

# LEGAL MEMORANDUM

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

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

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## I. SUMMARY

1. For the reasons set out below, the authors of this Memorandum – experienced public international lawyers and practitioners from Belgium, Germany, Japan, the Netherlands, Nigeria, the United Kingdom, and the United States – having given their most serious consideration to this issue, conclude that it would be lawful, under international law, for States which have frozen Russian State assets to take additional countermeasures against Russia, given its ongoing breach of the most fundamental rules of international law, in the form of transfers of Russian State assets as compensation for the damage resulting directly from Russia’s unlawful conduct. Only Russian State assets would be affected. No new measures would be imposed on assets that are genuinely privately owned. In coming to these conclusions, none of us are acting on behalf of sponsors or clients.
2. Our recommendation, set forth below, is that the compensation be provided through an international mechanism, to which the States concerned would transfer the Russian State assets currently under their control. This mechanism could support urgent programs to efficiently and effectively mitigate further damages and aid Ukraine’s recovery, while it could also be given the authority and capacity to receive and review claims from Ukraine and other injured parties – public and private – and distribute appropriate compensation in line with internationally-agreed standards and procedures. The total amount of compensation would not exceed the amount owed by Russia for the damage it has caused. In the unlikely event that the Russian State assets transferred to the mechanism are found to exceed the amount of damage suffered by Ukraine and other injured States and entities, the excess would be returned to the Russian accounts from which the assets were transferred.
3. There is no doubt about the illegality of Russia’s invasion of Ukraine, occupation of Ukrainian territory or annexation of large parts of it. By these actions, Russia has violated the most fundamental rules of international law, enshrined, *inter alia*, in the United Nations Charter, Article 2, paragraph 4, which prohibits the use or threat of force against the territorial integrity or political independence of another State. The principle is embodied in UN General Assembly (“UNGA”) resolution 2625 (1970), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which reflects customary international law and declares unlawful and inadmissible the acquisition

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

4. Based on its violation of these fundamental principles, Russia's invasion of Ukraine has been condemned three times in resolutions adopted by the UNGA, which collectively call upon Russia to immediately cease its armed intervention in Ukraine, withdraw its forces from Ukrainian territory, and compensate Ukraine for the damage it has inflicted. On 16 March 2022, the International Court of Justice ("ICJ") ordered provisional measures against Russia, calling on it to immediately end its military activities against Ukraine. Russia has ignored the UNGA's resolutions and the ICJ's Order on Provisional Measures.
5. In the face of such a blatant violation of a State's international legal obligations, international law permits other States to respond with "countermeasures". Lawful countermeasures are measures that would be unlawful if imposed against an innocent State, that is, one that has not violated its international obligations, but are permitted if they are taken against an offending State and are intended to induce the offending State to cease its unlawful conduct, or to comply with its obligation to compensate States that have been injured by that conduct.
6. Third States, that is, States that have not been directly injured by the offending State's conduct, are permitted by international law to take collective countermeasures against the offending State, in this case Russia, for grave breaches of its obligations under peremptory norms of international law that have an *erga omnes* character, as here.
7. Moreover, States that have been specially affected by Russia's unlawful acts, or damaged indirectly by the threats, costs or disruptions these acts have caused, can join in countermeasures employed by other States on these grounds, as well.
8. As an early response to Russia's unlawful invasion of Ukraine, several States where Russian State assets are located took action to freeze those assets so that they would not be available to finance Russia's war of aggression, and these assets remain frozen today. Whether labelled as such or not, these were lawful countermeasures under international law. And they remain so, since Russia's unlawful conduct, to which they were a response, has not ceased. Absent Russia's offending conduct, it would have been unlawful for any State to freeze its assets.
9. In light of the enormous level of damage and destruction Russia has inflicted on Ukraine during nearly two years of war, and the immense cost of reconstruction, some of which has

