



ARTICLE

War Reparations: The Case for Countermeasures

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Abstract. Who pays for the terrible destruction wrought by war? This problem is far from new, but it is currently receiving renewed attention as a result of the war in Ukraine. The options currently available to states that are the victims of unlawful wars in the postwar era are limited. For Ukraine, some have proposed addressing this shortfall by seizing frozen Russian sovereign assets, and both the United States and Canada have passed legislation permitting just that. European officials have considered a similar proposal, but they have thus far rejected them as too legally risky. Indeed, such plans run afoul of the longstanding international law doctrine of sovereign immunity. Put simply, they attempt to cure one international legal violation by engaging in another.

In this Article, we offer another way forward for Ukraine and any other state that might find itself in this situation in the future: Ukraine may deploy what is known as the international law doctrine of countermeasures to freeze Russian sovereign assets in response to Russia's injurious and illegal conduct against it. We argue that frozen assets need not be returned to Russia at the close of the war as long as Russia has failed to pay reparations. That is because the failure to pay reparations is itself an unlawful act for which countermeasures (continued freezing of assets) may be kept in place even if the unlawful war has ceased. Moreover, other states may join Ukraine, putting in place collective countermeasures, sometimes called "third-party" countermeasures. However, we argue *against* using countermeasures doctrine to simply seize Russian assets; such seizures would not properly qualify as countermeasures and thus would violate international law.

This approach to countermeasures, if adopted, could have implications beyond Ukraine, extending not only to future war reparations but also to international responses to cyber operations, human rights violations, or violations of environmental law obligations. Indeed, the challenge of securing reparations for Ukraine must be addressed not as a one-off problem but as a systemic one. We should therefore seek a solution that will benefit

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not just Ukrainians but other similarly situated actors in the future. This is yet another reason that existing ad hoc legislative proposals to seize Russian assets are inadequate: They might provide money to Ukrainians now, but they will undermine the international legal system while doing little to help future victims. Keeping the larger picture in view is not only important as a matter of equity and justice. It is also in the best interests of Ukraine, which must maintain unprecedented levels of global support for its ongoing defensive actions and efforts to hold the architects of this illegal war accountable for the extraordinary harm they have done. This Article's proposal for institutionalizing collective countermeasures meets this challenge, offering a way to reinforce the reparations obligation in circumstances beyond the present conflict.

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Introduction

War destroys lives, property, infrastructure, and entire communities. Yet compensation for that destruction has long been sporadic. Historically, victors would seize the land and belongings of defeated nations as compensation for the costs they suffered in the war. Conquest and booty were the reward for victory; destitution and loss the price of defeat.¹ In the modern era, however, war is illegal, and conquest and booty have been outlawed along with it.² This has left an unanswered question: Who pays for the terrible destruction wrought by war?

This problem is currently front and center in Ukraine, the site of the largest ground war in Europe since World War II.³ In February 2024, nearly two years after Russia began its all-out assault on the country, the World Bank estimated that it would take \$486 billion to recover and rebuild,⁴ a number that will continue to grow as long as the war continues. Ukraine has demanded reparations for the damage done by Russia's manifestly illegal war. In September 2022, Ukrainian President Volodymyr Zelenskyy spoke at the United Nations General Assembly, declaring to the gathered nations that "Russia should pay for this war with its assets."⁵ In November 2022, the United Nations General Assembly took up this charge, passing a resolution stating that Russia "must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations," 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

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1. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 31-55, 93-98 (2017) (explaining that conquest was legal and legitimate in the "Old World Order" and offering several examples, including the United States's seizure of much of what is now the Southwest of the United States from Mexico in 1848).
 2. See *id.* at 298-305 (explaining the demise of the "Old World Order" and the establishment of a "New World Order" where conquest is illegal and aggression is a crime).
 3. See PISM et al., *The Invasion that Shook the World*, COUNCIL ON FOREIGN RELS. (Feb. 22, 2023), <https://perma.cc/5C7H-H8LB> ("It has been one year since Russia invaded Ukraine on February 24, 2022, setting off the largest armed conflict in Europe since World War II.").
 4. Press Release, World Bank, *Updated Ukraine Recovery and Reconstruction Needs Assessment Released* (Feb. 15, 2024), <https://perma.cc/CL2N-BCC7>. For example, the country's medical infrastructure appears to have been the target of attacks by Russia. See, e.g., Danielle N. Poole et al., Yale Humanitarian Rsch. Lab, *The Effect of Conflict on Medical Facilities in Mariupol, Ukraine: A Quasi-Experimental Study 5* (Aug. 6, 2023), <https://perma.cc/99TJ-X7E8> (finding that 77% of medical facilities in Mariupol sustained damage during Russia's siege).
 5. U.N. GAOR, 77th Sess., 7th plen. mtg. at 52, U.N. Doc. A/77/PV.7 (Sept. 21, 2022).

by such acts.”⁶ The Council of Europe has since established a Register of Damage designed to support a future compensation mechanism.⁷

States like Ukraine that are the victims of unlawful wars in the postwar era have limited options when seeking reparations. In the modern era, large-scale reparations mechanisms have been established in four ways: (1) imposed by victors after total defeat and unconditional surrender, (2) mandated by a United Nations Security Council Resolution, (3) formed through consent of the responsible state to a negotiated resolution, or (4) created pursuant to an international court judgment.⁸ For Ukraine, as for most victims of war, these four options are unlikely to satisfy the full demands for reparations: Russia has made clear that it will veto any Security Council resolution and has indicated no intent to halt the war nor to pay reparations.⁹ While modest reparations

6. G.A. Res. ES-11/5, ¶ 2 (Nov. 14, 2022).

7. See Council of Europe Comm. of Ministers, CM/Res(2023)3, Establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine (May 12, 2023), <https://perma.cc/N22J-XM8U>. For more on this development, see Chiara Giorgetti & Patrick Pearsall, *A Significant New Step in the Creation of an International Compensation Mechanism for Ukraine*, JUST SEC. (July 27, 2023), <https://perma.cc/B6UM-4YF5>. Ukraine had earlier devised a website inviting individual citizens to file claims for compensation for lost or damaged property, which the government apparently intends to pay using reparations. See Poshkodzhene Mayno (Пошкоджене майно) [Damaged Property], DIYA (Дія), <https://perma.cc/U6UV-GFGX> (archived Apr. 4, 2024); see also Alyona Mazurenko, *Zelenskyy Urges Russians to Learn the Meaning of the Word “Reparation,”* UKRAINSKA PRAVDA (Mar. 3, 2022, 10:31 AM), <https://perma.cc/GVQ7-SVGS> (“We will restore every building, every street, every city. And we are telling Russia: you should learn the meaning of the word[] ‘reparations’ You will restore everything that you have destroyed in Ukraine. In full.”).

8. The Allied forces claimed reparations following World War II. See, e.g., Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT’L L. 314, 343-44 (2005) (discussing the Paris Reparations Agreement). Since then, the most significant interstate war reparations mechanisms have been the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopia Claims Commission (EECC). The Security Council mandated the UNCC, while the EECC was established by bilateral agreement. See David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT’L L. 183, 186, 196-97 (2002); Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 WIS. INT’L L. J. 23, 86 (2007). Only the former resulted in actual reparations payments, which were derived from frozen Iraqi assets and oil revenues. Hannah R. Garry, Morgan Brock-Smith & Nicholas Maisel, *The Eritrea Ethiopia Claims Commission: At the Intersection of International Dispute Resolution and Transitional Justice for Atrocity Crimes?*, in BY PEACEFUL MEANS: INTERNATIONAL ADJUDICATION AND ARBITRATION 63, 77 (Charles M. Brower ed., 2024); see also LUKE MOFFETT, REPARATIONS AND WAR: FINDING BALANCE IN REPAIRING THE PAST 101-02 (2023) (discussing the UNCC and the EECC).

9. See *infra* note 371 and accompanying text. Putin’s rhetoric following the March 2024 presidential election echoes this entrenchment. See Christian Edwards, *Putin Extends One-Man Rule in Russia After Stage-Managed Election Devoid of Credible Opposition*, CNN (updated Mar. 18, 2024, 9:46 AM EDT), <https://perma.cc/RJJ8-5TMZ> (“No matter how
footnote continued on next page”).

may be awarded in the context of ongoing International Court of Justice (ICJ),¹⁰ International Criminal Court (ICC),¹¹ and European Court of Human Rights (ECHR)¹² proceedings, those reparations will be tied to the particular criminal law violations established in court and will not address the vast majority of the damage done in the war.¹³

Reparations following interstate conflict are often elusive, but the Russian invasion of Ukraine has brought the issue to a head. After more than a year of debate, in April 2024, the United States enacted legislation permitting the president to repurpose Russian sovereign assets located in the United States, subject to a number of conditions, including an obligation to “coordinate with the G7, the European Union, Australia, and other partners and allies of the United States.”¹⁴ Canada adopted a law permitting seizure of Russian Sovereign assets in 2022, though as of May 2024, the authority had not yet been exercised.¹⁵ European officials have considered a similar plan, but they have deemed it “too legally risky.”¹⁶ Indeed, seizing sovereign assets would run afoul

hard anyone tries to frighten us, whoever tries to suppress us, our will, our consciousness, no one has ever managed to have done such a thing in history, and it won't happen now and it won't happen in the future. Never.”; *see also infra* note 112.

10. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening), INT'L CT. JUST. (Feb. 2, 2024), <https://perma.cc/K8TW-K4J5>.
11. Ukraine: Situation in Ukraine ICC-01/22, INT'L CRIM. CT., <https://perma.cc/9VYA-PPMM> (archived Apr. 4, 2024).
12. Ukraine v. Russia, App. Nos. 8019/16, 43800/14, 28525/20, 11055/22 (Nov. 30, 2022), <https://perma.cc/RPQ9-VJ2Y>.
13. There is an effort to establish a Special Court to try the Crime of Aggression, but that court, too, would only be able to order particular defendants to pay reparations to victims; it could not reach Russian government assets. *See, e.g.*, David Scheffer, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part IV)*, JUST SEC. (Sept. 28, 2022), <https://perma.cc/99BD-ZPZY> (noting that a special tribunal is not the forum in which to address the “overall prospect of Russian reparations” as such reparations are tied to *state responsibility*, and are therefore not at issue in the criminal prosecution of individual defendants).
14. Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes, Pub. L. No. 118-50, §§ 101-108 (2024). As of May 2024, there were no public plans to use this statutory authority to seize Russian central bank assets. Rather, the United States has proposed giving Ukraine up to \$50 billion in aid as a loan, with the debt to be repaid using the windfall profits from frozen sovereign Russian assets, most of which are held in Europe, effectively allowing Ukraine to borrow against the expected stream of income. *See* Jennifer Jacobs, Alberto Nardelli & Viktoria Dendrinou, *G-7 Eyes Plan on US-Led \$50 Billion Aid Package for Ukraine*, BLOOMBERG (May 3, 2024, 10:48 AM PDT), <https://perma.cc/L8BK-PQ3S>.
15. Budget Implementation Act, 2022, S.C. 2022, c 20, § 438(1) (Can.).
16. Julia Payne & Jan Strupczewski, *EU Unlikely to Confiscate Russian Central Bank Assets—Officials*, REUTERS (Jan. 23, 2024, 7:56 AM PST), <https://perma.cc/YF6B-F7JH>. The footnote continued on next page

of the well-established international law doctrine of sovereign immunity. Put simply, it would attempt to cure one international legal violation by engaging in another.¹⁷

There is a possible way forward for Ukraine and for any other state that might find itself in a similar situation in the future that would not require violating international law: They may use the international law doctrine of countermeasures to continue to freeze Russian assets until Russia meets its reparations obligation.

Under the doctrine of countermeasures, a harmed State may take an action that would otherwise be unlawful—a “countermeasure”—against a state that is responsible for an internationally wrongful act in order to induce that state to comply with its legal obligations.¹⁸ A classic example of countermeasures took place in 1978, when French police surrounded a Pan Am airplane that landed in Paris and refused to let passengers disembark after having stopped in London to discharge some passengers and switch to a smaller plane, known in aviation as a “change of gauge.”¹⁹ The United States argued that France’s actions violated a treaty between them—the Air Service Agreement of 1946.²⁰ In response, the United States put in place a countermeasure: It banned French air carriers traveling from Paris from landing in Los Angeles if they stopped over in Montreal.²¹ Ultimately, an arbitral tribunal concluded that France was obligated to lift its prohibition on changes of gauge and that the United States had acted lawfully in imposing a countermeasure in the interim.²² Countermeasures are supposed to operate this way: When one state breaks the rules, the harmed state is allowed to break them back to bring the first state back into compliance.

Countermeasures, moreover, need not be in kind. Indeed, today, economic sanctions are one of the most potent examples of countermeasures deployed in

Council of European Union has instead decided to take steps to redirect windfall profits from the assets to Ukraine. See Press Release, Council of the E.U., *Immobilised Russian Assets: Council Decides to Set Aside Extraordinary Revenues* (Feb. 12, 2024), <https://perma.cc/TX3T-ABR3>. As discussed in the text accompanying notes 139-41 below, this more modest plan does not raise the same legal concerns.

17. See *infra* Part II.B.

18. Int’l L. Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10, art. 49 (2001). For a succinct overview of the “conditions and limitations” international law imposes on the use of countermeasures, see David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 57-58 (2014).

19. Air Service Agreement of 27 March 1946 Between the United States of America and France, 18 R.I.A.A. 417, 420 (Perm. Ct. Arb. 1978).

20. *Id.* at 424.

21. *Id.* at 421.

22. *Id.* at 447.

response to a range of illegal behaviors. Ukraine may deploy countermeasures by freezing Russian sovereign assets in response to Russia's injurious and illegal conduct against it—that much is uncontroversial. Here, we go a step further, arguing that frozen or seized state assets need not be returned to Russia at the close of the war if Russia has failed to pay reparations. That is because the failure to pay reparations is *itself* an unlawful act for which countermeasures (including the continued freezing of assets) may be kept in place even if the unlawful war has ceased.²³ We also argue that other states may join Ukraine, putting in place *collective countermeasures*, sometimes called “third-party” countermeasures.²⁴ In doing so, we take a step beyond the International Law Commission's (ILC) Draft Articles on State Responsibility, which remain agnostic on collective countermeasures.²⁵ We make the case for limited collective countermeasures. If adopted, this approach could have implications beyond Ukraine, extending not only to future war reparations but also to international responses to cyber operations, human rights violations, or violations of environmental law obligations.

We acknowledge at the outset that war reparations do not have an unblemished history. The ruinous reparations imposed on Germany in the wake of World War I played a role in the rise of the far right in Germany and thus contributed to a second world war in the twentieth century.²⁶ The proposal outlined in this Article imagines that a final resolution of the reparations claims will come only once Russia finally agrees to a resolution—a result that is likely to happen only after its defeat or a change in regime.²⁷ Looking to history, some may argue that this would be precisely the wrong moment to deplete Russian resources. Rather, those resources should be used to shore up and rebuild a country at a critical turning point.²⁸ Still others may warn that insisting on

23. See *infra* Part III.

24. These terms are often used interchangeably. See Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council*, 77 BRITISH Y.B. INT'L L. 333, 333 n.1 (2007) (describing the lack of consensus among at least eight different terms). Neither is entirely satisfactory. “Collective” might misleadingly imply that such measures *must* be taken by multiple states simultaneously; “third party” ignores that all states, by definition, have a first-party legal interest in violations of obligations *erga omnes*, regardless of material injury. Here, we adopt the term “collective countermeasures,” except where other terminology is used in quoted material.

25. See *infra* Part III.C.1.

26. DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 305, 316 (1995).

27. See *infra* text accompanying note 110 (detailing how the invasion of Ukraine is highly unlikely to result in the decisive defeat and unconditional surrender of Russia).

28. Cf. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 799-800 (2004) (summarizing “formidable practical objections to retroactive justice” after regime change).

reparations for the harm caused in the war may make it harder to achieve peace. After all, if defeat means significant resources will be extracted from the country, it may be difficult for any Russian leader to lay down arms.²⁹ And if reparations are used to recompense all property harm, they may reproduce the unequal and unfair distribution of resources that predated the war, wherein much of Ukraine's wealth was held by those willing to use political power for personal gain during decades of corruption and kleptocracy.³⁰

Relying on countermeasures doctrine as the foundation for reparations addresses many of these concerns. Countermeasures "should as far as possible" be reversible once the target state comes into compliance.³¹ Holding frozen assets and using them to form the basis of a negotiated reparations system that involves welcoming Russia back into the international community could even incentivize peace, since those frozen assets will be inaccessible by Russia until an agreement is reached. The precise structure of a reparations scheme, moreover, is not set in stone. It could, and should, be designed in a way that serves the best interests of Ukraine; that may include negotiating an end to the war that does not require full payment for damages. This approach has downsides—Ukraine's immediate needs are serious³²—but it has the advantage of providing time and space to design a reparations plan that protects and preserves both countries' futures and allows those involved to contend with Ukraine's prewar shortcomings.

