine, it is vital that world leaders exploit his instincts for self-preservation rather than succumb to his saber-rattling bluster.

B. Proposed Guidelines for the International Transfer Mechanism

Having determined that they have the legal authority to seize Russia's frozen assets, the United States and the other countries undertaking the proposed transfer must fashion a workable mechanism to transfer those funds to Ukraine. Until a proposed seizure and transfer plan is concretized in an institutional form that can provide what amounts to "proof of concept," the idea is likely to be resisted on the morally and pragmatically shaky but psychologically understandable ground that it is unclear exactly how it might be done. Accordingly, rather than leave the design of a particular mechanism up in the air on the basis that many options might in fact be available and that choosing among them is premature, this report adopts the approach of embracing the proposals propounded by other experts whereby each country creates and controls an escrow

account and then agrees to pool the funds in those accounts into an international fund, from which distributions can be made to Ukraine for its continued defense and eventual reconstruction.⁶²⁹

This Section outlines three important aspects of that proposed transfer mechanism. First, the escrow account should be international in nature, pooling the seized funds across the United States and its allies, and overseen by an independent international board. Second, the United States and its allies should take steps to ensure that the transfer process is not undermined by corruption, or even the appearance of corruption. And third, the account should have defined uses for the seized funds that correspond to the legal justifications for seizure.

1. International and Independent

Any transfer mechanism must be structured so that any country that is prepared to seize Russian sovereign assets frozen within its jurisdiction can contribute those assets to an international fund administered by an independent board. Thus, this report proposes that the United States and other allied countries create national escrow accounts to temporarily house Central Bank assets in the United States and other foreign countries and then transfer those assets to an independent international trust fund administered by an independent board composed of members from the international community.

Such a multilateral effort is critical for several reasons. To begin with, only a relatively small portion of the total CBR assets is located in the United States.⁶³⁰ Engaging allied global leaders has the obvious benefit of ensuring that more funds can be redistributed to Ukraine. But even if the CBR assets were differently distributed, creating a multilateral fund with contributions from a critical mass of countries will bolster the legitimacy of the entire effort. History proves the

⁶²⁹ See NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 3.

⁶³⁰ See *supra* Part II.

point. There was significant backlash to the United States' unilateral seizure of Afghanistan's central bank assets;⁶³¹ by comparison, there was greater international acceptance of the multilateral U.N. Compensation Commission.⁶³² All countries involved in transferring Russian assets to Ukraine are in a far stronger political posture if they act together rather than alone.⁶³³

Such an international fund has useful historical precedents. The first such precedent is the transfer of Iraqi state funds to Kuwait after Iraq's 1990 invasion. Much like Russia's 2022 invasion of Ukraine, Iraq invaded Kuwait in an unprovoked war of aggression with the intent of annexing the entire country.⁶³⁴ In the aftermath of the ensuing Gulf War, the U.N. Security Council negotiated peace terms for Iraq that included the creation of a compensation fund for Kuwaiti victims that would be administered by a U.N. commission.⁶³⁵ The Security Council justified this action by stating that Iraq was "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 [its] unlawful invasion and occupation of Kuwait."⁶³⁶

⁶³¹ See, e.g., Ali Harb, *'Theft': Advocates decry US decision to withhold Afghan funds*, AL JAZEERA (Feb. 11, 2022), <https://www.aljazeera.com/news/2022/2/11/theft-afghan-americans-decry-decision-to>; Charlotte Greenfield, *International economists ask Biden to release Afghan central bank funds*, REUTERS (Aug. 10, 2022), <https://www.reuters.com/world/international-economists-ask-biden-release-afghan-central-bank-funds-2022-08-10/>.

⁶³² See, e.g., David Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, not Retribution*, 13 EUR. J. INT'L L. 183 (Feb. 2022).

⁶³³ See, e.g., Jean Pisani-Ferry, *Collective Action in a Fragmented World*, BRUEGEL (Sept. 2019), https://www.bruegel.org/sites/default/files/wp-content/uploads/2019/09/Bruegel_Policy_Brief-2019_05_1.pdf; Kemal Davis, *Multilateralism: What policy options to strengthen international cooperation?*, BROOKINGS INST. (Nov. 17, 2020), <https://www.brookings.edu/articles/multilateralism-what-policy-options-to-strengthen-international-cooperation/>.

⁶³⁴ See Lea C. Owen, *Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims*, 31 VAND. L. REV. 499, 505 (1998).

⁶³⁵ See *id.* at 514.

⁶³⁶ S.C. Res. 687 ¶ 16 (Apr. 3, 1991).

Before the U.N. Compensation Commission (“UNCC”) was up and running, countries with Iraqi Central Bank assets first created national escrow accounts to hold the funds temporarily.⁶³⁷ In the United States, President George H. W. Bush ordered U.S. banks to transfer any Iraqi state funds to the Federal Reserve Bank in New York.⁶³⁸ The Federal Reserve was then given authorization to “hold, invest, or transfer” the funds in the escrow accounts.⁶³⁹ Ultimately, the United States transferred these funds to the UNCC, which was administered by a fifteen-member Governing Council made up of experts in finance, law, accountancy, insurance, and assessing environmental damage, and was based in part on the Iran-U.S. Claims Tribunal and American mass tort claims administration.⁶⁴⁰ The UNCC made Kuwait and Kuwaiti victims the final payments in January 2022, totaling \$52.4 billion in reparations.⁶⁴¹

A second relevant example is the recent move of frozen Afghan central bank assets from the United States to a Swiss-based trust fund established for the Afghani people. After the 2021 Taliban’s takeover of Afghanistan and the Central Bank of Afghanistan, the United States Departments of State and Treasury announced that they would transfer \$3.5 billion of frozen Afghan central bank assets to a “Afghan fund” based in Switzerland and outside of the Taliban’s control with the goal “to benefit the people of Afghanistan.”⁶⁴² The Swiss fund, which is housed in the Geneva-based Bank for International Settlements, is managed by four people on the Board

⁶³⁷ See NEW LINES INSTITUTE, MULTILATERAL ASSET TRANSFER, *supra* note 31, at 23.

⁶³⁸ Exec. Order No. 12,817, 57 Fed. Reg. 48433 (Oct. 23, 1992).

⁶³⁹ *Id.*

⁶⁴⁰ See Owen, *Between Iraq and a Hard Place*, *supra* note 634, 31 VAND. L. REV. at 514 n.71, 518.

⁶⁴¹ *Iraq makes final reparation payment to Kuwait for 1990 Invasion*, UN NEWS (Feb. 9, 2022), <https://news.un.org/en/story/2022/02/1111632>.

⁶⁴² *The United States and Partners Announce Establishment of Fund for the People of Afghanistan*, U.S. DEP’T OF STATE (Sept. 14, 2022), <https://www.state.gov/the-united-states-and-partners-announce-establishment-of-fund-for-the-people-of-afghanistan/>.

of Trustees, including two U.S.-based Afghan professionals who have previously worked with Afghanistan's Central Bank, the U.S. Ambassador to Switzerland, and an official representing the Swiss government.⁶⁴³ Deloitte in Geneva serves as a secondary review board, and the fund is subject to annual external audits as required by Swiss law.⁶⁴⁴

Following these historical examples, the United States and its allies should similarly call for the United Nations to create an independent third-party commission similar to the UNCC and the Swiss trust fund where the fund for the Afghan people is housed. This fund would then distribute reparations payments as was done for Kuwait up until 2022. These examples show that a large-scale international mechanism can be an effective and secure method to manage and distribute billions of dollars of belligerent state assets.

2. Combat Corruption

A priority in structuring the international fund will be to insulate the tens or even hundreds of billions of dollars in that fund from the reality, or even the appearance, of corruption. To that end, the fund should be managed by an independent oversight committee, such as the Ukrainian Development Authority proposed, that is not beholden to political dynamics or local loyalties in Ukraine.⁶⁴⁵ That committee's individual members should be selected based on clean records of service in high-level government positions, and the committee's operations and spending should be fully disclosed to the public.⁶⁴⁶ Additionally, the independent committee should work closely

⁶⁴³ William Byrd, *U.S. to Move Afghanistan's Frozen Central Bank Reserves to New Swiss Fund*, U.S. INST. PEACE (Sept. 28, 2022), <https://www.usip.org/publications/2022/09/us-move-afghanistans-frozen-central-bank-reserves-new-swiss-fund>.

⁶⁴⁴ *Id.*

⁶⁴⁵ Anders Åslund, *Russia Must Pay Reparations*, PROJECT SYNDICATE (Mar. 24, 2022), <https://www.project-syndicate.org/commentary/russia-reparations-to-ukraine-seize-reserves-for-reconstruction-by-anders-aslund-2022-03>.

⁶⁴⁶ Anders Åslund, *How to Rebuild Ukraine*, KYIV POST (May 30, 2022), <https://archive.kyivpost.com/article/opinion/op-ed/how-to-rebuild-ukraine.html>; Anders Åslund, *Russia must foot*

with other organizations that are experienced in dispersing large amounts of money abroad, like the United Nations, the G7, and humanitarian assistance groups like UNICEF, the World Food Programme, and the Red Cross.