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

## II. RELEVANT FACTS

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

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

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

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

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

11. Russia's aggression has caused massive loss of life and destruction in Ukraine. Its major cities and many smaller towns have, for more than one and half years, repeatedly faced extensive aerial bombardment and missile strikes aimed at population centres and civilian infrastructure unrelated to any military activity. As of 24 September 2023, the UN Office of the High Commissioner for Human Rights recorded 27,449 civilian casualties in Ukraine, including 9,701 fatalities, but noted that the real figures are likely considerably higher.<sup>4</sup> These numbers do not include the tens if not hundreds of thousands of Ukrainian military casualties – dead and wounded – caused by Russia; or the damage Russia has brought about by forcing more than seven million Ukrainians to flee the country. In February 2023, the World Bank estimated that the reconstruction and recovery of Ukraine would require funding of USD \$411 billion over 10 years.<sup>5</sup> That number is likely to have increased considerably since the estimate was made. For as long as Russia's aggression goes on, the scale of destruction to Ukraine's civilian population, its armed forces, its national infrastructure and the public and private property of its people will continue to grow. Left unremedied, there is a danger that the Ukrainian State and economy could collapse, which is the apparent intention of Russia's current warfare, which includes the disruption of all of Ukraine's maritime commerce and its civil aviation, as well as broad attacks on vital infrastructure.
  
12. The unlawfulness of Russia's military campaign in Ukraine, and its responsibility for the immense damage it has caused, are beyond reasonable dispute. The waging of an aggressive war to conquer another State's territory or remove its government is a flagrant violation of Article 2, paragraph 4, of the UN Charter, as well as customary international law. An aggressive war breaches a peremptory norm of international law – the prohibition of aggression – which is non-derogable and admits of no exceptions. Also beyond dispute is Russia's obligation in international law to make reparation to Ukraine for the damage caused

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

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

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

13. This is the view of the vast majority of States, as reflected in the UNGA resolution adopted shortly after Russia's invasion (ES-11/1), by which an overwhelming majority of Member States (141 in total):
  - a. deplored "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter";
  - b. demanded that Russia immediately "cease its use of force" against Ukraine and "immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders";
  - c. deplored the Russian decision of 21 February 2022 "related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter"; and
  - d. called upon Russia "to abide by the principles set forth in the Charter and the Declaration on Friendly Relations" and urged "immediate peaceful resolution of the conflict between the Russian Federation and Ukraine through political dialogue, negotiations, mediation and other peaceful means".<sup>6</sup>
14. Russia has failed, and continues to fail, to abide by the terms of resolution ES11/1.
15. On 24 March 2022, the UNGA adopted another resolution, ES-11/2, deploring Russia's attacks on civilian targets in Ukraine (including educational institutions, water and sanitation systems and medical facilities, and besiegement, shelling and air strikes in densely populated cities in Ukraine).<sup>7</sup> Again, by that resolution, an overwhelming majority of UN Member States demanded the immediate cessation of hostilities by Russia against Ukraine, in particular "any attacks against civilians and civilian objects", and called for the protection of civilians.

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

<sup>7</sup> UNGA Res. ES-11/2 (24 Mar. 2022) UN Doc A/RES/ES-11/2.

16. In addition to UNGA resolutions ES-11/1 and ES-11/2, on 14 November 2022, the UNGA adopted resolution ES-11/5 titled “Furtherance of remedy and reparation for aggression against Ukraine”.<sup>8</sup> The resolution (*inter alia*):
- a. recognises that Russia “must be held to account for any violations of international law in or against Ukraine” and that it “must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts”; and
  - b. encourages Member States to establish, in cooperation with Ukraine “an international mechanism for reparation and damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine.”
17. Resolution ES-11/5 thus specifically calls for the establishment of an international mechanism to enforce Russia’s obligation to pay reparations for any injury arising from its war of aggression against Ukraine.<sup>9</sup>
18. On 23 February 2023, the General Assembly adopted resolution ES-11/6, which stresses the need for a comprehensive, just and lasting peace in Ukraine, consistent with the UN Charter, including the principles of sovereign equality and territorial integrity, and repeats the demand for the immediate, complete and unconditional withdrawal of all Russian troops from Ukraine, and the cessation of hostilities. The resolution also emphasizes the need for accountability for Russia’s most serious breaches of international law.<sup>10</sup>
19. Although no international mechanism to enforce Russia’s obligation to pay reparations to Ukraine has yet been established, many States have responded to Russia’s aggression and the UNGA’s resolutions by imposing coordinated economic sanctions. The freezing of Russian State assets has been a key element of this package of measures.
20. In February 2023, officials from Australia, Canada, the European Commission, France, Germany, Italy, Japan, the United Kingdom, and the United States established the multilateral “Russian Elites, Proxies and Oligarchs” task force (“REPO”). In May 2023, the task force was asked to map the location of Russian sovereign assets. In September 2023,

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<sup>8</sup> UNGA Res. ES-11/5 (14 Nov. 2022) UN Doc A/RES/ES-11/5.