While the call for reparations in Ukraine is urgent, we must not lose sight of the fact that the problem of uncompensated harms for international legal wrongs is a problem that existed long before the current war. Indeed, some have asked whether the situation in Ukraine really deserves such heightened attention from the international community, given that the problems Ukraine has experienced are far from unique.³³ Observers might reasonably ask if the

29. See, e.g., Barry Eichengreen, *Should Russia Pay Reparations for the Ukraine War?*, GUARDIAN (June 13, 2022), <https://perma.cc/624N-9T34> ("[T]he demand for reparations would make it harder to imagine a Russia reconciled to Ukraine's independence and territorial integrity.")

30. See, e.g., Thomas de Waal, *Fighting a Culture of Corruption in Ukraine*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 18, 2016), <https://perma.cc/5QTN-RA6G>.

31. See Int'l L. Comm'n, *supra* note 18, art. 49, cmt. (9).

32. Some of those needs can be addressed with donor funds. See *infra* note 340. Yet we acknowledge that the failure to meet immediate needs, and thus the imperative to rely on taxpayers in allied countries and on donations is a drawback. Unfortunately, as we explain in Part II, proposals to seize Russian funds to address immediate needs violate core international law obligations.

33. See, e.g., Malaka Gharib, *Not Every War Gets the Same Coverage as Russia's Invasion—and That Has Consequences*, NPR (Mar. 4, 2022, 2:47 PM ET), <https://perma.cc/JL4D-MZ4B> (noting that "some wars get more attention than others" and describing proposals to bring wider coverage to the conflicts that receive less attention).

international community is only concerned about a problem that has long existed around the globe when it impacts Europeans. After all, the 2003 United States war in Iraq also violated the U.N. Charter,³⁴ and yet there have been few calls for the United States to provide reparations.³⁵

The answer to this challenge is to insist on treating the current call for reparations for Ukraine not as a one-off problem but as a systemic one. We should aim for a solution to this challenge that will benefit Ukrainians and others who may find themselves in the same situation. This is yet another reason that existing ad hoc legislative proposals to seize Russian assets are inadequate. They might provide money to Ukrainians now, but they undermine the international legal system while doing little to help future victims.³⁶ Keeping the larger picture in view is not only important as a matter of equity and justice, but it is also in the best interests of Ukraine. After all, Ukraine must maintain unprecedented levels of global support for its ongoing defensive actions and efforts to hold the architects of this illegal war accountable for the extraordinary harm they have done. This Article's proposal for institutionalizing collective countermeasures meets this challenge by offering a method of reinforcing the reparations obligation in various circumstances beyond the present conflict.

Part I begins by examining existing frameworks for reparations, none of which offers an adequate answer to the current demand for reparations. Part II discusses proposals to seize Russian assets for use as reparations and their fatal legal and political shortcomings. Part III offers a proposal to compel Russia to meet its obligation to provide reparations. We argue that Ukraine may deploy countermeasures by freezing Russian assets in response to Russia's injurious and illegal conduct against it. Going a step further, we argue that frozen or seized assets need not be returned to Russia at the close of the war as long as Russia has failed to pay reparations. That is because the failure to pay reparations is itself an unlawful act for which countermeasures (continued freezing of assets) may be kept in place even if the unlawful war has ceased. We

34. Among the authorities that have reached this conclusion is then-UN Secretary-General Kofi Annan, who stated in 2004, "from the charter point of view[,] it was illegal." Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, *GUARDIAN* (Sept. 15, 2004, 9:28 PM EDT), <https://perma.cc/7SY7-HNFY>.

35. There are exceptions. *See, e.g.*, Press Release, Center for Constitutional Rights, At 20th Anniversary of U.S. Invasion of Iraq, We Renew Our Call for Reparations and Accountability (Mar. 15, 2023), <https://perma.cc/2HZM-B5X7> ("Twenty years after the U.S. government invaded Iraq, we renew our call for reparations for those harmed as a result of the U.S.'s unlawful act of aggression in its cruel, senseless, and baseless war-for-profit."); Kaleem Hawa, *Reparations for Iraq*, *N.Y. MAG.* (Sept. 1, 2021), <https://perma.cc/9FG2-5FHJ>.

36. *See infra* Part II.

also argue that other states may join Ukraine, putting in place collective countermeasures, sometimes called “third-party” countermeasures.

Although this proposal does not guarantee that Ukraine will receive urgently needed financial assistance in the short term, Part IV explains why this approach to securing reparations is nevertheless the best method for engaging the broadest possible coalition of states to vindicate collective international legal obligations. This is in the best long-term interests not only of Ukraine but also of victim states the world over that have been or will be harmed by violations of international law’s most fundamental norms.³⁷ Part IV also offers a concrete proposal for institutionalizing collective countermeasures under the auspices of the United Nations to legitimize and constrain the use of collective countermeasures while providing a model for future action.

I. Existing Frameworks for Reparations

Despite widespread recognition that international law “requir[es] the payment of reparations for the wrongful use of force,” reparations are rarely actually paid, with warring parties more commonly agreeing to mutually renounce reparations or simply disregarding their counterparties’ claims.³⁸ Nonetheless, there are several examples of reparations in modern history. Based on an analysis of that history, here we outline four existing frameworks for war reparations: (1) reparations after total defeat; (2) reparations mandated by the U.N. Security Council; (3) consent-based reparations; and (4) reparations pursuant to an international court judgment. We conclude that these existing frameworks are inadequate in the context of the Russia-Ukraine challenge and other recent circumstances involving state-inflicted injuries.

37. Our focus here on applying existing international legal doctrine to secure *interstate* reparations is not intended to exclude the possible progressive development of international law and institutions to better protect and compensate individual civilian victims of war. Cf. Rebecca Crootof, *War Torts*, 97 N.Y.U. L. REV. 1063, 1066-70 (2022) (proposing the development of an international “war torts” regime that would “enable civilians to bring claims for harms incurred in armed conflicts,” irrespective of the lawfulness of the act giving rise to the harm).

38. Pietro Sullo & Julian Wyatt, *War Reparations*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW paras. 26-27 (Rüdiger Wolfrum ed., 2015), <https://perma.cc/E35Y-6ELM>; see also, e.g., Moffett, *supra* note 8, at 97-98 (noting that, although “the North Vietnamese went into the Paris peace negotiations with the intent of seeking reparations from the United States . . . [t]he final peace treaty between the two countries makes no reference to reparations”).

A. Reparations After Total Defeat

In the immediate aftermath of Germany's "total defeat" in the Second World War,³⁹ the Allies, including the Soviet Union, generally agreed to prioritize state-level reparations claims rather than individual compensation.⁴⁰ Nonetheless, the severity, allocation, and composition of postwar reparations were contentious, with the United States arguing against "excessive claims" even as the Soviet Union maintained a "harsh" view.⁴¹ Reparations could eventually be drawn from a range of "monetary assets, productive facilities, and other physical assets, deliveries out of current production, [and] even temporary use of prisoners of war as a labor force."⁴² The disposal of "physical assets" raised a dilemma. France, reeling from occupation, advocated for specific restitution, seeking "to use traceable ownership of looted productive assets as the basis for a superior claim to those assets."⁴³ While the Allies sought to negotiate an ultimate international agreement to settle these matters, countries across Europe—Allied and otherwise—adopted domestic legislation to assess, register, and compensate damage suffered during occupation and war.⁴⁴ Most of these countries, recognizing that funding for compensation would be limited, made no guarantee of payment. Some predicated compensation on factors such as the claimant's citizenship, relative financial need, or commitment not simply to pocket monetary compensation but "to rebuild the destroyed property . . . in accordance with the requirements of existing economic plans."⁴⁵

With Allied consensus out of reach, the Soviet Union maintained its own program of "démontage reparations," extracting resources and assets from its portion of occupied Germany.⁴⁶ Meanwhile, as negotiations were still

39. See Philip C. Jessup, *Discussion in the Security Council of the Berlin Crisis*, 19 DEP'T OF STATE BULL. 484, 485 (1948) ("The rights of the United States as a joint occupying power in Berlin derive from the total defeat and unconditional surrender of Germany.").

40. Buxbaum, *supra* note 8, at 333.

41. *Id.* at 322-24.

42. *Id.* at 324.

43. *Id.* at 325.

44. See Nehemiah Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 L. & CONTEMP. PROBS. 347, 348 (1951).

45. *Id.* at 351-53 (reflecting a provision of France's "comprehensive war damage compensation" legislation, oriented more toward "reconstruction of the country" than "indemnification of the damagee" *per se*).