The United States and its allies must also consider the unfortunate history of corruption in Ukraine itself.⁶⁴⁷ Fortunately, President Zelenskyy and his government ministers understand the magnitude of the corruption problem and have been admirably candid in recognizing that fighting corruption there is essential to continued financial support from G7 and E.U. countries as well as to fulfill Ukraine's goal of E.U. membership.⁶⁴⁸ Accordingly, Ukraine has taken ambitious steps to combat corruption even in the midst of a brutal and indeed existential war. For example, Ukraine's anti-corruption squad raided the home of the Chief Justice of the Ukrainian Supreme Court, who was allegedly involved in a multi-million-dollar bribery scheme.⁶⁴⁹

It would be entirely appropriate for the international fund to include a tranche set aside for supporting President Zelenskyy's anti-corruption efforts. As proposed by Former Ambassador and Obama "Ethics Czar" Norman Eisen and German Marshall Fund Fellow Josh Rudolph, the details of the fund's distributions should be made as transparent to the international public as possible, and local investigative journalists should be encouraged to scrutinize the process for any

the bill for rebuilding Ukraine, STRATEGIST (Mar. 25, 2022), <https://www.aspistrategist.org.au/russia-must-foot-the-bill-for-rebuilding-ukraine/>.

⁶⁴⁷ See, e.g., Priyanka Shankar & John Savage, *Ukraine confronts two enemies: Russia and corruption*, AL JAZEERA (Feb. 14, 2023), <https://www.aljazeera.com/news/2023/2/14/ukraine-confronts-two-enemies-russia-and-corruption>; see also Bret Stephens, *Can Samantha Power Win the Battle for Ukraine's Future?*, N.Y. TIMES (Sept. 13, 2023), <https://www.nytimes.com/2023/09/13/opinion/power-ukraine-foreign-aid.html>.

⁶⁴⁸ See David L. Stern, *Ukraine clamps down on corruption as Western supporters cast watchful eye*, WASH. POST (June 19, 2023), <https://www.washingtonpost.com/world/2023/06/19/ukraine-corruption-judge-war-bribes/>.

⁶⁴⁹ *Id.*

impropriety.⁶⁵⁰ Additionally, the United States and its allies can support President Zelenskyy's anti-corruption goals by making further international aid contingent on anti-corruption progress, such as demanding the divestment of assets from Ukraine's oligarchs and requiring that Ukraine fully join the European Public Prosecutor's Office.⁶⁵¹

3. Transfer the Assets to the Ukrainian Government

Finally, the international fund should clearly define the permissible uses of any assets transferred to Ukraine. In particular, the funds should be sent directly to the government of Ukraine as the victim of Russia's violations of international law. Providing the funds directly to Ukraine (subject to the anti-corruption measures described above) has several advantages.⁶⁵²

First, transferring the funds directly to Ukraine coheres with the formal legal justification provided for the initial seizure and therefore makes the international fund easier to defend both politically and under international law. Second, the government of Ukraine is closest to the needs on the ground in terms of defending and rebuilding the country. The government is also politically accountable to Ukraine's people and therefore has an obvious incentive to use the funds in a way that will most benefit everyday Ukrainians. And third, transferring Russia's seized assets directly to Ukraine will have the additional benefit of paying down Russia's reparations debt to the country it has ravaged.

⁶⁵⁰ Josh Rudolph & Norman Eisen, *Ukrainian recovery funding must be tied to anti-corruption*, BROOKINGS INST. (Oct. 24, 2022), <https://www.brookings.edu/articles/ukrainian-recovery-funding-must-be-tied-to-anti-corruption/>.

⁶⁵¹ *Id.*

⁶⁵² While this report has focused on providing immediate assistance to Ukraine, the legal authority for the proposed asset transfer and the moral and practical considerations in support of that action may potentially provide a roadmap for future proposals to transfer some portion of Russia's frozen assets to other victims of Russia's aggression and violations of international law. Delivering life-saving relief to Ukraine is the beginning, but not the end, of holding Russia and Putin accountable for their grotesque actions.

Eventually, an international body will need to calculate the exact amount of reparations that are owed to Ukraine, as the ICJ has done for past conflicts like Uganda's invasion of the Democratic Republic of the Congo.⁶⁵³ Based on the World Bank's current estimate of \$411 billion to rebuild Ukraine, it is very unlikely that Russia's seized assets will exceed the value of the reparations to which Ukraine is entitled under international law.

C. Transferring Assets to Ukraine Will Not Set an Unfavorable Precedent

Among the most frequently voiced objections to transferring Russia's frozen assets to Ukraine is that doing so would set a dangerous precedent in the future. Even if the confiscation of Russia's frozen assets is lawful in this context, so the objection goes, that action could be invoked in the future to expropriate states' sovereign assets under very different (and, ostensibly, less compelling) circumstances.⁶⁵⁴ If exceptions to fundamental principles like sovereign immunity are invoked too often, objectors say, the principle could eventually be eroded altogether. For the reasons set forth below, such concerns are fundamentally misplaced in the extraordinary circumstances presented by Russia's aggression against its neighbor, Ukraine.

1. The Case for Seizing Russia's Assets Builds Clear Limiting Principles into Its Very Structure

First, Russia's conduct toward Ukraine is fortunately exceedingly rare, if not unique, in the modern international system. Second, any effort by a country to similarly confiscate another state's assets would have to satisfy all the requirements of that country's domestic laws. Third, seizure of

⁶⁵³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Judgment (Feb. 9, 2022), ¶¶ 163-384, 405-06, <https://www.icj-cij.org/sites/default/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> (awarding the DRC \$300 million in reparations for loss of life, personal injuries, displacement, the impressment of child soldiers, and destruction of physical property and natural resources).

⁶⁵⁴ See, e.g., Stephan, *Giving Russian Assets to Ukraine*, *supra* note 90; Anderson & Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, *supra* note 140; Lev E. Breydo, *Putin's Matryoshka. A War Reparations Facility for Rebuilding Ukraine*, COLUM. J. TRANSNAT'L L. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4183023.

those assets by that country would have to further satisfy all requirements of international law. And fourth, countries can expressly subject their confiscation efforts to any number of additional pragmatic limitations that would cabin the precedent in the future. Each of these limiting principles is explored in turn below.

a. Conduct Like Russia's Has Become Extremely Rare

As an initial matter, any concern that confiscating Russia's assets will set a dangerous precedent if similar circumstances arise in the future rests on an assumption that conduct analogous to Russia's has occurred with frequency in the modern era or will in fact recur. On the contrary, Russia's war in Ukraine may well be unprecedented since the Second World War. Russia, a country with one of the largest militaries in the world, has invaded a much-weaker neighbor with the express purpose of permanently occupying, and even annexing, that neighbor's territory. It has done so without any legal authorization or even facially plausible justification but instead with the simple purpose of eliminating a separate, sovereign country. In the process, Russia has committed war crimes and even genocide. Even at this early stage, there is already substantial evidence that Russia's actions have violated international law, resulting in initial decisions by formal bodies like the U.N. General Assembly, the ICJ, the ICC, and the ECHR.⁶⁵⁵

Countries have tried to hold Russia accountable with an array of sanctions, but these actions have proven inadequate to induce Russia to comply with its international obligations.⁶⁵⁶ Yet there is no viable mechanism by which to hold Russia accountable given its veto as a permanent member of the U.N. Security Council.

⁶⁵⁵ See *supra* notes 352-354.

⁶⁵⁶ See *supra* notes 504-506; Summers, Zelikow & Zoellick, *The Other Counteroffensive to Save Ukraine*, *supra* note 32.

Even if these factors taken together did not suffice to make Russia's conduct entirely unique in the post-World War II landscape, at the very least its conduct places it in a very small club of extremely bad actors.⁶⁵⁷ If the United States or any other country were to hold Russia accountable for this most egregious behavior by transferring a portion of Russia's assets to the victim of Russia's aggression, it is highly unlikely that another situation would soon arise that shares all of these salient characteristics and might accordingly justify a similar response.

Moreover, whether states choose to emulate Russia's aggression in the future is, at least in part, within the control of the United States and its allies. International norms like those against aggression and war crimes are not set in stone but are instead the product of state practice and constant re-enforcement. The norms against aggression, war crimes, and genocide are currently being tested to a degree the world has rarely seen. If states understand that these norms continue to have force and that violations will be met with swift and severe consequences—consequences that, if this report's recommendations are followed, would include seizure of sovereign assets and their transfer to the victim of the former owner's aggression—then they are far more likely to make the rational decision to comply with their international obligations.⁶⁵⁸

In short, if the United States wants to face fewer crises like that in Ukraine, it should send the unmistakable message to the international community that Russia's conduct will not be tolerated and should avoid sending the aggression-encouraging signal that such conduct will be met with appeasement.

⁶⁵⁷ Kamminga, *Confiscating Russia's Frozen Central Bank Assets*, *supra* note 531, at 11; 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>.

⁶⁵⁸ See generally Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Andrew T. Guzman, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

b. Domestic Law Constraints

Domestic law provides another meaningful constraint on any country's effort to confiscate the assets of another sovereign state. The United States and Canada, both of which currently have laws that authorize seizing Russia's frozen assets, demonstrate the point.

United States. In the United States, IEEPA authorizes the President to transfer Russia's assets to Ukraine, but it does so subject to several stringent requirements.⁶⁵⁹ First, the President must declare a national emergency, which requires a finding of an "unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States," that originates "in whole or substantial part outside the United States."⁶⁶⁰ Once an emergency is declared, the President may exercise the authority conferred by IEEPA only to deal with that threat directly and not "for any other purpose."⁶⁶¹

This is obviously a substantial limitation on the seizure of sovereign assets. Three separate presidential administrations from both parties have found that Russia's military invasion of Ukraine satisfies the strict requirements of a national emergency—a conclusion that is abundantly clear from the facts available.⁶⁶² But one can imagine any number of severe violations of international law, especially tragedies contained within a country's borders, that would not similarly pose such a threat to the United States and so would not permit the use of IEEPA.⁶⁶³

⁶⁵⁹ See *supra* Section III.B.1.