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

<sup>10</sup> UNGA Res. ES-11/6 (23 Feb. 2023) UN Doc A/RES/ES-11/6.

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

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

### III. LEGAL ANALYSIS

#### A. Countermeasures and the Law of State Responsibility

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

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

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

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



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

23. On 9 August 2001, at its 270<sup>th</sup> meeting, the ILC produced a report in which it recommended that the UNGA take note of ARSIWA and annex it to a resolution (the “ILC Report”).<sup>15</sup> In response, on 28 January 2002, resolution 56/83 was adopted by which the UNGA, in paragraph 3, recorded that it had considered the ILC Report, noted its recommendations, annexed the articles to the resolution, and commended them to the attention of Member States.<sup>16</sup> Although ARSIWA has not been incorporated into a draft convention opened for signature, it represents the most authoritative statement of customary international law on State responsibility, and is frequently cited as such in the Judgments of the ICJ and other international tribunals.<sup>17</sup>
24. ARSIWA is composed of four Parts. Part One is on ‘The Internationally Wrongful Act of a State’, and it consists of five Chapters: I. General Principles; II. Attribution of Conduct to a State; III. Breach of an International Obligation; IV. Responsibility of a State in Connection with the Act of Another State; and V. Circumstances Precluding Wrongfulness. Part Two addresses the ‘Content of the International Responsibility of a State.’ It has three Chapters: I. General Principles; II. Reparation for Injury; and III. Serious Breaches of Obligations under Peremptory Norms of General International Law. Part Three is entitled ‘The Implementation of the International Responsibility of a State.’ It is especially pertinent to

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

<sup>15</sup> *Ibid.* paras 72-73.

<sup>16</sup> UNGA Res 56/83 (adopted without a vote) UN Doc A/RES/56/83.

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

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

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

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

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

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

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

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

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

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

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

Article 30: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; [...]"

Article 31 (1): “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Article 31(2): “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

30. Therefore, when a wrongdoing State breaches its obligations under Articles 30 and 31 of ARSIWA, that is, when it does not cease its internationally wrongful conduct or does not make full reparation for injury caused by that conduct, the injured State may adopt countermeasures to induce the wrongdoer to comply with the duties of cessation and/or reparation. The word "induce" means “to persuade someone to do something, or to cause something to happen.”<sup>19</sup>
31. In this case, by transferring assets to an international compensation mechanism, States would cause Russia to comply with its obligation to “make full reparation” to Ukraine. The same measure would also serve as an inducement or incentive to Russia to cease its wrongful conduct and bring itself into compliance with the peremptory norms it has been violating. On both of these bases, the transfer of assets would constitute a lawful countermeasure because, as described by the ILC, the transfer would be "an instrument for achieving compliance with the obligations of the responsible State under Part Two".<sup>20</sup>
32. Under the second requirement of Article 49, countermeasures must have a temporal aspect: they can only suspend “for the time being” the obligations of the injured State to the offending State such that, for that time period, the wrongfulness of a measure in breach of such an obligation would be precluded. Although no time period is specified, it can be

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

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

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

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

33. Under the third requirement of Article 49, countermeasures must be reversible, that is, “taken in such a way to permit the resumption of performance of the obligations in question.” As explained in the Judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project*, since the “purpose [of a countermeasure] must be to induce the wrongdoing State to comply with its obligations under international law,” “the measure must therefore be reversible.”<sup>21</sup> The requirement that countermeasures be reversible is not intended to impose strict temporal limits on their operation. As explained by the International Law Commission, it is meant to ensure that a State is in a position to resume performance of its obligations when the unlawful conduct has ceased and the countermeasures have been terminated: “Paragraph 3 of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible.”<sup>22</sup>
34. All three conditions of Article 49, therefore, demonstrate that countermeasures are intended to induce the offending State to comply with its legal obligations, and thus to eventually restore normal legal relations between the parties. The countermeasures proposed herein would, in effect, suspend the performance of certain international obligations, including obligations of reciprocal regard between sovereigns for the financial assets each might deposit in the other's jurisdiction, or obligations in agreements about the treatment of such investments.