46. See Buxbaum, *supra* note 8, at 323, 326. Although the Allies had agreed to a common "structure for reparations" in the 1945 Potsdam Agreement, "no agreement was achieved on the total amount of reparations, or on the period during which Germany would have to make such contributions." Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After* *footnote continued on next page*

underway among the Western occupying powers, the interim Allied Commission on Reparations purported to “legitimate[.]” the West’s own “self-help” in the form of German “plants, equipment and materials” taken from their respective zones.⁴⁷ By the time the United States, the United Kingdom, and France finally announced a conference in Paris aimed at concluding the reparations agreement, they had agreed that non-occupying members of the Western alliance, including even “non-military Allies,” would be invited to “satisfy their costs” in part using “prewar holdings of German governmental and private-sector assets” located in their territories, which “were expected to become a significant proportion of the reparations process.”⁴⁸ The Paris Agreement on Reparations essentially elaborated these interim approaches while establishing the proportional allocation of reparations among the signatory states. It left the total absolute value of reparations to be determined by the Inter-Allied Reparation Agency, which the United States, the United Kingdom, and France controlled.⁴⁹

Perhaps most notably, one category of assets recognized by the Paris Agreement as a source of reparations included “German enemy assets within [each signatory’s] jurisdiction,” which the signatories agreed to “dispose of . . . in manners designed to preclude their return to German ownership or control” with the net value of these assets “charge[d] against [their] reparation share[s].”⁵⁰ At the war’s commencement, “[p]rivately owned German assets in Allied countries had been frozen.”⁵¹ The Paris Agreement “now vested (i.e., confiscated)” them.⁵² The Allied countries also turned to German assets, private and public, held in *neutral* countries, especially Switzerland, seeking to “capture those assets for additional reparation purposes.”⁵³

1945, 20 BERKELEY J. INT’L L. 296, 316, 318 (2002). The Western occupying powers “successively and deliberately reduced [their] reparation demands in 1946,” after which “the Soviet Union extracted considerable reparations from the Eastern zone of occupation.” *Id.* at 318, 321.

47. Buxbaum, *supra* note 8, at 327–28 n.51.

48. *Id.* at 331. The Allies later agreed to reserve \$25,000,000 of these “German external assets (principally those located in neutral countries, plus non-monetary gold)” for the benefit of stateless persons “who had been in concentration camps.” *Id.* at 336.

49. Reparation from Germany, Establishment of Inter-Allied Reparation Agency, and Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. 3157, 555 U.N.T.S. 69 [hereinafter Paris Agreement].

50. *Id.* pt. I, art. 6.

51. Richard M. Buxbaum, *From Paris to London: The Legal History of European Reparation Claims: 1946-1953*, 31 BERKELEY J. INT’L L. 323, 326 n.7 (2013).

52. *Id.*

53. *Id.* at 337.

Even at the time, these “efforts to seize the private property of former enemy subjects” were of questionable international legitimacy.⁵⁴ The Allies defended the seizures as exercises of authority “in their capacity as sovereigns in Germany”⁵⁵ and invoked the Nazi government’s own *de facto* nationalization of German citizens’ external assets.⁵⁶ Nevertheless, the effective expropriation of private enemy property faced heavy criticism and was the subject of extensive negotiations between the United States and Switzerland, with the latter characterizing the policy “as the unprincipled exercise of the victors’ power.”⁵⁷ The following decade, after the United States had renounced part of its share of reparations and begun to consider returning (to German owners) some German assets under its control, one scholar argued that *returning* the assets would violate the United States’s obligations under the Paris Agreement.⁵⁸ He offered this somewhat prescient defense of the Allies’ approach:

[T]he international lawfulness of seizure and retention of alien property centers on the justification for the action . . . “[U]tilization of enemy private property is not confiscatory when it serves to release the enemy from the payment of claims against it.” . . . [I]n a world in which the possibility of war is a continuing threat, the search for means of averting recourse to war is not furthered by making holders of enemy assets trustees for the duration of the conflict. The risk of loss of external assets cannot be disregarded as a factor in deterring aggression.⁵⁹

Notwithstanding this justification’s *normative* resonance, its *legal* relevance is limited to the specific context of the postwar Paris Agreement. The nonbelligerent Western allies pursuing reparations for today’s Russia-Ukraine conflict are in a vastly different position than the Allied occupying powers were immediately postwar; they cannot rely on either total defeat or a victor-imposed reparations treaty. Still, the coalition supporting Ukraine today can and should, like the Allies, contemplate innovative mechanisms for restitution

54. *Id.*

55. F.A. Mann, *German Property in Switzerland*, 23 BRIT. Y.B. INT’L L. 354, 356 (1946); see also Buxbaum, *supra* note 8, at 316 (noting “the temporary disappearance of Germany as a sovereign state actor and the substitution of the Occupying Powers as that sovereign”).

56. Henry P. deVries, *The International Responsibility of the United States for Vested German Assets*, 51 AM. J. INT’L L. 18, 26 (1957).

57. Buxbaum, *supra* note 51, at 339-40.

58. deVries, *supra* note 56, at 23.

59. *Id.* at 27-28 (quoting CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 737 (2d rev. ed. 1945)). Though he cites extensive United States case law and commentaries, deVries appeals primarily to the Paris Agreement itself for *international* legal authority. For contemporary treatise sources indicating that international law *did* require, upon cessation of hostilities, the return of any enemy private property not confiscated at sea, see Kenneth S. Carlston, *Return of Enemy Property*, 52 PROC. OF THE AM. SOC’Y INT’L L. 53, 55 n.9 (1958).

and reparation within the constraints of both contemporary international law and geopolitical realities.⁶⁰

In addition to the approach to external assets described above, the Paris Agreement signatories agreed to use looted monetary gold recovered from Germany (including that which Germany had transferred to third countries) as restitution “in proportion to their respective losses of gold through looting or by wrongful removal to Germany.”⁶¹ The Western occupying powers soon established the Tripartite Commission for the Restitution of Monetary Gold to adjudicate the signatories’ claims and oversee disbursements, which operated for nearly half a century prior to its final dissolution in 1998.⁶² The provision featured in the eponymous ICJ judgment *Monetary Gold*, in which the Court decided it could not exercise jurisdiction over cases in which the interests of absent states “form the very subject-matter” of the disputes.⁶³

The case involved an attempt by the United Kingdom to directly obtain payment of reparations owed to it by Albania pursuant to the ICJ’s *Corfu Channel* judgment by executing that judgment against a portion of monetary gold to which Albania laid claim.⁶⁴ The ICJ decided that it had no jurisdiction, leaving the states to work the issue out on their own. Though it declined to opine on the lawfulness of the United Kingdom’s attempt at unilateral reparations, the underlying events (and the fact that the Court was seized of the issue) underscore the controversy that surrounded that attempt, as well as its singularity as a matter of state practice.⁶⁵

60. As articulated in an interagency study of the effort to use German external assets to fund reparations, “international law did not always afford a basis for [the Allies] demands on the neutrals, compelling the Allies to base their arguments on higher ‘moral’ grounds.” WILLIAM SLANY, U.S. DEP’T OF STATE, U.S. AND ALLIED WARTIME AND POSTWAR RELATIONS AND NEGOTIATIONS WITH ARGENTINA, PORTUGAL, SPAIN, SWEDEN, AND TURKEY ON LOOTED GOLD AND GERMAN EXTERNAL ASSETS AND U.S. CONCERNS ABOUT THE FATE OF THE WARTIME USTASHA TREASURY 8 (1998), <https://perma.cc/7H2X-ZVCH>.

61. Paris Agreement, *supra* note 49, pt. III.

62. See Arthur L. Smith, Jr., *Questions Concerning the Looted Nazi Gold Controversy*, 20 CARDOZO L. REV. 483, 489 (1998); Press Release, Joint Statement of the Governments of France, the United Kingdom, and the United States, Dissolution of the Tripartite Gold Commission (Sept. 9, 1998), <https://perma.cc/D4KN-HDAA>.

63. See *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. & U.S.), Judgment, 1954 I.C.J. 19, 32 (June 15).

64. *Id.* at 21.

65. See PIERRE D’ARGENT, LES RÉPARATIONS DE GUERRE EN DROIT INTERNATIONAL PUBLIC: LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS À L’ÉPREUVE DE LA GUERRE [War Reparations in Public International Law: The International Responsibility of States Tested by War] 808-13 (2002) (reviewing the handful of debatable examples of historical state practice suggesting a right to effect “payment” of an aggressor’s reparations obligation unilaterally).

The Paris Agreement framework and Tripartite Commission for the Restitution of Monetary Gold could serve as a model for lawfully effectuating reparations in circumstances in which they are confirmed by treaty-based or tribunal authority.⁶⁶ The entire process of postwar reparations, however, relied on the complete defeat and unconditional surrender of the countries whose assets were used to satisfy the various claims, leaving the historical case of limited value in a context where those conditions are not present.