⁶⁶⁰ 50 U.S.C. § 1701(a).

⁶⁶¹ *Id.* § 1701(b).

⁶⁶² Exec. Order No. 13,660, 79 Fed. Reg. 13491 (Mar. 6, 2014); Exec. Order No. 13,849, 83 Fed. Reg. 48195 (Sept. 20, 2018); Exec. Order No. 14,065, 87 Fed. Reg. 10293 (Feb. 21, 2022).

⁶⁶³ Subsection C is even less likely to be misused because it requires the President to make a finding that "the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals." 50 U.S.C. § 1702(a)(1)(C); see also *supra* Section III.C.

Nor, under IEEPA, does the President have the last word on whether certain circumstances constitute a national emergency. Rather, that decision is subject to continuous congressional scrutiny. Once a national emergency is declared, the President must submit to Congress a report that details the basis for the President's finding and explains the particulars of the President's response.⁶⁶⁴ That initial report must be followed by subsequent reports every six months.⁶⁶⁵ If Congress at any point disagrees with the President's finding, it may override the President's decision with a joint resolution.⁶⁶⁶ The upshot is that if either the President or Congress—two branches accountable to the people—believes that IEEPA is inappropriate in a given circumstance, either has the authority to prohibit action under the law.

If one looks beyond the seizure of *sovereign* assets, even more limitations appear, including the Due Process Clause and the Takings Clause, which are inapplicable here because the assets at issue belong to an instrumentality of a foreign state.⁶⁶⁷

Canada. Significant constraints are also present in Canada, which passed its Special Economic Measures Act with the specific purpose of authorizing the seizure of Russian assets.⁶⁶⁸ That Act requires the approval of a judge, prior notice to the affected property owner, and consultation with the Ministers of Finance and of Foreign Affairs.⁶⁶⁹ It further limits the transfer of assets to another state to those situations in which there has been a “grave breach of international peace and security” or “gross and systematic human rights violations” and the assets seized would

⁶⁶⁴ 50 U.S.C. § 1703(b).

⁶⁶⁵ *Id.* § 1703(c).

⁶⁶⁶ *Id.* § 1706(b).

⁶⁶⁷ *See supra* Sections III.D.1 and III.D.2.

⁶⁶⁸ *See supra* Section IV.E.1.

⁶⁶⁹ Special Economic Measures Act, Bill C. 19 (assented to June 23, 2022), enacted at S.C. 1992 c. 17, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/royal-assent>.

fund the reconstruction of a state that was the victim of that grave breach and would help restore international peace.⁶⁷⁰

c. International Law Constraints

Even if domestic law authorizes the seizure of another state's assets, the seizure must also satisfy the demanding requirements of international law. As explained in Part IV of this report, Russia's frozen assets are broadly protected under customary international law by principles of sovereign immunity and norms against expropriation of property. But states can temporarily abrogate those obligations and transfer Russia's frozen assets to Ukraine as a countermeasure to induce Russia's compliance with international law. Although the case for countermeasures is clear here, that does not mean the doctrine does not impose serious limitations on state action in other less extreme circumstances. Three limitations are particularly important to limiting the overuse of countermeasures.⁶⁷¹

First, an aggressor state (here, Russia) must have violated international law. That violation must ordinarily have breached a legal obligation owed to the state that seeks to impose a countermeasure.⁶⁷² Only a handful of international obligations—like the prohibitions against aggression, war crimes, and genocide—qualify as obligations *erga omnes* that may permit so-called third-party countermeasures.⁶⁷³ If a state imposes a countermeasure where no violation of international law has actually occurred, then the target of the countermeasure may seek (and win) compensation in an international tribunal.

⁶⁷⁰ *Id.*

⁶⁷¹ See *supra* Section IV.D.1, text accompanying notes 469-476.

⁶⁷² ARSIWA arts. 22, 49.

⁶⁷³ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Judgment (Feb. 5, 1970), ¶¶ 33-34, <https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>.

Second, a countermeasure must be proportionate to the violation to which it responds. International tribunals have held on several occasions that a countermeasure was unlawful because it was disproportionate to the violation of international law to which it was a response.⁶⁷⁴ As previously explained, one important consideration in the proportionality analysis is that the international community has imposed many sanctions on Russia already, and its continued violations of international law therefore justify a more severe response in the form of confiscating its sovereign assets to induce Russia's compliance with its international obligations.⁶⁷⁵

Third, a countermeasure should be reversible such that legal relations may be normalized after the wrongful conduct ends. That principle is satisfied by confiscation of Russia's assets (as this report has explained above), but it is hardly the case that it would be satisfied by any and all proposed sanctions that could be imposed as countermeasures.⁶⁷⁶

d. Pragmatic Constraints

Last, if the United States or other countries are worried about the precedent they may set by transferring Russia's frozen assets to Ukraine and are dissatisfied with the limitations already written into law, the solution is surely to narrow the effect of the precedent that is set, not to abstain from action altogether. This could be achieved, for example, if the President's decision to transfer Russia's assets were to be accompanied by an announcement defining the narrow conditions under which that seizure was deemed justified and could be permitted in the future, thereby going some

⁶⁷⁴ E.g., *Case Concerning the Air Service Agreement (United States of America v. France)*, ICJ Judgment (Dec. 9, 1978), ¶¶ 80-99, https://legal.un.org/riaa/cases/vol_XVIII/417-493.pdf (holding countermeasure was proportionate); *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Judgment (Sept. 25, 1997), ¶¶ 82-85, <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> (holding countermeasures were disproportionate).

⁶⁷⁵ See *supra* Section IV.D.1.c.

⁶⁷⁶ See *supra* Section IV.D.1.d.

distance toward tying the hands of future administrations that might seek to cite the seizure of Russia's assets as relevant precedent.

The United States could, for instance, state as its policy that it will use IEEPA to seize another state's assets only if (a) that state uses military force to invade another sovereign country and (b) that state has not ceased its wrongful behavior in the face of less-costly sanctions. Professor Moiseienko has proposed further pragmatic limitations that a government could impose on its seizure, such as requiring that the state's armed activities be found to violate international law by a formal tribunal like the ICJ or ECHR, or requiring the absence of U.N. Security Council action because of a permanent member's veto.⁶⁷⁷

Of course, such pragmatic limitations on seizure announced at the time would not be strictly binding on successor administrations. A future U.S. administration could choose to ignore these limitations and exercise its authority to the full extent permitted by IEEPA and by international law. But that is a description of the current state of play, which already permits the seizure of assets without any stated pragmatic limits. Again, it is not a reason to refrain from seizing and transferring Russia's frozen sovereign assets in the extreme circumstances presented here. Precommitment to clear limitations on seizure would, however, subject any future administration that seeks to disregard those limits to well-founded charges of hypocrisy that could impose a sufficient political cost to change that administration's cost-benefit analysis.⁶⁷⁸

⁶⁷⁷ Moiseienko, *Frozen Russian Assets*, *supra* note 525, at 22.

⁶⁷⁸ See generally Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055 (2003); Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

2. The False Compromise of Investing Russia's Frozen Assets

Some critics of seizing Russia's frozen assets have instead advocated investing Russia's assets on its behalf and then transferring the proceeds of that investment to Ukraine without reducing Russia's principal.⁶⁷⁹ But while this proposal might at first appear to be a tempting compromise, it is far from an adequate response—it would neither avoid the primary legal criticisms against seizure nor provide Ukraine with the funds it needs. Reminiscent of the misguided move of leaping halfway across a gaping chasm when one has decided that one cannot, or would rather not, make the trip all the way across, any such compromise should be resisted.

First, the assumption that this proposal would avoid the purported pitfalls of outright seizing Russia's frozen assets is manifestly fallacious. The core criticism made under both domestic and international law is that seizure is not permitted because it would infringe Russia's property rights in its central bank assets. Yet there is no principled distinction between Russia's property right to the *principal* and its right to the *returns* generated by investing that principal. Indeed, under settled concepts of property law, Russia has ownership interests in both the principal *and* the investment income on that principal.⁶⁸⁰ If seizing Russia's assets is not permitted under international and domestic law (and, to be clear, this report concludes that seizure is fully permissible), then the same conclusion would follow for seizure of Russia's investment returns.

⁶⁷⁹ E.g., Jan Strupczewski, *EU leaders push to fund Ukraine with proceeds from Russia's frozen assets*, REUTERS (June 29, 2023), <https://www.reuters.com/world/europe/eu-leaders-push-fund-ukraine-with-proceeds-russias-frozen-assets-2023-06-29/>; Sam Fleming et al., *Von der Leyen rejects ECB worries over levy on frozen Russian assets*, FIN. TIMES (June 30, 2023), <https://www.ft.com/content/28f8f846-a9a5-4d82-841c-0002620cd6de>; Lisa O'Carroll, *EU mulls levy on frozen Russian assets to support Ukraine reconstruction*, GUARDIAN (June 29, 2023), <https://www.theguardian.com/world/2023/jun/29/eu-mulls-levy-on-frozen-russian-assets-to-support-ukraine-reconstruction>.

⁶⁸⁰ See generally John G. Sprankling, THE INTERNATIONAL LAW OF PROPERTY (2014); e.g., 31 C.F.R. § 526.313 (definition of "property" applicable to IEEPA).