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

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

35. There is no “immunity” between sovereigns in respect of breaches of international obligations. Instead, there is State responsibility. Ordinarily, Russia could seek compensation if another sovereign appropriated its property. In this case, the unlawfulness of any transfer of State assets is precluded because of Russia's ongoing wrongful conduct.<sup>23</sup> Once Russia has complied with its legal obligations, its normal legal relations will be restored. Its future or remaining deposits will again be entitled to respect. But Russia would not be entitled to regain any money that has been lawfully transferred to compensate Ukraine. It could only ask that these transfers not exceed its liability, and be credited as an offset against such liability.
36. Also, as the words "as far as possible" in section 3 of Article 49 demonstrate, "the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased."<sup>24</sup> The damage Russia has done to Ukraine and others has to be addressed as quickly as possible for the remedies to be effective. Otherwise, the scale of damage only grows much larger or the damage becomes irremediable.
37. The countermeasure proposed herein – the transfer of frozen Russian States assets to an international compensation mechanism that would disburse compensation on Russia’s behalf to Ukraine or other injured parties in satisfaction of Russia’s legal obligation – would fully satisfy the condition of reversibility as understood by the ILC. The prior legal relations would be restored.
38. Also, the relevant assets are fungible. Nothing precludes States from reversing the interference with them if and when the reason for the countermeasure no longer applies. The ILC further noted that States ought to refrain from taking countermeasures that inflict any "irreparable damage", and, if given "a choice between a number of lawful and effective countermeasures, ... should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures."<sup>25</sup> To illustrate, when transferring frozen assets, States could recognise that the assets would be transferred back should Russia comply with its obligations of cessation and reparation. Or, alternatively, the rules and

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

<sup>24</sup> Ibid.

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

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

39. Finally, to satisfy the proportionality requirement set out in Article 51, the countermeasures would have to be “commensurate” with the injury suffered by the injured State and the gravity of the offending State’s internationally wrongful conduct. And to satisfy Article 53, they would have to be terminated as soon as the offending State has resumed compliance with its international obligations.
40. In these ways, countermeasures are instrumental (rather than punitive) in character.<sup>26</sup> Provided the conditions are met, the law on countermeasures justifies measures which would otherwise be unlawful, where those measures are: (i) in response to a State’s unlawful conduct, (ii) for the purposes of procuring from that State cessation of the unlawful conduct, or effecting compliance with its obligation to pay compensation for it, (iii) proportionate to the gravity of the unlawful conduct and the injury caused, (iv) in effect only for such time as required to obtain compliance by the offending State, at which point they are (v) reversible, as normal legal relations resume. It is for each State taking countermeasures to satisfy itself that these conditions are met.<sup>27</sup> The authority to take countermeasures resides with individual sovereign States and, in this sense, is a decentralized and voluntary obligation.<sup>28</sup>
41. In the case of Ukraine and Russia, this means that Ukraine (and other States, as described below) can take countermeasures against Russia, including measures that would otherwise

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

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

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

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

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

### **B. Countermeasures by States Beyond Ukraine**

43. States beyond Ukraine have two potential grounds for invoking Russia's responsibility for its internationally wrongful acts and joining the group of States taking countermeasures. First, under Article 42 of ARSIWA, other States are entitled to invoke Russia's responsibility if the obligations were owed to the international community as a whole or if the breach of the obligation specially affected those States. Under Article 31 of ARSIWA, "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."
44. This Article's reference to States that are "specially affected" borrows its language from the Vienna Convention on the Law of Treaties. Like that Convention, there is no set definition of the special impact that constitutes the injury. "This will," the commentary observes, "have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way that distinguishes it from the generality of other States to which the obligation is owed."<sup>29</sup>
45. Russia's war has displaced millions of refugees, imposing costs on all the countries that have helped resettle and support them. In addition, Russia's war and purposeful disruptions of

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

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

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

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

47. As explained in the Commentary:

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

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

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



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

49. The obligation of non-aggression is another peremptory norm of international law, which has been recognized as an obligation *erga omnes*.<sup>33</sup> As such, it affects all States, not only the direct victim of the aggression. A war of aggression therefore entitles any State, or any group of States, to invoke the responsibility of the aggressor and seek redress, just as any State may invoke the responsibility of a State that has committed genocide.
50. This is recognised in Article 48 of ARSIWA, which provides an entitlement and a mechanism for third-party States to invoke the responsibility of a wrongdoing State.<sup>34</sup> Article 48 provides:

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

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

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

<sup>33</sup> As recognised by the ICJ in the *Barcelona Traction* case (n. 31) at para 33.