B. Reparations Mandated by the U.N. Security Council

Throughout the Cold War, the U.N. Security Council (UNSC) repeatedly endorsed the right to war reparations on the basis of internationally wrongful uses of force, but none of the resolutions it passed “ever resulted in the transfer of war reparations between the States concerned.”⁶⁷ The UNSC took more forceful action in 1991, invoking its authority to impose binding measures on member states under Chapter of the U.N. Charter to establish the United Nations Compensation Commission (UNCC), which was designed to adjudicate claims and compensate losses flowing from Iraq’s aggression against Kuwait.⁶⁸ Consistent with state responsibility doctrine, the UNCC’s mandate focused not on retribution but on delivering “practical justice” to victims by resolving and administering payment of claims using monies derived from Iraqi oil revenues.⁶⁹ As after World War II, revenues were assessed in accordance with the “first charge principle,” accounting for Iraq’s ability to pay.⁷⁰ However, in an inversion of the postwar approach, individual claims took relatively high priority; they could be brought directly, including for

66. Cf. W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT’L L. 1, 19-20 (1969) (describing how a multilateral enforcement program may be authoritative, when undertaken in coordination with an extant organization, as an augmentation of that body’s authority); see also *infra* Part I.D.

67. Sullo & Wyatt, *supra* note 38, para. 29 (discussing UNSC resolutions responsive to Israel’s military action in Lebanon in 1968, South Africa’s incursion in Angola in 1975, and the Iran-Iraq War in the 1980s).

68. See PILPG, Possible Avenues for the Establishment of a Ukraine Reparations Mechanism Based on Past Experiences 1 (Jan. 9, 2023) (unpublished manuscript) (on file with author); Luke Moffett, Reparations Options for the War in Ukraine 16 (Nov. 9, 2022) (working paper), <https://perma.cc/X9EE-4XP7>; Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, in WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT 29, 29-30 (Timothy J. Feighery, Christopher S. Gibson & Trevor M. Rajah eds., 2015).

69. David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT’L L. 183, 185-86, 196-97 (2002).

70. See Sullo & Wyatt, *supra* note 38, para. 32.

compensation for *jus in bello* violations.⁷¹ The UNCC also sought to avoid the “perceived failings” of the Iran-U.S. Claims Tribunal, including its “bias toward business and governments,” and drew procedural inspiration from various government-sponsored claims mechanisms, including the German Holocaust reparations scheme and the United States September 11th Compensation Fund.⁷² The body processed its final claim in 2022, having disbursed over \$50 billion to successful claimants.⁷³

The UNCC remains a singular exercise of UNSC authority to carry out comprehensive war reparations.⁷⁴ In 2005, the U.N.’s International Commission of Inquiry on Darfur recommended to the UNSC the establishment of an international compensation commission to handle claims arising from the conflict in Sudan.⁷⁵ The report suggested Sudanese government assets and “international voluntary contributions” as funding sources for the payment of claims.⁷⁶ The UNSC ultimately agreed to a first-ever ICC referral, but it refused to establish a dedicated compensation commission, apparently finding “that since the ICC had the power to award reparation to victims, it was not necessary to establish an additional mechanism.”⁷⁷

The UNSC’s post-UNCC hesitancy to mandate reparations extended to the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), “[n]either of [which] had a mandate to provide reparations.”⁷⁸ Victims could not initiate requests for compensation, and both tribunals were

71. See MWATANA FOR HUM. RTS. & LOWENSTEIN INT’L HUM. RTS. CLINIC, YALE L. SCH., RETURNED TO ZERO: THE CASE FOR REPARATIONS TO CIVILIANS IN YEMEN 60-61 (2022), <https://perma.cc/H3UA-C7F9>.

72. McGovern, *supra* note 68, at 32, 47.

73. See Press Release, U.N. Information Service in Geneva, Governing Council of the United Nations Compensation Commission Holds Special Session to Mark the Fulfilment of its Mandate, U.N. Press Release UNCC22.001E (Feb. 9, 2022), <https://perma.cc/G4CF-ACDN>.

74. See *supra* note 8.

75. See Rep. of the Int’l Comm. of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, transmitted by Letter dated 31 January 2005 from the Secretary-General Addressed to the President of the Security Council, ¶ 601, U.N. Doc. S/2005/60 (Feb. 1, 2005).

76. See *id.* ¶ 603.

77. OPEN SOC’Y JUST. INITIATIVE, UN ENTITIES’ POWERS TO ESTABLISH ADMINISTRATIVE REPARATIONS PROGRAMS: A BRIEFING PAPER FOR DISCUSSIONS ON THE ARMED CONFLICT IN YEMEN 34 (2022), <https://perma.cc/5YZZ-YY8D>.

78. *Id.* at 48; see also Dinah Shelton, *Reparations*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW para. 31 (Rüdiger Wolfrum ed., 2015), <https://perma.cc/YE87-CTR9> (“Neither the ad hoc tribunal for the former Yugoslavia nor the ad hoc tribunal for Rwanda [authorized reparation to victims], although restitution of property or its proceeds could be imposed.”).

“unwilling” to exercise even their narrow “authority to order restitution” of criminally acquired property.⁷⁹ At most, in ICTY, victims could invoke the tribunals’ determinations of individuals’ liability (notably distinct from any state responsibility) in support of compensation and property claims brought before their respective domestic courts.⁸⁰

Other institutional mechanisms established in the aftermath of the conflict in the Balkans have been similarly constrained. The Commission for Real Property Claims in Bosnia and Herzegovina, a quasi-international creature of the Dayton Peace Agreement, was limited in scope to assigning or recognizing prewar property rights, with enforcement or compensation rarely resulting in practice.⁸¹ Likewise, the Housing and Property Claims Commission (HPCC) in Kosovo, a “joint international and local body” supported by the Organization for Security and Co-operation in Europe and the United Nations Interim Administration Mission in Kosovo (UNMIK), had interim jurisdiction “to settle the most serious residential property claims” (for restitution, not compensation) only until Kosovo’s own courts were deemed capable of doing so.⁸²

In short, the Security Council can establish a comprehensive compensation mechanism. However, with the rise of “new wars,”⁸³ some of them proxy conflicts, the Security Council has proven increasingly reluctant to do so.⁸⁴

79. CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 91 (2012).

80. See Mark S. Ellis & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia*, 20 BERKELEY J. INT’L L. 342, 351 (2002). *But cf.* Anne-Marie de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 LEIDEN J. INT’L L. 207, 216 (2007) (noting the ICTR’s limited provision of rehabilitation to survivors of sexual violence in their capacity as victim-witnesses before the tribunal).

81. See Hans van Houtte, *Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina*, 48 INT’L & COMPAR. L.Q. 625, 628-30, 637-38 (1999).

82. DJORDJE DJORDJEVIĆ, INT’L CTR. FOR TRANSITIONAL JUST., *A CASUALTY OF POLITICS: OVERVIEW OF ACTS AND PROJECTS OF REPARATION ON THE TERRITORY OF THE FORMER YUGOSLAVIA* 15 (2002), <https://perma.cc/52NU-5KZN>; see also KOSOVO HOUS. & PROP. CLAIMS COMM’N, *FINAL REPORT OF THE HOUSING AND PROPERTY CLAIMS COMMISSION 18-35* (2007) (describing the UNMIK mandate for the HPCC and the regulations establishing the body, including legal frameworks and administrative support). *But cf.* Alexander Heinze, *The Kosovo Specialist Chambers’ Rules of Procedure and Evidence: A Diamond Made Under Pressure?*, 15 J. INT’L CRIM. JUST. 985, 999 (2017) (noting that the Kosovo Specialist Chambers provide for “reparations order[s] against the accused” and “referral[s] to civil litigation”).

83. See Mary Kaldor, *In Defence of New Wars*, 2 STABILITY, no. 1, 2013, at 1, 2 (synthesizing literature on “the wars of the era of globalisation”).

84. See Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, in *LAW AND WAR* 67-69 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2014) (“[A]ttempts by international for a to promulgate a clear
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That reluctance has extended to conflicts in which none of the permanent five members of the Security Council are directly involved, and it is even more obviously true for those in which they are.⁸⁵

C. Consent-Based Reparation Regimes

There is little doubt that states can consent to provide reparations, though such cases are rare. After roughly two years of armed conflict, the 2000 Algiers Agreement between Ethiopia and Eritrea created a binding arbitral mechanism, the Eritrea-Ethiopia Claims Commission (EECC), to adjudicate violations of international humanitarian law claimed by the state parties either on their own behalf or on behalf of individuals.⁸⁶ The EECC is relevant in the Russia-Ukraine context in that, like the UNCC, it was oriented toward ensuring interstate reparations following an international armed conflict. However, it departed from the UNCC model in at least two major respects. First, and most obviously, it was bilateral, not a UNSC-sanctioned mechanism.⁸⁷ Second, state liability rested primarily on violations of international humanitarian law,⁸⁸ although the EECC's award to one party—Ethiopia—did include *jus ad bellum* damages based on its finding that Eritrea bore ultimate liability for the conflict.⁸⁹ The EECC has been criticized for its relatively paltry and as yet unpaid awards, as well as for its failure to direct compensation to individual victims.⁹⁰ Like the Iran-U.S. Claims Tribunal,⁹¹

and general duty to compensate individual victims of war crimes have all remained in the realm of soft law.”)