In fact, investing Russia's frozen assets would complicate, not simplify, the legal questions involved. Who, for instance, decides how to invest the assets? Would that decision maker (whether the United States or one of its allies) be obligated to choose only "safe" investments that are most likely to safeguard Russia's principal but are least likely to produce the returns that Ukraine needs? Most pressing, if Russia's assets are invested in assets that experience negative returns, would the United States and its allies ultimately owe Russia compensation for the lost principal?⁶⁸¹ These questions do not have easy answers. And if countries holding Russian assets affirmatively take the position that they cannot seize Russia's principal, those statements could be thrust back at them in the event that investment losses shrink the principal.

Second, investing Russia's frozen assets while keeping the principal untouched simply would not generate the magnitude of resources that Ukraine requires. By the European Union's estimate, investing Russia's sovereign funds in relatively safe (albeit, not risk-free) investment vehicles would generate approximately \$3 billion in returns each year.⁶⁸² While transferring those returns to Ukraine would certainly be better than nothing at all, that sum represents approximately the amount that the European Union has given to Ukraine each month, and less than the amount the United States has given each month, since the war's start.⁶⁸³ In short, this proposal would make only a small fraction of the resources available to Ukraine that full transfer would make available, and it would do so only after a substantial, and unacceptable, delay.

⁶⁸¹ E.g., Paola Tamma, *EU looks at investing frozen Russian state assets to raise cash for Ukraine*, POLITICO (Mar. 24, 2023), <https://www.politico.eu/article/eu-looks-at-investing-vladimir-putin-russia-state-assets-to-raise-cash-for-ukraine/>; Editorial Board, *Is there enough money to rebuild Ukraine?*, WASH. POST (June 24, 2023), <https://www.washingtonpost.com/opinions/2023/06/24/ukraine-reconstruction-cost-russian-assets/>.

⁶⁸² Julia Payne, *Windfall from Russia's frozen assets in Europe could be \$3 billion a year, Belgium says*, REUTERS (June 30, 2023), <https://www.reuters.com/world/europe/windfall-russias-frozen-assets-europe-could-be-3-billion-year-belgium-2023-06-30/>.

⁶⁸³ Ruby Mellen & Artur Galocha, *A look at the amount of U.S. spending powering Ukraine's defense*, WASH. POST (Aug. 10, 2023), <https://www.washingtonpost.com/world/2023/08/04/ukraine-war-us-spending/> (totaling U.S. spending on Ukraine to \$66.2 billion since February 2022; E.U. spending on Ukraine to \$35.9 billion).

D. The Dollar's Dominant Position Will Not Be Undermined

One of the most persistent concerns about transferring Russia's frozen assets is that doing so will undermine the U.S. dollar's position as the world's reserve currency and preferred unit of exchange in international transactions. Transferring Russia's assets, some worry, will be seen as "weaponizing" the dollar and thereby fuel ongoing efforts to replace the dollar's central role in the international financial system (i.e., "dedollarization").⁶⁸⁴

Although the prediction may appear novel to some, this is in fact just the latest flashpoint in an old debate. Economists and commentators have made predictions about the dollar's role in the international system almost since it gained its prominent position at Bretton Woods in 1944.⁶⁸⁵ Serious concerns that the dollar would be replaced have been raised since at least the 1980s, yet those fears have repeatedly failed to materialize.⁶⁸⁶

The decision to transfer Russia's frozen assets is unlikely to be the reason that the U.S. dollar ceases to be the world's reserve currency after nearly a century. Although such predictions are necessarily uncertain, there is good reason to conclude that the U.S. dollar's position is safe regardless of the decision to transfer Russia's assets. First, the transfer of Russia's assets will not meaningfully change the current reasons to keep or abandon the dollar. A decade of sanctions against Russia have already fully convinced it of the need to abandon the dollar. But it is unlikely

⁶⁸⁴ See, e.g., Benn Steil, *The Real Cost of De-Dollarization*, PROJECT SYNDICATE (Aug. 16, 2023), <https://www.project-syndicate.org/commentary/no-alternative-to-the-us-dollar-by-benn-steil-2023-08>; Somesh Jha, *Will Russia sanctions dethrone 'King Dollar'?*, AL JAZEERA (Mar. 7, 2023), <https://www.aljazeera.com/features/2023/3/7/will-russia-sanctions-dethrone-king-dollar>.

⁶⁸⁵ See, e.g., Richard N. Cooper, *The Future of the Dollar*, FOREIGN POL'Y, Summer 1973, at 3; William A. Salant, *The Reserve Currency Role of the Dollar: Blessings or Burden to the United States?*, REV. ECONS. & STATS., May 1964, at 165.

⁶⁸⁶ Jim O'Neill, *A BRICS Threat to the Dollar?*, PROJECT SYNDICATE (Apr. 13, 2023), <https://www.project-syndicate.org/commentary/brics-plus-and-the-future-of-dollar-dominance-by-jim-o-neill-2023-04> ("Perceived threats to the dollar's role in the global financial system are nothing new; they have been a frequent occurrence since I began my career in the 1980s.").

that many, if any, countries will follow. Second, the U.S. dollar has maintained its position for nearly a century because of structural reasons that have, if anything, only gained force in recent years. Those structural advantages are especially persuasive given that there is no viable alternative reserve currency that comes close to matching the dollar. And third, faced with uncertain predictions about the U.S. dollar's future, and even more uncertainty about whether the dollar's current position is still a benefit to the United States, the only moral certainty is that Ukraine desperately needs Russia's assets to address an indisputable and growing humanitarian crisis.

1. Transferring Russia's Frozen Assets Will Not Change Motivations to Dedollarize

Russia has already dedicated itself to moving away from the U.S. dollar. That effort is a product of the hundreds of sanctions that the United States and its allies have imposed on Russia over the past decade. Even in 2014, after Russia invaded Crimea, Russia began to take steps to reduce its use of the dollar, and in 2018 it began to sell of its U.S. Treasury bonds and investigate trade using the ruble or other non-Western currencies.⁶⁸⁷ In June 2021, Russia's Finance Ministry announced that the National Wealth Fund would reduce dollar holdings from 35 to 0%.⁶⁸⁸ After Russia's invasion of Ukraine in February 2022, efforts to move away from the dollar went into overdrive as the Russian economy was hit by even harsher sanctions, including capping the price of Russian oil, and as the G7 countries froze \$300 billion in Russia's assets.⁶⁸⁹ Perhaps even more important to Russia was the decision to cut its banks off from the global SWIFT system, which is the basic infrastructure, built on the dollar, by which banks around the world communicate and

⁶⁸⁷ Chelsey Dulaney, Evan Gershkovich & Victoria Simanovskaya, *Russia Turns to China's Yuan in Effort to Ditch the Dollar*, WALL ST. J. (Feb. 28, 2023), <https://www.wsj.com/articles/russia-turns-to-chinas-yuan-in-effort-to-ditch-the-dollar-a8111457>.

⁶⁸⁸ Caileigh Glenn, *Lessons in Sanctions-Proofing from Russia*, WASH. Q., Spring 2023, at 105, 110.

⁶⁸⁹ *Id.* at 112.

make transactions.⁶⁹⁰ Ultimately, in late 2022, Russia's Finance Ministry announced an intent to hold 60% of its reserves in the Chinese renminbi and to hold effectively 0% of reserves in the U.S. dollar.⁶⁹¹

The upshot is that a decision to transfer Russia's frozen assets to Ukraine will have no effect on Russia's use of the dollar because the country is already fully committed to dedollarization. The question is instead whether the decision to transfer Russia's assets will persuade other countries that they must follow Russia's lead for fear they will be the next targets of asset transfer. It is very unlikely that other countries would do so.

For one, the authority to transfer Russia's assets is exceedingly narrow and subject to a series of legal requirements.⁶⁹² Identifying those limitations when the United States announces its decision to transfer Russia's assets would go a long way toward reassuring other countries that their assets remain safe. After all, other countries did not flee the dollar when the United States seized the assets of states like Afghanistan, Iran, or Syria, nor when the United States imposed sanctions on Russia in the past.⁶⁹³ As Nobel Prize-winning economist Paul Krugman remarked, "Unless you're a dictator planning to commit major war crimes, you needn't fear that the U.S. government will impound your assets."⁶⁹⁴

⁶⁹⁰ Jha, *Will Russia sanctions dethrone 'King Dollar'?*, *supra* note 684.

⁶⁹¹ Alexandra Prokopenko, *The Risks of Russia's Growing Dependence on the Yuan*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 2, 2023), [https://carnegieendowment.org/politika/88926#:~:text=It's%20believed%20that%20the%20yuan,the%20euro%20\(20%20percent\)](https://carnegieendowment.org/politika/88926#:~:text=It's%20believed%20that%20the%20yuan,the%20euro%20(20%20percent).).

⁶⁹² *See supra* Section V.C.1.

⁶⁹³ Colin Weiss, *Geopolitics and the U.S. Dollar's Future as a Reserve Currency*, Board of Governors of the Federal Reserve System Paper 1359 at 7 (Oct. 2022), <https://www.federalreserve.gov/econres/ifdp/files/ifdp1359.pdf>.

⁶⁹⁴ Paul Krugman, *Working Out: International Money Madness Strikes Again*, N.Y. TIMES (Apr. 14, 2023), <https://www.nytimes.com/2023/04/14/opinion/dollar-reserve-currency.html>.