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

51. Accordingly, third-party States, not specially affected by Russia's unlawful acts, are also entitled to invoke Russia's responsibility for its violation of *erga omnes* obligations. They, too, can demand, *inter alia*, the cessation of its unlawful conduct and the payment of reparations to any directly injured State for the injuries Russia has caused.
52. This broad standing under Article 48 includes taking countermeasures to achieve those ends. ARSIWA does not state this in express terms despite a "significant level of approval"<sup>35</sup> for third-party countermeasures. Instead, anticipating the evolution of such a customary norm, the ILC adopted "a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law."<sup>36</sup> That clause is part of Article 54, quoted above, which expressly "does not prejudice the right of *any* State" to invoke Article 48 and take countermeasures against an offending State "to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." The ILC Report explained that:

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

53. As one member of the ILC commented:

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

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

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

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

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

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

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

have reacted against what are alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured”, including by imposing economic sanctions.<sup>39</sup>

The examples identified by the ILC included (amongst others):

- a. “United States-Uganda (1978). In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda. The legislation recited that ‘[t]he Government of Uganda ... has committed genocide against Ugandans’ and that the ‘United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide’.”<sup>40</sup>
  - b. “Collective measures against Iraq (1990). On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion, and ordered the imposition of a comprehensive trade embargo and a cut-off of financial relations to induce Iraq to put an end to its unlawful occupation and purported annexation of Kuwait.<sup>41</sup> European Community Member States and the United States adopted trade embargoes and froze Iraqi assets. This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.”<sup>42</sup> Subsequently, the United Nations Compensations Commission (“the UNCC”) processed claims and paid compensation for loss and damage caused by the invasion to the victims, partially from frozen assets.<sup>43</sup>
  - c. “Collective measures against the Federal Republic of Yugoslavia (1998). In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and immediate flight ban.”<sup>44</sup>
55. State practice on the freezing of assets also included the United States’ freezing of Iranian assets following the Iran hostage crisis in 1979, which led to the establishment of another claims tribunal. In response to the taking of hostages at the US Embassy in Tehran, on 14 November 1979 U.S. President Jimmy Carter ordered the freezing of all Iranian government

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<sup>39</sup> *Yearbook of the ILC 2001* (n. 14) 137, commentary to Article 54.

<sup>40</sup> *Ibid.*, 138 (footnotes omitted).

<sup>41</sup> UNSC Res. 661 (6 Aug. 1990) UN Doc S/RES/661.

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

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

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

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

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

“Should a widely acknowledged grave breach of an erga omnes obligation occur, all the States to which the obligation is owed:

(a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;

(b) shall not recognize as lawful a situation created by the breach;

(c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach.”<sup>47</sup>

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

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

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<sup>45</sup> U.S. Executive Order 12170 (14 Nov. 1979), 44 F.R. 65729.

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

<sup>47</sup> For the full text of the Resolution, see Institut de Droit International, Fifth Commission, 'Obligations and rights erga omnes in international law' (Krakow session, 27 Aug. 2005) <[https://www.idi-iiil.org/app/uploads/2017/06/2005\\_kra\\_01\\_en.pdf](https://www.idi-iiil.org/app/uploads/2017/06/2005_kra_01_en.pdf)>.

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

enforcement measures were adopted by the UN Security Council pursuant to Chapter VII of the UN Charter.<sup>49</sup>