85. Cf. Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations*, 10 CHI. J. INT'L L. 55, 58 (2009) (arguing that the Security Council is “increasingly” limited to “diplomacy and debate,” as opposed to enforcement, “in a multipolar world of increasingly competitive powers”).

86. *Eritrea-Ethiopia Claims Commission*, PERM. CT. OF ARB., <https://perma.cc/2AGN-JBXF> (archived Apr. 4, 2024).

87. See *id.* (emphasizing that the Commission was established by the governments of Ethiopia and Eritrea “pursuant to an agreement signed in Algiers on 12 December 2000”).

88. See Rep. of the Workshop on Accountability and Fact-Finding Mechanisms for Violations of Int'l Humanitarian L. and Hum. Rts. Law: The Role of the Sec. Council—Past and Future (2011), transmitted by Letter dated 18 May 2012 from the Permanent Representative of Portugal to the United Nations Addressed to the President of the Security Council, 55-57, U.N. Doc. S/2012/373 (May 30, 2012).

89. See Ari Dybnis, Note, *Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict*, 33 LOY. L.A. INT'L & COMPAR. L. REV. 255, 266 (2011).

90. See *id.* at 273-75.

91. Although the Iran-U.S. Claims Tribunal was, like the EECC, a product of bilateral negotiation between mutually antipathetic states, it was designed to handle a relatively
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the EECC relied on a more cumbersome adversarial arbitral process. In contrast, individual claimants before the UNCC benefited from an inquisitorial process that did not require “individual claimants to provide evidence to support their claims.”⁹²

Competing claims for *interstate* compensation brought by consent before the ICJ have failed or been dismissed,⁹³ with one recent and significant exception in the Court’s *Armed Activities on the Territory of the Congo* judgment.⁹⁴ That decision offers useful insight into the legal assessment of the nature and quantum of reparations owed.⁹⁵ Overall, however, the *Armed Activities* judgment is of limited use as a model for the present moment for reasons that echo the UNSC’s own paralysis: The Court’s involvement requires both states’ consensual acceptance of its jurisdiction.⁹⁶ That condition—mutual consent—is very rarely met between warring states.⁹⁷ Nevertheless, where a tribunal does have, and exercises, jurisdiction, an international judgment can hold significant promise.

D. The International Judgment Exception

International courts often have the authority to award restitution for harms committed in war. The International Criminal Court, for example, allows restitution to be sought from convicted perpetrators of war crimes and other international crimes committed during war.⁹⁸ Other international courts similarly append compensation to criminal convictions, though they vary in

small number of claims—unlike Russia and Ukraine, Iran and the United States had not fought a bona fide armed conflict affecting tens of millions of individuals. See GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-U.S. CLAIMS TRIBUNAL* 4-6 (1996).

92. See John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT’L L. & FOREIGN AFF. 141, 162-63, 174-75 (2005).

93. See Sullo & Wyatt, *supra* note 38, para. 35.

94. See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. 13 (Feb. 9).

95. See *infra* notes 255-57 and accompanying text.

96. See Statute of the International Court of Justice, art. 36.

97. Cf. Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT’L L. 815, 818 & nn.14-15 (2007) (noting the rarity of jurisdiction based on dispute-specific special agreements). The typical exception is compulsory jurisdiction based on a compromissory clause in a preexisting treaty. *Id.*

98. See Rome Statute of the International Criminal Court, art. 77(2), July 17, 1998, 2187 U.N.T.S. 90 (“In addition to imprisonment, the Court may order: (a) A fine . . . (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime”); *id.* art. 79 (providing for creation of a trust fund for victims).

effectiveness. In Cambodia, the Internal Rules of the hybrid Extraordinary Chambers (established under a treaty between the U.N. and Cambodia, following a U.N. General Assembly Resolution) “allow[ed] victims to participate as Civil Parties, with the ability to make a claim for ‘collective and moral’ reparations.”⁹⁹ Monetary reparations were “not possible,” and given the claimed indigence of the defendants, reparations awarded (in the form of, for example, psycho-social support services) were funded by external donors.¹⁰⁰ In its judgment against former President of Chad, Hissène Habré, the Extraordinary African Chambers (established by agreement between the African Union and Senegal)¹⁰¹ ordered the payment of monetary reparations to victims through the “freezing and seizing any [of Habré’s] proceeds of crimes, property or assets.”¹⁰² And even if they are eventually recovered and dispersed, Habré’s assets¹⁰³ are “unlikely to satisfy reparation awards for compensation fully.”¹⁰⁴

Michael Reisman describes the enforcement of international judgments as a network of “general international organizations, functional agencies, regional organizations, and nation-states acting jointly or severally,” which are legitimated by the award rendered by a “highly authoritative organization.”¹⁰⁵ An international court judgment lends legitimacy to an enforcement action; a

99. Rachel Killean & Luke Moffett, *What’s in a Name? ‘Reparations’ at the Extraordinary Chambers in the Courts of Cambodia*, 21 MELB. J. INT’L L. 115, 118 (2020). See generally Extraordinary Chambers in the Court of Cambodia, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117; G.A. Res. 57/228, Khmer Rouge trials, U.N. Doc. A/RES/57/228 (May 22, 2003); Extraordinary Chambers in the Court of Cambodia Internal Rules (Rev. 10) (Oct. 27, 2022), <https://perma.cc/3W47-B5GK>.

100. OPEN SOC’Y JUST. INITIATIVE, *supra* note 77, at 49.

101. See Agreement on the Establishment of the Extraordinary African Chambers Within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union, Aug. 22, 2012, 52 I.L.M. 1024 (2013).

102. Daley J. Birkett, *Victims’ Justice? Reparations and Asset Forfeiture at the Extraordinary African Chambers*, 63 J. AFR. L. 151, 158 (2019).

103. See generally Christoph Sperfeldt, *Victims of Habré’s Rule Haven’t Been Paid a Cent of the Compensation Due to Them*, CONVERSATION (Sept. 28, 2021, 10:37 AM EDT), <https://perma.cc/6LJD-79SN> (reporting that the Chambers have seized Habré’s property in Senegal, which has yielded only a paltry sum, while a Chadian commission has alleged that Habré absconded with millions from the Senegalese national treasury in 1992 but further assets outside of Senegal’s borders have not been located).

104. Birkett, *supra* note 102, at 160.

105. See Reisman, *supra* note 66, at 9; see also N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT’L L. 1393, 1442 (2009) (arguing that when “wrongful conduct has been determined by an international body with responsibility for monitoring and verifying compliance . . . the use of countermeasures in response to violations . . . may serve to promote respect for the international rule of law”).

state acting to enforce an “authoritative pronouncement” does not abrogate the target’s sovereign immunity because such immunity “should not be accorded to a delinquent state.”¹⁰⁶ This is especially true in the case of ICJ judgments.¹⁰⁷ An ICJ award affords a degree of legitimacy to the attachment of assets in enforcement thereof even when those assets would otherwise be immune; some scholars have contended that such an award may even produce something akin to a *duty* to aid.¹⁰⁸ Moreover, because ICJ jurisdiction is consent-based, states have arguably consented to awards rendered by the Court and therefore to enforcement proceedings as well.¹⁰⁹ A similar case can be made for the enforcement of judgments of the International Criminal Court.