Holding Russia accountable is especially unlikely to influence other countries' decisions about the dollar. Already, Russia has been sanctioned by a coalition of countries that represent “more than 90% of global currency reserves, approximately 80% of global investment, and 60% of world trade and economic output.”⁶⁹⁵ Many of those countries not only sanctioned Russia but have frozen Russia's sovereign assets as well. Certainly, those countries will not fear that the United States will seize their sovereign assets next. And even among those countries that have not sanctioned Russia, there is still a widely shared belief that Russia's war is unjustified and unlawful.⁶⁹⁶ Even if those countries disagree with the decision to transfer Russia's assets, they are highly unlikely to conclude that Russia is the first of many countries to have its assets seized. Instead, the action will be at most understood as an overreaction to a rare circumstance that is unlikely to be repeated.

Importantly, putting Russia aside, the desire to avoid sanctions is only one reason why some countries have explored an alternative to the dollar.⁶⁹⁷ The BRICS countries (i.e., Brazil, Russia, India, China, and South Africa), for example, have expressed increasing dissatisfaction with the dollar because of the Federal Reserve's recent rate hikes, which serve U.S. economic interests but can cause financial instability abroad.⁶⁹⁸ Another reason that countries have explored alternatives to holding their reserves in dollars is increasing worry about political dysfunction in

⁶⁹⁵ Carla Norrlof, *Currency, Conflict, and Global Order*, PROJECT SYNDICATE (July 14, 2023), <https://www.project-syndicate.org/onpoint/will-multipolarity-follow-global-dollar-hegemony-by-carla-norrlof-2023-07>.

⁶⁹⁶ *Id.*; Carla Norrlof, *Dollar dominance: Preserving the US dollar's status as the global reserve currency*, ATL. COUNCIL (June 8, 2023), <https://www.atlanticcouncil.org/commentary/testimony/dollar-dominance-preserving-the-us-dollars-status-as-the-global-reserve-currency/>.

⁶⁹⁷ Barry Eichengreen, *Is de-dollarisation happening?*, VOX EU (May 12, 2023), <https://cepr.org/voxeu/columns/de-dollarisation-happening>.

⁶⁹⁸ Paul McNamara, *Why a Brics currency is a flawed idea*, FIN. TIMES (Feb. 10, 2023), <https://www.ft.com/content/02d6ab99-ea36-41c4-9ad3-9658bb1894a7>; Penny Chen, *Calls to move away from the U.S. dollar are growing — but the greenback is still king*, CNBC (Apr. 24, 2023), <https://www.cnbc.com/2023/04/24/economic-and-political-factors-behind-acceleration-of-de-dollarization.html>.

the United States—namely, that the current Congress might default on the nation’s debts.⁶⁹⁹ These motivations to abandon the dollar will exist regardless of whether the United States transfers Russia’s frozen assets to Ukraine.

2. The U.S. Dollar Has Structural Advantages that No Alternative Can Match

But accept, for the time being, that the United States’ decision to transfer Russia’s assets to Ukraine is perceived by other countries not as a unique reaction to a desperate situation but instead as posing a generalized threat to any country that disagrees with U.S. foreign policy and holds dollar reserves. Even then, it is very difficult to see how the dollar would lose its central position, because two stubborn realities would remain: The dollar is deeply entrenched in the fabric of the global financial system, and there is no alternative to it on the horizon.

The U.S. dollar has several structural advantages. The simplest of these is its incumbency advantage—the dollar is used by individuals, companies, and governments around the world and has been used for decades.⁷⁰⁰ It excels on each characteristic of a currency.⁷⁰¹ Accordingly, the dollar is used for the vast majority of international transactions, and no other currency comes close to it.⁷⁰² It has long been used, for example, as the principle means of pricing oil, and oil-producing

⁶⁹⁹ Krugman, *International Money Madness Strikes Again*, *supra* note 694; Brad W. Setser, *The U.S. Has Every Reason It Needs to Drop the Debt Ceiling—Both at Home and Abroad*, COUNCIL ON FOREIGN RELS. (June 8, 2023), <https://www.cfr.org/blog/us-has-every-reason-it-needs-drop-debt-ceiling-both-home-and-abroad> (“A default of choice would diminish the dollar’s appeal as a global currency for payments and finance.”).

⁷⁰⁰ Paul Krugman, *What’s Driving Dollar Doomsaying?*, N.Y. TIMES (May 2, 2023), <https://www.nytimes.com/2023/05/02/opinion/us-dollar-reserve-currency.html> (“The bottom line in most of this analysis is that the dollar is widely used because it’s widely used — that all of the various roles the dollar plays create a web of self-reinforcement, keeping the dollar pre-eminent. The point is that tugging on one or two strands of this web isn’t likely to cause it to unravel.”).

⁷⁰¹ Saleem Bahaj & Ricardo Reis, *The Economics of Liquidity Lines Between Central Banks*, 14 ANN. REV. FIN. ECONS. 57, 61 (2022) (“In the three roles that money plays—store of value, unit of account, and medium of exchange—there are strong complementarities. This creates a strong force for one currency to become internationally dominant.... Currently, the USD is dominant in trade invoicing, denomination of international bonds, and exchange rate pegs.” (citations omitted)).

⁷⁰² Joseph W. Sullivan, *Don’t Discount the Dollar Yet*, FOREIGN POL’Y (Aug. 21, 2020), <https://foreignpolicy.com/2020/08/21/dollar-global-reserve-currency-yuan-china/>.

countries in the Middle East have every incentive to keep it that way.⁷⁰³ The wide usage of the dollar makes it difficult to get rid of. For one, a currency gains in the value the more that it is used by others, a phenomenon termed a “network effect.”⁷⁰⁴ And like building a rival social media network, it can be difficult to overcome an incumbent currency with a strong network effect. The dollar’s wide usage also means that many public and private entities incur debt in dollars rather than in their local currency. And to assure creditors that those debts will be paid, debtor countries must maintain currency reserves in dollars as well.⁷⁰⁵

Aside from this incumbency advantage, the U.S. dollar also has the advantage of being backed by a mature and open financial system governed by the rule of law. Although a government like Russia may fear the United States government, investors around the world are much more afraid of illiberal governments like Russia itself.⁷⁰⁶ Setting sanctions against Russia aside, the United States does not have a reputation for restricting the flow of capital or for arbitrary expropriation of property.⁷⁰⁷ The importance of U.S. institutions is especially crucial in times of crises. If a currency cannot maintain liquidity in times of crises, then it will not be trusted as a reserve currency for long. On this front, the United States has repeatedly excelled by offering badly needed liquidity both to private companies and to foreign governments during the global financial

⁷⁰³ Javier Blas, *The Myth of the Inevitable Rise of a Petroyuan*, WASH. POST (Feb. 28, 2023), https://www.washingtonpost.com/business/energy/the-myth-of-the-inevitable-rise-of-a-petroyuan/2023/02/27/7d6cd58c-b65e-11ed-b0df-8ca14de679ad_story.html.

⁷⁰⁴ Gerard DiPippo & Andrea Leonard Palazzi, *It’s All about Networking: The Limits of Renminbi Internationalization*, CTR. FOR STRATEGIC & INT’L STUDS. (Apr. 18, 2023), <https://www.csis.org/analysis/its-all-about-networking-limits-renminbi-internationalization>.

⁷⁰⁵ Sullivan, *Don’t Discount the Dollar Yet*, *supra* note 702.

⁷⁰⁶ Michael Pettis, *Changing the Top Global Currency Means Changing the Patterns of Global Trade*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 12, 2022), <https://carnegieendowment.org/chinafinancialmarkets/86878>.

⁷⁰⁷ *Id.*; Krugman, *International Money Madness Strikes Again*, *supra* note 694.

crisis and the early days of the COVID-19 pandemic.⁷⁰⁸ That kind of reputation is not easily built by a rival currency. One last major advantage in the dollar's favor goes beyond these economic considerations into the geopolitical. "[T]hree-quarters of the U.S. assets held by foreign governments are in the hands of allies" that cooperate with the U.S. military.⁷⁰⁹ These countries would not lightly discard the dollar and risk their relations with the United States, especially not over sanctions targeted at Russia.

Even if the dollar's considerable advantages were to weaken, opponents of the dollar would still need to identify an adequate alternative reserve currency. The two most likely candidates for a country that wants to avoid sanctions from the United States and its allies would be the Chinese renminbi or a new currency being proposed by the BRICS countries. Neither alternative is promising.

Start with the renminbi, which has long been suggested as an alternative reserve currency to the dollar. Indeed, Russia has already decided the renminbi is preferable to the dollar.⁷¹⁰ But Russia is likely to remain alone in making that transition. As an initial matter, the renminbi is used in only a small fraction of international transactions, and it currently makes up less than 3% of total global reserves.⁷¹¹ That percentage is not meaningfully increasing. In fact, even as Russia is

⁷⁰⁸ Zongyuan Zoe Liu & Mihaela Papa, *Can BRICS De-Dollarize the Global Financial System?*, CAMBRIDGE ELEMENTS at 5, 50 (Feb. 24, 2022); Carol Bertaut, Bastian von Beschwitz & Stephanie Curcuru, "The International Role of the U.S. Dollar" *Post-COVID Edition*, FEDS NOTES (June 23, 2023), <https://www.federalreserve.gov/econres/notes/feds-notes/the-international-role-of-the-us-dollar-post-covid-edition-20230623.html>.

⁷⁰⁹ Weiss, *Geopolitics and the U.S. Dollar's Future as a Reserve Currency*, *supra* note 693, at 2.

⁷¹⁰ Nuriya Kapralou, *Russia's embrace of yuan cannot bring financial stability*, NIKKEI (Feb. 14, 2023), <https://asia.nikkei.com/Opinion/Russia-s-embrace-of-yuan-cannot-bring-financial-stability>.