- b. In May 2011, EU Member States imposed measures against Syria, including freezing the assets of President Al-Assad and the Central Bank of Syria.<sup>50</sup> A further 10 States have undertaken to ensure the implementation of the EU sanctions regime: Albania, Croatia, Georgia, Iceland, Lichtenstein, Macedonia, Moldova, Montenegro, Norway and Serbia. Australia, Canada, Japan, Switzerland and the U.S. took “*similar action*” against Syria.<sup>51</sup> French President Sarkozy established the “*Group of Friends of the Syrian People*”, made up of 83 States and international organizations, which welcomed the sanctions adopted by the EU and others, including the freezing of Syrian State assets.<sup>52</sup>
- c. In March 2014, EU Member States, Australia, Canada, Japan, Liechtenstein, Switzerland and the U.S. imposed various measures against Russia for its role in the destabilisation of Ukraine.<sup>53</sup> These included, *inter alia*, denying Russian financial institutions access to European capital markets, and export embargoes.
- d. Since Russia’s unlawful invasion of Ukraine in February 2022, EU Member States and at least 14 other States and Taiwan<sup>54</sup> have adopted a wide range of measures against Russia including: economic, financial and banking sanctions, asset freezes and property seizures, export controls, blocking of access to the SWIFT payment system, banning Russian aircraft and vessels, and suspending distribution of “disinformation outlets” such as *Russia Today*.<sup>55</sup>
- e. There are numerous other examples, including measures adopted by the European Union and numerous other States against Myanmar (from 2000 to present), Zimbabwe (from 2002 to present) and Belarus (2004 to present).<sup>56</sup>

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

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

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

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

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

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

<sup>55</sup> See Minami Funakoshi, Hugh Lawson, and Kannaki Deka, ‘Tracking Sanctions against Russia’ (*Reuters*, 6 Jul 2022) <<https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrijenzmve/>>.

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

58. These measures include some that would not have been lawful if they had been taken in the absence of internationally wrongful conduct by the State against which they were directed. Instead, they would have been breaches of obligations owed to that State. Under ARSIWA, their wrongfulness can only have been precluded by their imposition as countermeasures in response to wrongful conduct by the targeted State. The measures adopted by States not directly injured were therefore justified as lawful countermeasures within the meaning of Part 2, Chapter II of ARSIWA.
59. In terms of the lawfulness of a countermeasure, there is no material difference between a measure freezing another State's assets, and one which transfers them to the victim of the wrongful conduct as reparations for the injuries it has suffered. To be sure, transfer of the assets would be a step beyond freezing them. But both measures would be lawful if taken in response to a breach of obligations under a peremptory norm of international law with an *erga omnes* character; intended to induce the cessation of the wrongful conduct or to repair the damage caused to the injured State; if they were proportionate, that is, commensurate with the injuries caused; and designed to terminate upon the wrongdoer's compliance with its legal obligations, including the obligation to pay reparation for such injuries; and if they were reversible.
60. In 1996, the United States transferred frozen Cuban State assets to the families of two US citizens whose planes were shot down by Cuban aircraft. President Bill Clinton provided, by executive order, compensation to the victims' families, paid out of Cuban frozen assets. Subsequently, the U.S. Congress enacted legislation to permit the families of the victims to make further claims against those assets,<sup>57</sup> and the President signed an executive order authorising additional funds to be transferred. Subsequently, the Congress adopted legislation allowing the transfer of frozen Iranian assets to the family of a U.S. citizen killed by a suicide bomber, allegedly linked to Iran, and the President approved the transfer.<sup>58</sup>

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

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

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

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

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

“After consulting with the Minister of Finance and the Minister of Foreign Affairs, the Minister [responsible for the administration of an order of seizure] may — at the times and in the manner, and on any terms and conditions, that the Minister considers appropriate — pay out of the Proceeds Account, as defined in section 2 of the Seized Property Management Act, amounts not exceeding the net proceeds from the disposition of property forfeited under section 5.4, but only for any of the following purposes:

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

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

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

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

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

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

### C. Substantive Limits on Countermeasures

64. ARSIWA lays out the substantive and procedural limits of permissible countermeasures. In particular, Article 50(1) provides that countermeasures cannot suspend inviolable obligations such as the prohibition against the use of force or obligations for the protection of fundamental human rights. And Article 50(2) provides that countermeasures cannot be relied upon to infringe upon a State's consular or diplomatic agents and property. None of these substantive limitations on countermeasures would apply to the transfer of frozen Russian State assets to compensate those damaged by Russia's internationally wrongful acts.
65. Article 51 sets out another substantive limitation on countermeasures. It requires that they must be proportionate to the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. The seizure and transfer of frozen Russian sovereign assets to Ukraine and other injured parties plainly satisfies this requirement. As expressly set out in Article 51, an assessment of proportionality takes account of both: (i) the gravity of the internationally unlawful acts; and (ii) the rights in question. The gravity of Russia's internationally unlawful acts cannot be overstated. They breach not only obligations arising under a peremptory norm of an *erga omnes* character, but a foundational principle of the rules-based international order that prohibits wars of aggression and the acquisition of territory by force. It is thus no surprise that the General Assembly "[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter".<sup>62</sup> Nor can Ukraine's rights be overstated:

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

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



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

66. The countermeasures addressed herein would not be disproportionate, therefore, to the violations or the rights at issue. Any sums transferred to Ukraine or other injured parties would be credited to Russia in the form of a reduction in the amount of its liability. As such, the countermeasures would be compensatory, not punitive. They would enable Ukraine to begin the urgent process of mitigating its injuries and recovering from them. Since the authoritative estimates of the financial costs of such a recovery are far greater than the total amount of frozen Russian State assets, there is no risk that the proposed measures would involve transfers of assets in excess of Russia's ultimate liability, which extends to States and other possible claimants beyond Ukraine.<sup>63</sup>
  
67. A first countermeasure –the freezing of Russian State assets – has already been taken by various States. But the actions of those States, both in freezing assets and imposing a broad package of economic and commercial sanctions, have not succeeded in influencing Russia to cease its unlawful aggression against Ukraine. Nor have they, thus far, induced Russia to provide reparation for the enormous injury suffered by Ukraine and others as a result of its internationally unlawful conduct, neither persuading nor causing such compensation to happen. The freezing of Russia's assets and the other sanctions have thus been largely ineffective; they have accomplished neither of the objectives that lawful countermeasures are intended to achieve. Nor are they likely to do so in the foreseeable future. In the circumstances, further countermeasures are justified. If Russia cannot be persuaded to cease its unlawful conduct, and to provide compensation for the injuries it has caused, new and additional measures are warranted to provide at least some compensation to Ukraine and other affected parties in partial fulfilment of Russia's legal obligations under international law. To the extent that the frozen Russian assets can be transferred to the international compensation mechanism for ultimate distribution to Ukraine and other injured parties, the countermeasures will be effective in providing some measure of the reparations to which they are lawfully entitled.

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

68. Indeed, the purpose of the international compensation mechanism would be to ensure the effectiveness of the transfer of funds in compensating Ukraine and others for the injuries they have suffered. Such a mechanism could combine urgent programs to limit damage and support recovery with claims processes modeled on similar mechanisms employed in other conflict or post-conflict situations despite the absence of Russia's agreement, and would provide assurance to the States transferring the Russian State assets, to Ukraine and the other parties that ultimately receive them, and even to Russia, that the compensation system is transparent, evidence-based and equitable to all interested parties.
69. Although not expressly stated in ARSIWA, a further limitation on the countermeasures that could be taken against Russia is that they target only assets of the Russian State. That is, they would not be directed against the property of any private Russian entities or nationals. It is, after all, the State that is in breach of its *erga omnes* obligations under international law, not any Russian companies or individuals (although they might be complicit in or contribute to the State's unlawful conduct), and it is therefore the State against which any lawful countermeasures must be taken.
70. In this way, the proposed countermeasures would be distinguished from, and could not be invoked to justify, the unlawful measures that Russia has taken against private companies from States opposed to its war against Ukraine. Limiting the countermeasures to Russian State property also avoids potential difficulties such as those encountered in *Al-Dulimi and Montana Management Inc v. Switzerland*.<sup>64</sup> That case arose over concerns that the designation of particular individuals or entities on a sanctions list might have arbitrarily swept up people or companies unrelated to the sanctioned State (Iraq). If private assets were transferred to Ukraine, it could lead to litigation by affected individuals against those States that engaged in such transfers, or against Ukraine.
71. In contrast, litigation by Russia to challenge the transfer of its State assets is extremely unlikely, and all but certain to fail given the lawfulness of the countermeasures herein proposed.<sup>65</sup>

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<sup>64</sup> App no 5809/08 (ECtHR, 21 June 2016).