The enforcement of international judgments offers a useful tool for seeking compensation for harm done during war, but it faces a key drawback: Such cases generally address particular legal wrongs prosecuted in court and are therefore highly unlikely to provide complete compensation for the myriad harms done in a war. Such judgments are also difficult to obtain, given the relative dearth of courts with jurisdiction over such violations. That may be particularly true of compensation attached to criminal proceedings against

106. See Reisman, *supra* note 66, at 6, 12.

107. See *id.* at 9 n.26.

108. Reisman argues that this is incorporated into the statute of the Court in Article 38(1), which identifies one source of international law as “general principles of law recognized by civilized nations,” including a prohibition on abetting non-compliance. Therefore, member states are compelled to aid enforcement. *Id.* at 18 n.62. Reisman also notes evidence of this principle in the *Treaty of Washington* and the arbitral award in *Alabama Claims*. *Id.* at 18; see also SHABTAI ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY* 89 (1957) (“Non-compliance with the decision of the International Court by a State in a case to which it is a party . . . is an international wrong . . . [T]he State whose interests are adversely affected by the non-compliance . . . has the right to perform coercive acts in order to ensure the execution of the judgment.”); Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT’L L. 1, 14 (1960) (“[I]t could well be maintained that the obligation in the Charter to carry out the judgments of the International Court (or the similar obligation under customary international law to carry out other binding international awards) should prevail over a claim of immunity.”); C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 709-10 (1964) (“A government entitled to the benefit of an international decision or award would not appear to be debarred by immunity from attaching in satisfaction of the judgment any assets of the debtor government found within its jurisdiction and it may well be that immunity is not a bar to proceedings instituted by such a government in another jurisdiction where assets can be reached with the co-operation or consent of the government having authority there.”). The *Chorzow Factory* case may also be instructive, given the Court’s holding that a municipal court could not invalidate an international judgment. Reisman, *supra* note 66, at 18 n.66. As Reisman notes, “[f]rom this one may infer that a municipal court may not act contrary to an I.C.J. judgment,” although that inference does not necessarily indicate a duty to act. *Id.*

109. Similar logic helps justify and explain the high rates of enforcement of investor-state dispute settlement awards.

individuals. After all, compensation in those cases is limited to the harm done in the course of the crimes for which an individual is convicted—and the convicted individual’s assets limit their capacity to satisfy the award.

* * *

None of the models above is likely to address the demand for reparations for the war in Ukraine. The Russian invasion of Ukraine marks a devastating conflict that is highly unlikely to result in the decisive defeat and unconditional surrender of Russia.¹¹⁰ Russia is also unlikely—barring any significant developments—to voluntarily admit wrongdoing or agree to a consent-based bilateral reparations mechanism. Because Russia can veto any Chapter VII action of the Security Council, a mandatory compensation commission of the kind established in Iraq is also highly unlikely. Already, Ukraine has sought reparations as part of the dispute it has brought before the ICJ against Russia under the Genocide Convention.¹¹¹ Yet, because Ukraine’s case is premised not on an allegation that Russia has perpetrated genocide but rather on the allegation that Russia has employed false allegations of genocide as a pretext for its unlawful invasion of Ukraine, the awarded compensation may be limited.¹¹² Similarly, there will likely be some compensation awarded as a result of the cases against Russians in the International Court of Justice, the European Court of Human Rights, and the International Criminal Court,¹¹³ but those cases are likely to take years, and, given the limited scope of these cases, any compensation is unlikely to address even a small fraction of the harms caused by the war.

110. See Simon Tisdall, *Putin Is Waging a Forever War. The West Can’t Pull the Plug on Ukraine Now*, GUARDIAN (Sept. 2, 2023, 10:35 EDT), <https://perma.cc/U86N-4YCF> (explaining the factors that “render a meaningful peace process implausible” between Russia and Ukraine); Ivan Verstyuk, *Putin Will Win Unless the West Finally Commits to Ukrainian Victory*, ATL. COUNCIL (Nov. 2, 2023), <https://perma.cc/29YA-NXKE> (highlighting the stability in Russia’s 2024 military spending, favorable changes for Russia in the global geopolitical landscape, and pending United States elections, all favoring Putin’s plan for a “long war”); Roger Cohen, *Putin’s Forever War*, N.Y. TIMES (Aug. 6, 2023), <https://perma.cc/9GVH-V4RN> (quoting a Kremlin spokesman stating that there were “no grounds for an agreement” and that Russia would “continue the operation [in Ukraine] for the foreseeable future”).

111. See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Rus.)*, Provisional Measures Order, 2022 I.C.J. 211 (Mar. 16).

112. Ukraine has confirmed that it will seek reparations from Russia through the *Allegations of Genocide* case but has not announced the amount. *Ukraine Confirms It Will Demand Reparations from Russia in The Hague, Amount to Be Determined*, UKRAINSKA PRAVDA (Sept. 19, 2023, 4:15 PM), <https://perma.cc/N2AT-Y7MH>. Because Ukraine’s claim is focused on the illegality of Russia’s false pretext, the scope of reparations owed may not extend to all of the harms Ukraine has suffered from Russia’s invasion.

113. See *supra* notes 9–13 and accompanying text.

As a result, the existing frameworks are inadequate to meet the current demand for reparations. Of course, this gap is not unprecedented. The serious shortcomings of the reparations status quo exist not only for Ukraine but also in a variety of other contemporary contexts that do not neatly satisfy the narrow conditions under which reparations historically have been paid.¹¹⁴ The next Part examines current proposals to fill that gap and their drawbacks.

II. Unilateral Seizures

It has long been true that “establishing rules of war reparations has been hell for international law.”¹¹⁵ And yet the degree of global support for reparations for the war in Ukraine, while by no means universal, appears to have reached a level not seen since World War II, which is appropriate, perhaps, to the shameless aggression and disregard for international law that undergird the present conflict. As a result, there are many proposals aimed at effecting reparations through the outright unilateral seizure of Russian assets. Unfortunately, as this Part explains, these proposals are contrary to long-standing international legal norms. It would be a terrible mistake for Ukraine and its allies to embrace an approach to reparations that violates the law. After all, Ukraine’s most powerful asset in the war has been its capacity to demonstrate time and again that it is consistently on the right side of the law against an opponent bent on breaking every rule on the books.¹¹⁶

A. Proposals for Unilateral Seizures

Policymakers, scholars, and commentators have voiced support for the confiscation or seizure (and subsequent transfer to Ukraine) of Russian assets, either by executive action or through judicial proceedings.¹¹⁷ Russian central

114. For example, the United States’s own conduct in Vietnam or Iraq might be viewed as having given rise to an obligation to make reparation. *See, e.g.,* *Hawa*, *supra* note 35. *But see* Frederick Z. Brown, *Rapprochement Between Vietnam and the United States*, 32 CONTEMP. SE. ASIA 317, 319-20 (2010) (noting Vietnam’s acquiescence to the United States’s refusal to counsel reparations). Assuming the United States did owe reparations in these or other circumstances, the fact that these obligations have not been fulfilled reinforces the importance of this Article’s intervention, which envisions a method of collective vindication of reparations obligations with potential bite even against powerful states. *See infra* notes 391-93 and accompanying text (discussing the conflict in Yemen).

115. Roger P. Alford, *On War as Hell*, 3 CHI. J. INT’L L. 207, 217 (2002).

116. Oona A. Hathaway, *International Law Goes to War in Ukraine: The Legal Pushback to Russia’s Invasion*, FOREIGN AFFS. (Mar. 15, 2022), <https://perma.cc/2L5N-6BWN>.

117. *See, e.g.,* Sam Fleming, *EU Should Seize Russian Reserves to Rebuild Ukraine, Top Diplomat Says*, FIN. TIMES (May 9, 2022), <https://perma.cc/2KK8-XKYV> (reporting a European diplomat’s view that “EU capitals should consider seizing frozen Russian foreign
footnote continued on next page”).

bank assets are the primary target of these proposals, both because they are of much greater total monetary value than the sum of private assets owned by sanctioned Russian individuals¹¹⁸ and because they are more immediately inculpable as part of the Russian state apparatus. Frozen Russian central bank assets are also relatively liquid, whereas many of the private assets presently frozen are vanity wealth displays unlikely to yield proceeds sufficient to meet Ukraine's needs.¹¹⁹ Rather than aiming to persuade or induce Russia to make reparation, proposals to seize Russian assets seek to obtain what might be termed "unilateral reparations."¹²⁰

The legality of seizures of private assets depends on both international and domestic law, including constitutional property protections.¹²¹ Private assets are not protected by sovereign immunity, hence the doctrine of sovereign immunity does not pose a bar to their seizure. As a matter of United States domestic law, the attachment and execution of these frozen assets can be accomplished via "civil forfeiture," although in the United States that process

exchange reserves to cover the costs of rebuilding Ukraine"); 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://perma.cc/NR3B-QG4L> (advocating "the seizure and liquidation of [Russian] assets"); Philip Zelikow & Simon Johnson, *How Ukraine Can Build Back Better: Use the Kremlin's Seized Assets to Pay for Reconstruction*, FOREIGN AFFS. (Apr. 19, 2022), <https://perma.cc/2PW3-KBU3> (advocating "[t]ransferring frozen Russian funds as compensation" for Ukraine).