⁷¹¹ Chen, *Calls to move away from the U.S. dollar are growing*, *supra* note 698; Barry Eichengreen, *Would handing frozen Russian assets to Ukraine be better than reparations?*, GUARDIAN (July 11, 2023), <https://www.theguardian.com/business/2023/jul/11/frozen-russian-assets-ukraine-reparations-putin>.

buying into the renminbi, many other investors are moving out of it because of growing fears that Chinese government bonds are too risky.⁷¹²

The biggest difference between the dollar and the renminbi may be the difference between U.S. and Chinese institutions writ large. Perhaps the chief purpose of a reserve currency is to act as a predictable and stable store of value that investors (whether companies or governments) can access in times of need.⁷¹³ By this measure, China has severe deficiencies.⁷¹⁴ For decades, the Chinese government has controlled capital flows and has manipulated the value of its currency.⁷¹⁵ And investors in China regularly worry that their property will be seized by the government.⁷¹⁶ Those policies are not accidental or something China could stop overnight. Rather, controlling capital flows, manipulating the renminbi, and seizing private property, have been, and continue to be, pillars of President Xi's export-focused economic plan.⁷¹⁷ In short, replacing the dollar as a reserve currency would require, at the least, a fundamental reworking of the Chinese economy.

A new currency developed by the BRICS countries is even less likely to replace the dollar. BRICS countries have for more than a decade floated this idea, and it remains as unlikely as ever.⁷¹⁸

⁷¹² Jamie McGeever, *Yuan won't be FX reserve currency if no one buys China's bonds*, REUTERS (May 16, 2023), <https://www.reuters.com/markets/asia/yuan-wont-be-fx-reserve-currency-if-no-one-buys-chinas-bonds-2023-05-16/> ("China's yuan faces significant long-term obstacles to becoming a global reserve currency of any great import, but the biggest challenge in the near term is the fact that nobody wants to buy Chinese bonds.").

⁷¹³ Sullivan, *Don't Discount the Dollar Yet*, *supra* note 702.

⁷¹⁴ McFaul et al., *Why and How the West Should Seize Russia's Sovereign Assets*, *supra* note 562, at 8-9.

⁷¹⁵ *Id.*; Daniel McDowell, *What is Holding the Yuan Back? Xi is.*, GEO. J. INT'L AFFS (Feb. 11, 2022), <https://gjia.georgetown.edu/2022/02/11/what-is-holding-the-yuan-back-xi-is/>.

⁷¹⁶ *Larry Summers rejects de-dollarization fears*, BLOOMBERG (May 1, 2023), <https://www.bloomberg.com/professional/blog/larry-summers-rejects-de-dollarization-fears/>.

⁷¹⁷ DiPippo & Palazzi, *It's All about Networking*, *supra* note 704; Pettis, *Changing the Top Global Currency Means Changing the Patterns of Global Trade*, *supra* note 706; Milton Ezrati, *Dreams of Yuan Dominance Remain Just That—Dreams*, NAT'L INT. (Feb. 3, 2023), <https://nationalinterest.org/feature/dreams-yuan-dominance-remain-just-%E2%80%94dreams-206175>.

⁷¹⁸ Mary Angela Rowe & Nick Olivari, *BRICs won't break dollar's supremacy, for now*, REUTERS (June 12, 2009), <https://www.reuters.com/article/idINIndia-40288720090612>; *China and Brazil sign \$30bn currency swap agreement*, BBC (Mar. 27, 2013), <https://www.bbc.com/news/business-21949615>.

The BRICS is not a formal governing body—it has no “secretariat, charter, or other formally established norms.”⁷¹⁹ And there are serious divisions between the BRICS countries. India, for example, is more likely to rival China than it is to cooperate on something as sensitive as a shared currency.⁷²⁰ Even if the BRICS countries moved past their differences and managed to find common ground for a currency (a big “if”), it took the far-more-united European Union decades to establish its own currency, and even the euro has not displaced the dollar.⁷²¹ It is rather unsurprising, then, that even the man who originally coined the “BRICS” term has referred to the idea of a shared BRICS currency as “ridiculous” and “embarrassing.”⁷²²

3. Assisting Ukraine in Its Time of Need Is Worth the Speculative Risk to the Dollar

At a minimum, it is far from certain that transferring Russia’s frozen assets to Ukraine would have any appreciable effect on the dollar’s international position. But even if there were some undefined future risk, that speculation should not overcome Ukraine’s immediate and clear need for assets to defend itself and to rebuild.

That is especially true because it is not even clear what, if anything, the United States would lose if the dollar were no longer the go-to reserve currency. After all, the United Kingdom’s position as an international financial center only strengthened after the pound lost its status as a global reserve currency.⁷²³ In fact, some observers have even argued the dollar’s role as a reserve

⁷¹⁹ D.I. Kondratov, *Internationalization of the Currencies of BRICS Countries*, 91 HERALD RUSS. ACAD. SCI. 37, 40 (2021).

⁷²⁰ O’Neill, *A BRICS Threat to the Dollar?*, *supra* note 686; McNamara, *Why a Brics currency is a flawed idea*, *supra* note 698; Liu & Papa, *Can BRICS De-Dollarize the Global Financial System?*, *supra* note 708, at 4.

⁷²¹ *Deep Dive: Why We Think De-Dollarization Fears Are Faulty Logic*, FISHER INVS. (May 12, 2023), <https://www.fisherinvestments.com/en-us/insights/market-commentary/deep-dive-why-we-think-dedollarization-fears-are-faulty-logic>.

⁷²² Arjun Neil Alim & Joseph Cotterill, *Brics creator slams ‘ridiculous’ idea for common currency*, FIN. TIMES (Aug. 15, 2023), <https://www.ft.com/content/d8347bd0-cc4f-4c3b-9225-0ccd272330a6>.

⁷²³ Krugman, *International Money Madness Strikes Again*, *supra* note 694.

currency now imposes a net burden (rather than net advantage) on the U.S. economy because it makes U.S. products more expensive to export abroad and effectively forces the United States to maintain a permanent debt.⁷²⁴ Historically, the dollar's status permitted the United States to borrow at lower interest rates than other countries did.⁷²⁵ But there is a growing consensus among economists that the marginal interest-rate benefit the dollar enjoys has already disappeared.⁷²⁶ As Former Chair of the Federal Reserve Ben Bernanke observed, the “tangible benefits” of the dollar as a reserve currency have “significantly eroded,” such that today the United States pays interest rates that are “generally no lower (and are currently higher) than those paid by other creditworthy industrial countries.”⁷²⁷

By contrast, there is no debate about the merits of Russia's aggression or uncertainty about the material effects of its war in Ukraine. The United States should not let concerns about the dollar lead it to hesitate, but should instead immediately transfer Russia's frozen assets to Ukraine where those assets can alleviate the immense human suffering Russia has caused.

E. Speculation About Russian Retaliation Should Not Stop Needed Action

One final worry associated with seizing Russia's frozen assets is that it could spur Russia to retaliate, either in kind by seizing assets belonging to the United States and its allies, or by escalating its military operations in Ukraine. Yet the difficult reality for Russia is that it has already placed most, if not all, of its chips on the table, and it lacks the capacity to meaningfully up the

⁷²⁴ E.g., Pettis, *Changing the Top Global Currency Means Changing the Patterns of Global Trade*, *supra* note 706; Simon Tilford & Hans Kundnani, *It Is Time to Abandon Dollar Hegemony*, FOREIGN AFFS. (July 28, 2020), <https://www.foreignaffairs.com/articles/americas/2020-07-28/it-time-abandon-dollar-hegemony>.

⁷²⁵ E.g., Steil, *The Real Cost of De-Dollarization*, *supra* note 684.

⁷²⁶ Paul Krugman, *Working Out: Is the Dollar's Dominance Under Threat?*, N.Y. TIMES (Feb. 3, 2023), <https://www.nytimes.com/2023/02/03/opinion/us-dollar-reserve-currency.html>.

⁷²⁷ Ben S. Bernanke, *The dollar's international role: An “exorbitant privilege”?*, BROOKINGS INST. (Jan. 7, 2016), <https://www.brookings.edu/articles/the-dollars-international-role-an-exorbitant-privilege-2/> (“Overall, the fact that English is the common language of international business and politics is of considerably more benefit to the United States than is the global role of the dollar.”).

ante if other countries moved to hold it accountable by seizing its assets abroad. Instead, such swift and united action in support of Ukraine is more likely to signal to President Putin that his war cannot be won, and that Russia would be better served by finding avenues to de-escalate.

1. Retaliation Through Expropriation

Some may worry that any state that announces an intent to seize Russia's frozen assets would soon be met by a reciprocal announcement by Russia that it will seize assets connected to that state. The initial difficulty for Russia, however, is that because the country is not a financial center and the ruble is not a reserve currency, Russia does not hold other countries' sovereign funds. Instead, Russia would have to settle for seizing assets belonging to U.S. and European private individuals and companies. But many of those companies already fled from Russia following its invasion of Ukraine, and Russia seized those companies' assets.⁷²⁸ Those foreign companies that remain in Russia, either by choice or by necessity, are already the victims of ongoing unlawful expropriations. In April 2023, for example, Russia seized power plants owned by Finnish and German companies.⁷²⁹ And in July 2023, Russia placed two of the largest consumer-goods companies in the world, Carlsberg and Danone, under state control.⁷³⁰

⁷²⁸ *Companies Are Getting Out of Russia, Sometimes at a Cost*, N.Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/article/russia-invasion-companies.html>; Jonathan Yerushalmy, *Bean counters: how Russia's wealthy profited from exit of western brands*, GUARDIAN (June 14, 2023), <https://www.theguardian.com/world/2023/jun/14/sale-how-russia-wealthy-profited-from-exit-of-western-brands-starbucks-operations>.