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

72. Nor could Russia viably argue that its State assets are protected from seizure or transfer by another State under the doctrine of sovereign immunity. Sovereign immunity is a concept that prevents the national courts of one State from sitting in judgment of the governmental acts of another State, or from executing upon the other State’s assets. The countermeasures addressed herein would not be judicially imposed. They would be adopted and implemented strictly by the executive branch of government, by legislation, or by cabinet decisions in parliamentary systems. They would be acts of state which are not ordinarily regarded as justiciable. To be sure, sovereign equality obligates States to protect another State’s assets within their jurisdiction in normal circumstances. But that protection (or immunity) is lost when the offending State breaches obligations owed to an injured State or the international community as a whole, and thus subjects itself to the lawful imposition of countermeasures which might be unlawful absent the breach.
73. Accordingly, even if Russia were to complain about the lawfulness of the countermeasures: (i) its complaint would be without merit under international law; and (ii) it would not be able to find a forum to adjudicate its claim, let alone to provide its assets with immunity from seizure or transfer.

#### **D. Procedural Requirements for Countermeasures**

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

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

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

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

2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.”
75. Although Article 52 identifies the requirements for an “injured State” to take countermeasures, the same requirements would apply to other States contemplating countermeasures. Accordingly, before a State can impose countermeasures on Russia for its internationally unlawful aggression against Ukraine, the State must call, or must have called, upon Russia to fulfil its international legal obligations – by, in this case, ceasing its aggression, withdrawing its forces and personnel from Ukrainian territory, and compensating Ukraine and other parties for the injuries caused by its wrongful conduct. It must also notify Russia of its decision to take countermeasures, and offer to negotiate with Russia over the fulfilment of its obligations. It could be argued that all these requirements already have been met in the context of adoption of the three UNGA resolutions discussed above, given the contents of the resolutions and the statements made in support of them; but it would not be difficult to satisfy them independently. It should also be noted that Ukraine has publicly asked the international community to use Russian frozen assets to fund compensation for the war’s victims.<sup>66</sup>
76. Article 52 further provides that:
- “3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
    - (a) The internationally wrongful act has ceased; and
    - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
  4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.”
77. Article 52 poses no impediment to the countermeasures addressed herein. Russia’s internationally wrongful conduct has not ceased; nor has Russia given any indication that it intends to cease such conduct or otherwise fulfil its international legal obligations. Although Ukraine has initiated proceedings against Russia before the ICJ, the subject matter of the dispute does not fully cover Russia’s aggression against Ukraine or the injuries it has caused. In any event, paragraph 4 of Article 52 would apply because Russia, in ignoring and refusing to comply with the ICJ’s Order on Provisional Measures, has failed “to implement the

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<sup>66</sup> Chris Giles and Max Seddon, ‘Volodymyr Zelensky calls for global plan to rebuild Ukraine after war,’ *Financial Times* (London 23 May 2022) <<https://www.ft.com/content/f625893a-4377-44f1-b100-47ee07b794cf>>.

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

#### IV. CONCLUSION

78. Russia has used force against Ukraine in manifest violation of the Charter of the United Nations, as found by the UNGA and the ICJ (in a provisional measures phase). It has done so in circumstances that amount to an act of aggression. For the reasons stated above, the transfer of frozen Russian State assets to an international compensation mechanism to be used to compensate Ukraine and other parties for the injuries caused by Russia’s internationally unlawful war of aggression would be a lawful, proportionate, reversible and justified countermeasure, which all States are entitled to participate in, given the *erga omnes* character of Russia’s wrongful conduct.
79. It cannot be emphasized enough that Russia’s aim of military conquest and annexation of all or part of Ukraine gives rise to a generational and fundamental challenge for international law: a war of aggression that strikes at the heart of the international legal order. If Russia is allowed to succeed, it would suggest the impotence of that legal order to prevent or punish even the most egregious violations of its basic rules.
80. There is no apparent likelihood that Russia will cease its wrongful conduct until it has accomplished its objective, accepts defeat, or experiences a change in government that results in a radical change of policy. In the meantime, it remains defiant in the face of condemnation by most of the international community, refusing to comply with resolutions by the UNGA to cease its military operations against Ukraine and withdraw from Ukrainian territory, and it is unmoved by the sanctions imposed upon it to date, including the freezing of its assets in various States.
81. In these circumstances, international law permits not only Ukraine but also other specially affected states and third-party States to take countermeasures against Russia, including measures that would be unlawful in ordinary circumstances, but which are justifiable and entirely lawful when employed against a State that is flagrantly violating the fundamental

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

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

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