⁷²⁹ Alexander Morrow, Gleb Stolyarov & Anne Kauranen, *Kremlin warns of more asset seizures after move against Fortum and Uniper*, REUTERS (Apr. 26, 2023), <https://www.reuters.com/business/energy/fortum-says-investigating-news-russian-asset-seizure-2023-04-26/>.

⁷³⁰ Georgi Kantchev & Saabira Chaudhuri, *Russia Steps Up Economic War With West, Seizing Assets of Big Conglomerates*, WALL ST. J. (July 17, 2023), <https://www.wsj.com/articles/russia-steps-up-economic-war-with-west-seizing-assets-of-big-conglomerates-e592f137?ns=prod/accounts-wsj>.

Russia has justified these actions and other forms of retaliation against private companies under the countermeasures doctrine, even though no valid case for countermeasures exists.⁷³¹ Knowledgeable observers expect that that these large-scale expropriations will continue, especially because President Putin needs to offer up these companies' assets to maintain support for his regime.⁷³² Given this rapid pace of expropriation and Putin's own motivations to continue it, there is little reason to believe that the decision to seize Russia's frozen assets would affect his decision to expropriate further.

2. Retaliation Through Escalation of Military Operations

If the United States and its allies seize Russia's frozen assets, Russia might instead announce an intent to retaliate through military means in Ukraine. But here, too, it is far from clear how Russia could meaningfully escalate its already-egregious conduct. From the beginning, Russia devoted the vast majority of its military resources to invading Ukraine.⁷³³ Over the past year and a half, Russia has suffered setback after setback, costing it dearly in the form of both lost equipment and a staggering number of casualties.⁷³⁴ Even now, these casualties, paired with a shrinking pool of future recruits, are making it difficult for Russia to deploy additional soldiers to the

⁷³¹ Lawrence Summers, Philip Zelikow and Robert Zoellick on why Russian reserves should be used to help Ukraine, *ECONOMIST* (Jul. 27, 2023), <https://www.economist.com/by-invitation/2023/07/27/lawrence-summers-philip-zelikow-and-robert-zoellick-on-why-russian-reserves-should-be-used-to-help-ukraine>.

⁷³² Jake Cordell, 'Foreign Companies Are Being Taken Hostage': Kremlin Escalates Campaign on Western Corporates, *MOSCOW TIMES* (July 19, 2023), <https://www.themoscowtimes.com/2023/07/19/foreign-companies-are-being-taken-hostage-kremlin-escalates-campaign-on-western-corporates-a81891>; Ekaterina Kurbangaleeva, *Russia Looks to Economic Redistribution to Shore Up the Regime*, *CARNEGIE ENDOWMENT FOR INT'L PEACE* (July 14, 2023), <https://carnegieendowment.org/politika/90209>.

⁷³³ Peter Weber, *Putin has committed 75 percent of Russia's total military to the Ukraine war, Pentagon estimates*, *WEEK* (Mar. 17, 2022), <https://theweek.com/russo-ukrainian-war/1011404/putin-has-committed-75-percent-of-russias-total-military-to-the-ukraine>.

⁷³⁴ Alexander Smith, *The 'stunning' scale of Russian deaths in Ukraine signals trouble ahead for Putin*, *NBC NEWS* (May 2, 2023), <https://www.nbcnews.com/news/world/russia-casualties-soldiers-killed-ukraine-counteroffensive-putin-war-rcna82380>.

battlefield.⁷³⁵ The rising cost of the war is also placing the Russian economy under great stress just to maintain the current pace of military activity in Ukraine.⁷³⁶ The upshot of these trends is that, every day, President Putin loses the capacity to maintain Russia's current operations in Ukraine, let alone meaningfully escalate them.⁷³⁷

Further escalation appears particularly unlikely given the backdrop of the decision to seize Russia's frozen assets. Already, the United States and other countries have imposed a long list of sanctions on Russia, have provided Ukraine intelligence to target and kill Russian military leaders, and have seized billions of dollars of assets belonging to Russian nationals.⁷³⁸ The United States has also supplied Ukraine with a number of offensive military weapons, from cluster munitions to tanks to F-16 fighters, despite clear warnings from Russia that such weapons would cause Russia to escalate its own operations.⁷³⁹ If these actions did not prompt Russia to escalate, it is difficult to

⁷³⁵ Dara Massicot, *The Russian Military's Looming Personnel Crises of Retention and Veteran Mental Health*, RAND (June 1, 2023), <https://www.rand.org/blog/2023/06/the-russian-militarys-looming-personnel-crises-of-retention.html>; Anastasia Tenisheva, *Russia's Massive Army Recruitment Drive Appears to Deliver Few Soldiers*, MOSCOW TIMES (June 8, 2023), <https://www.themoscowtimes.com/2023/06/08/russias-massive-army-recruitment-drive-appears-to-deliver-few-soldiers-a81436>; *Russia is resorting to desperate measures to recruit soldiers*, ECONOMIST (Aug. 1, 2023), <https://www.economist.com/europe/2023/08/01/russia-is-resorting-to-desperate-measures-to-recruit-soldiers>.

⁷³⁶ Jeffrey Sonnenfeld & Steven Tian, *How Putin Cannibalizes Russian Economy to Survive Personally*, TIME (June 30, 2023), <https://time.com/6291642/putin-cannibalizes-russian-economy/>; Boris Grozovski, *Putin's War Costs: Shifting the Burden to the Population*, WILSON CTR. (Jan. 18, 2023), <https://www.wilsoncenter.org/blog-post/putins-war-costs-shifting-burden-population>.

⁷³⁷ Lawrence Freedman, *Putin Is Running Out of Options in Ukraine*, BROOKINGS INST. (July 25, 2023), <https://www.foreignaffairs.com/ukraine/putin-running-out-options-ukraine>.

⁷³⁸ Maia Nikoladze & Kimberly Donovan, *Russia Sanctions Database*, ATL. COUNCIL, <https://www.atlanticcouncil.org/blogs/econographics/russia-sanctions-database/>; Julian E. Barnes et al., *U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say*, N.Y. TIMES (May 4, 2022) <https://www.nytimes.com/2022/05/04/us/politics/russia-generals-killed-ukraine.html>; Sam Fossom, *US and its allies have frozen more than \$58 billion from Russian oligarchs*, CNN (Mar. 9, 2023), <https://www.cnn.com/2023/03/09/politics/russian-oligarchs-frozen-repo/index.html>.

⁷³⁹ See, e.g., Olafimihan Oshin, *Russia warns supplying Ukraine with US-built F-16 fighter jets would escalate conflict*, HILL (June 6, 2023), <https://thehill.com/policy/international/4036582-russia-warns-supplying-ukraine-with-us-built-f-16-fighter-jets-would-escalate-conflict/>; Elise Morton & Felipe Dana, *Putin warns Ukraine against using U.S.-supplied cluster bombs, saying Russia has its own 'sufficient stockpile'*, PBS (July 16, 2023), <https://www.pbs.org/newshour/world/putin-warns-ukraine-against-using-u-s-supplied-cluster-bombs-saying-russia-has-its-own-sufficient-stockpile>; Stephen Collinson, *There's a sense that another turning point is approaching in Russia's war in Ukraine*, CNN (Feb. 3, 2023), <https://www.cnn.com/2023/02/03/politics/russian-escalation-western->

see why the transfer of Russia's assets (which have already been frozen for more than a year) would.

Moreover, fears that seizing Russia's assets may antagonize Russia also fail to consider the costs of letting its billions in frozen assets lie idle while Russia continues to wage its illegal war. President Putin knows that he cannot maintain his war forever and is counting on Ukraine to run out of resources and for Ukraine's allies to run out of political resolve before Russia faces its own reckoning. That calculus is exactly why Ukraine must receive Russia's frozen assets so that it may continue to afford to defend its sovereign territory against Russia's superior numbers. And there is no surer way to convince President Putin that he is wrong about the waning resolve of the United States and its European allies than for those countries to unite and execute on a coordinated mechanism to support Ukraine.⁷⁴⁰ Although this report does not suggest any hope that seizing and repurposing Russia's assets for Ukraine's defense or reconstruction would make President Putin run to the negotiating table, it may at least provide him yet another data point that his continued military campaign in Ukraine is unlikely to succeed.

* * *

There is thus no defensible alternative to the path proposed by this report. Confronted by a uniquely destabilizing and deadly challenge to world peace, the United States and its allies cannot

arms-analysis/index.html; Geoffrey Roberts, *West risks war with Russia over escalating military aid*, IRISH TIMES (Jan. 25, 2023), <https://www.irishtimes.com/opinion/2023/01/25/germans-are-right-to-think-twice-about-sending-leopard-tanks-to-ukraine/>; Tyler Cowen, *A Price Cap on Russian Oil Would Be a Dangerous Escalation*, WASH. POST (Nov. 10, 2022), https://www.washingtonpost.com/business/energy/a-price-cap-on-russian-oil-would-be-a-dangerous-escalation/2022/11/10/12ba6df6-60d4-11ed-a131-e900e4a6336b_story.html; Tom Z. Collina, *Why America Should Not Deepen Its Military Involvement in Ukraine*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/america-military-ukraine.html>.

⁷⁴⁰ See Maximilian Hess, *Putin Is Trying to Wait Out Western Support for Ukraine*, AL JAZEERA (Feb. 22, 2023), <https://www.aljazeera.com/opinions/2023/2/22/putin-is-trying-to-wait-out-western-support-for-ukraine>; Brian Michael Jenkins, *What Will Putin Do Next?*, RAND (Mar. 9, 2023), <https://www.rand.org/blog/2023/03/what-will-putin-do-next.html>.

let hundreds of billions of dollars lie idle when both domestic and international law permit their timely transfer to Ukraine as the victim of Russia's monstrous transgression. Making Putin pay for his war of aggression, annexation, and atrocity will not restore Ukraine to the status quo ante but will provide a solid basis for hope and for a better future.

September 17, 2023

VI. About the Authors

Laurence H. Tribe is the Carl M. Loeb University Professor of Constitutional Law *Emeritus* at Harvard University and is Of Counsel to the law firm Kaplan, Hecker & Fink LLP. The title “University Professor” is Harvard’s highest academic honor, awarded to fewer than 75 professors in the University’s history. Tribe taught at Harvard Law School since 1968; received tenure at 30; and was voted the best professor by the graduating class of 2000. Born in China to Russian Jewish refugees, Tribe entered Harvard at 16; graduated *magna cum laude* with a *summa cum laude* in Mathematics (1962) and *magna cum laude* in Law (1966); clerked for the California and U.S. Supreme Courts (1966-68); was elected to the American Academy of Arts and Sciences in 1979 and to the American Philosophical Society in 2010. He helped write the constitutions of South Africa, the Czech Republic, and the Marshall Islands; has received eleven honorary degrees, most recently a degree *honoris causa* from the Government of Mexico in 2011 that was never before awarded to an American and a D. Litt. degree from Columbia University in 2013; has prevailed in three-fifths of the many appellate cases he has argued (including 35 in the U.S. Supreme Court); was appointed in 2010 by President Barack Obama to serve as the first Senior Counselor for Access to Justice and in 2021 by President Joseph R. Biden to serve on the Presidential Commission on the Supreme Court of the United States; and has written 120 books and articles, including his treatise, *American Constitutional Law*, cited more than any other legal text since 1950. Former Solicitor General Erwin Griswold wrote: “[N]o book, and no lawyer not on the [Supreme] Court, has ever had a greater influence on the development of American constitutional law,” and former U.S. Court of Appeals Judge J. Michael Luttig wrote in January 2023, “Laurence H. Tribe has been the Nation’s preeminent constitutional scholar for the past half century.”

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VII. Acknowledgments

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VIII. Bibliography of Judicial Decisions

United States Cases

767 Third Avenue Assocs. v. United States, 48 F.3d 1575 (Fed. Cir. 1995)

Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012)

Abraham-Youri v. United States, 139 F.3d 1462 (Fed. Cir. 1997)

Adamski v. McHugh, 304 F.Supp.3d 227 (D.D.C. 2015)

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082 (2020)

Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010)

Alden v. Maine, 527 U.S. 706 (1999)

Altmann v. Republic of Australia, 142 F. Supp. 2d 1187 (C.D. Cal. 2001)

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)

Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981)

Arizona v. United States, 567 U.S. 387 (2012)

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)

Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016)

Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988)

Biden v. Nebraska, 143 S. Ct. 2355 (2023)

Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020)

Breard v. Greene, 523 U.S. 371 (1998)

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)

Chae Chan Ping v. United States, 130 U.S. 581 (1889)

Chamber of Com. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)

Chang v. United States, 859 F.2d 893 (Fed. Cir. 1988)

Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981)

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)

Condor Operating Co. v. Sawhill, 514 F.2d 351 (Temp. Emer. Ct. App. 1975)

Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000)

Dalton v. Specter, 511 U.S. 462 (1994)

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

DeCanas v. Bica, 424 U.S. 351 (1976)

Dep’t of Navy v. Egan, 484 U. S. 518 (1988)

Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022)

El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004)

First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)

Flatow v. Islamic Republic of Iran, 305 F.3d 1249 (D.C. Cir. 2002)

Fleming v. Page, 50 U.S. 603 (1850)

Fong Yue Ting v. United States, 149 U.S. 698 (1893)

Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393 (2d Cir. 2009)

Georgia v. Pa. R. Co., 324 U.S. 439 (1945)

Global Relief Found., Inc. v. O’Neill, 315 F.3d 748 (7th Cir. 2002)

Haig v. Agee, 453 U.S. 280 (1981)

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

Hernandez v. Mesa, 140 S. Ct. 735 (2020)

Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003)

Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F.Supp.2d 57 (D.D.C. 2002)

Humanitarian L. Project v. U.S. Treasury Dep’t, 578 F.3d 1133 (9th Cir. 2009)

In re Ross, 140 U.S. 453 (1891)

INS v. Chadha, 462 U.S. 919 (1983)

Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728 (D.C. Cir. 2007)

Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34 (D.D.C. 2005)

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)

Jones v. United States, 137 U.S. 202 (1890)

Juragua Iron Co. v. United States, 212 U.S. 297 (1909)

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

Ker v. Illinois, 119 U.S. 436 (1886)

Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013)

Legal Tender Cases, 79 U.S. 457 (1870)

MacKenzie v. Hare, 239 U.S. 299 (1915)

Mathews v. Eldridge, 424 U.S. 319 (1976)

Matimak Trading Co. v. Khalily, 118 F.3d 76 (2d Cir. 1997)

Medellín v. Texas, 552 U.S. 491 (2008)

Mexico v. Hoffman, 324 U.S. 30 (1945)

Milner v. Dep't of Navy, 562 U.S. 562 (2011)

Miranda v. Sec'y of the Treasury, 766 F.2d 1 (1st Cir. 1985)

Morrissey v. Brewer, 408 U.S. 471 (1972)

Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804)

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007)

Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001)

Neely v. Henkel, 180 U.S. 109 (1901)

New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019)

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)

Open Soc’y Just. Initiative v. Trump, 510 F. Supp. 3d 198 (S.D.N.Y. 2021)

Paradissiotis v. United States, 49 Fed. Cl. 16 (2001)

Paradissiotis v. United States, 304 F.3d 1271 (Fed. Cir. 2002)

Perez v. Brownwell, 356 U.S. 44 (1958)

Pfizer, Inc. v. India, 434 U.S. 308 (1978)

Plyler v. Doe, 457 U.S. 202 (1982)

Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002)

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)

Propper v. Clark, 337 U.S. 472 (1949)

Regan v. Wald, 468 U.S. 222 (1984)

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)

Rimini Street, Inc. v. Oracle USA, Inc., 139 S. Ct. 873 (2019)

Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018)

Rucho v. Common Cause, 139 S. Ct. 2484 (2019)

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931)

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006)

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)

South Carolina v. Katzenbach, 383 U.S. 301 (1966)

Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)

Territory of Guam v. United States, 141 S. Ct. 1608 (2021)

The Amy Warwick, 67 U.S. 635 (1862)

The Paquete Habana, 175 U.S. 677 (1900)

TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296 (D.C. Cir. 2005)

Towne v. Eisner, 245 U.S. 418 (1918)

Trump v. Hawaii, 138 S. Ct. 2392 (2018)

Türkiye Halk Bankasi S.A. v. United States, 598 U.S. 264 (2023)

United States v. 50 Acres of Land, 469 U.S. 24 (1984)

United States v. Belmont, 301 U.S. 324 (1937)

United States v. Borden Co., 308 U.S. 188 (1939)

United States v. Caltex (Phil.), Inc., 344 U.S. 149 (1952)

United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958)

United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936)

United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006)

United States v. Pink, 315 U.S. 203 (1942)

United States v. Tajideen, 319 F. Supp. 3d 445 (D.D.C. 2018)

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983)

West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022)

Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989)

Wilson v. Omaha Indian Tribe, 422 U.S. 653 (1979)

Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067 (2018)

Wood v. United States, 41 U.S. 342 (1842)

World Fuel Corp. v. Geithner, 568 F.3d 1345 (11th Cir. 2009)

Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579 (1952)

Zemel v. Rusk, 381 U.S. 1 (1965)

Zevallos v. Obama, 10 F. Supp. 3d 111 (D.D.C. 2014)

Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012)

Zivotofsky v. Kerry, 576 U.S. 1 (2015)

Zschernig v. Miller, 389 U.S. 429 (1968)

International Cases

Air Service Agreement (United States of America v. France), ICJ Judgment (Dec. 9, 1978)

Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), ICJ Order on Provisional Measures (Mar. 16, 2022)

Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.), ICJ Judgment (Nov. 28, 1955) (separate opinion of Quintana, J.)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Judgment (Feb. 9, 2022)

Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Judgment (Feb. 5, 1970)

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Judgment (Sept. 25, 1997)

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), ICJ Judgment (Nov. 26, 1984)

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), ICJ Judgment (June 27, 1986)

Certain Iranian Assets (Iran v. United States of America), ICJ Judgment (Feb. 13, 2019)

Certain Iranian Assets (Iran v. United States of America), ICJ Judgment (Mar. 30, 2023)

Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, ITLOS Rep.

Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), ICJ Judgment (Feb. 3, 2012)

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion (July 9, 2004)

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Advisory Opinion (Feb. 25, 2019)

Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion (July 8, 1996)

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

North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), ICJ Judgment (Feb. 20, 1969)

PJSC Rosneft Oil Company v. Her Majesty's Treasury, Case C-72/15, 2017 E.C.R. I-236

Right of Passage Over Indian Territory (Port. v. India), ICJ Judgment (Apr. 12, 1960)

South West Africa Case, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), ICJ Judgment (July 18, 1966)

Ukraine and the Netherlands v. Russia, App. Nos. 8019/16, 43800/14, 28525/20 (Nov. 30, 2022)