118. Ukraine's allies are known to have frozen tens of billions of U.S. dollars of property and assets belonging to Russian oligarchs and elites, see, for example, Cosmo Sanderson, *Ukraine Pushes for War Claims Commission*, GLOB. ARB. REV. (Oct. 10, 2022), <https://perma.cc/FQZ5-GKYT>, whereas an estimated \$300 billion of frozen Russian central bank assets are held among the members of the G7 and the European Union, see Patricia Cohen, *Support Grows to Have Russia Pay for Ukraine's Rebuilding*, N.Y. TIMES (Mar. 24, 2023), <https://perma.cc/2PME-HB5H>.

119. Paul B. Stephan, *Seizing Russian Assets*, 17 CAP. MKTS. L.J. 276, 282 (2022).

120. See D'ARGENT, *supra* note 65, at 808-13 (2002) (discussing the legal ambiguity surrounding "unilateral reparations," citing as examples the United Kingdom's execution of the *Corfu Channel* judgment using monetary gold earlier seized from Albania and the United States's seizure of Iranian assets for reparatory purposes). Russia itself has taken this approach at least once before. See Pierre d'Argent, *La loi russe sur les biens culturels transférés: Beutekunst, agression, réparations et contre-mesures*, [The Russian Law on Transferred Cultural Property: Beutekunst, Aggression, Reparations, and Countermeasures], 44 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 114, 123 (1998) (detailing the Russian Federation's 1998 proclamation that compensation for damage to Russian cultural property could be accomplished via the "acquisition" of German state property "by the damaged State in its own favor").

121. See, e.g., Press Release, Federal Council, Federal Council Has Received Legal Clarifications on Frozen Russian Assets (Feb. 15, 2023), <https://perma.cc/LY7S-JF96> ("The confiscation of frozen private assets is inconsistent with the Federal Constitution and the prevailing legal order and violates Switzerland's international commitments. Other countries have similar constitutional rights and guarantees.").

requires a nexus with one of several statutorily specified criminal acts.¹²² The well-publicized seizures of Russian yachts and real estate are the result of this framework in operation.¹²³ Congress has considered expanding the executive branch's power to effect such seizures in the United States. One proposed bill would authorize the President to take "all constitutional steps" to confiscate assets derived in part from corruption linked to Putin's regime.¹²⁴ If passed, the legislation would smooth the process of finding a criminal nexus for individual oligarchs' assets, subject to due process limits.¹²⁵ A related provision in the consolidated appropriations bill passed in December 2022 created a limited framework for the legal transfer of these assets, authorizing the use of certain forfeited property "to provide assistance to Ukraine to remediate the harms of Russian aggression."¹²⁶

By contrast, there is no direct criminal nexus to frozen Russian central bank assets, which are not directly associated with any individual. Nevertheless, recent legislative proposals have contemplated jettisoning the traditional civil forfeiture process to facilitate the seizure of Russian central bank assets, including by authorizing the executive to conduct such seizures while circumventing the judiciary entirely. A United States law enacted in April 2024

122. See 18 U.S.C. § 981(a)(1)(A) (permitting the government to seize "any property . . . involved in a transaction . . . in violation of [specified crimes, including money laundering, mail fraud, and wire fraud], or any property traceable to such property").

123. See, e.g., Ayesha Rascoe, *The U.S. Seized Russian Oligarchs' Superyachts. Now, American Taxpayers Pay the Price*, NPR (Nov. 20, 2022, 8:45 AM ET), <https://perma.cc/RE2G-H7WM> (discussing the West's seizure of yachts and other luxury assets from the Russian elite, with the eventual aim of selling them through the forfeiture process); Press Release, U.S. Dep't of Just., \$90 Million Yacht of Sanctioned Russian Oligarch Viktor Vekselberg Seized by Spain at Request of United States (Apr. 4, 2022), <https://perma.cc/8TNZ-PQ4P> (detailing the seizure, in coordination with Spanish authorities, and initiation of forfeiture proceedings of the yacht "Tango"); Dan Mangan, *\$325 Million Yacht Seized from Russian Oligarch Suleiman Kerimov Sails to U.S. After Fiji Court Ruling*, CNBC (updated June 7, 2022, 3:01 PM EDT), <https://perma.cc/9FBM-LKVF> (detailing the seizure of a superyacht belonging to Russian oligarch Suleiman Kerimov by the U.S. Department of Justice in Fijian court); Press Release, U.S. Dep't of Just., Justice Department Files Civil Forfeiture Complaint Against \$300 Million Superyacht (Oct. 23, 2023), <https://perma.cc/73KF-3D8C> (detailing the civil forfeiture complaint of Kerimov's superyacht, "Amadea").

124. S. 536, 118th Cong. § 2(1) (2023).

125. Whether foreign sovereigns have due process rights is an open question. See *Argentine Republic v. Weltover*, 504 U.S. 607, 619 (1992); see also Paul Stephan, *Giving Russians Assets to Ukraine—Freezing Is Not Seizing*, LAWFARE (Apr. 26, 2022, 10:48 AM), <https://perma.cc/VK4Q-657L> (highlighting the division among courts, the American Law Institute, and scholars regarding whether constitutional due process applies to the property of foreign states).

126. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 5200, § 1708(a) (2022). The provision excludes assets seized for violations of export controls, among other property types. See *id.* § 1708(c)(2).

permits the president to seize Russian Sovereign assets, provided a number of conditions are met.¹²⁷ That law attempts to circumvent the international law constraints by restricting judicial review to United States constitutional law challenges only.¹²⁸ In 2022, Canada enacted legislation that empowers the executive to accomplish asset seizures and transfers, including of Russian central bank assets.¹²⁹ Canada's Minister of Foreign Affairs announced the first exercise of this expanded authority in December 2022, involving \$26 million U.S. dollars held by a company owned by Russian oligarch Roman Abramovich.¹³⁰ However, as of May 2024, Canada had not tried to use this newfound authority to seize *sovereign* Russian assets, nor had it made clear what international legal authority it would rely on to do so.¹³¹ As noted earlier, European officials have deemed a similar proposal "too legally risky."¹³²

Some have floated alternatives that purport to stop short of the outright unilateral seizure of Russian central bank assets while still extracting value from those assets. For example, in late 2022, the European Commission (EC) proposed transferring proceeds from the investment of frozen Russian assets, as distinct from the principal assets themselves, to Ukraine, to be "offset against" Ukraine's reparations claims against Russia.¹³³ The proposal ostensibly would not vest seized assets. Instead, the EC would serve as a sort of

127. Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes, Pub. L. No. 118-50, §§ 101-108 (2024).

128. *Id.* § 104(k).

129. Budget Implementation Act, *supra* note 15, § 438(1); see Janyce McGregor, *Canada Can Now Seize, Sell Off Russian Assets. What's Next?*, CBC NEWS (June 27, 2022, 4:00 AM EDT), <https://perma.cc/8T44-UZP9>; see also Janyce McGregor, *Proposed Powers to Sell, Redistribute Russian Assets May Violate International Law, Says Legal Expert*, CBC NEWS (June 6, 2022, 4:00 AM EDT), <https://perma.cc/9QV6-LSJN> (evaluating legal and political arguments surrounding proposed Canadian legislation that would permit the Canadian government to seize and sell sanctioned Russian assets to fund Ukrainian reconstruction).

130. Press Release, Global Affairs Canada, *Canada Starts First Process to Seize and Pursue the Forfeiture of Assets of Sanctioned Russian Oligarch* (Dec. 19, 2022), <https://perma.cc/9YDX-SEYW> ("If forfeited, the proceeds that are generated will be able to be used for the reconstruction of Ukraine and compensation to victims.").

131. McGregor, *Canada Can Now Seize, Sell Off Russian Assets. What's Next?*, *supra* note 129.

132. See Payne & Strupczewski, *supra* note 16.

133. See Directorate-General for Neighbourhood and Enlargement Negotiations, *Ukraine: Commission Presents Options to Make Sure That Russia Pays for Its Crimes*, EUR. COMM'N (Nov. 30, 2022), <https://perma.cc/C34Y-JGJ4> (proposing "to manage the frozen public funds, invest them and use the proceeds in favour of Ukraine" in the short term and to return the assets, potentially "offset against . . . war reparation," once sanctions are lifted); Laura Dubois, *EU Discusses Plan to Send Profits from €196.6bn of Frozen Russian Assets to Ukraine*, FIN. TIMES (May 24, 2023), <https://perma.cc/UGX2-7Z9Q>.

interim “usufructuary.”¹³⁴ The plan echoed the United States’s recent transfer of seized Afghan central bank assets to a trust fund “to benefit Afghans . . . while keeping the funds out of the hands of the Taliban.”¹³⁵ Like this latter approach, the proposal to invest the frozen assets and seize their earnings is fundamentally confiscatory. This is particularly true given the risk that returns could prove negative, thus diminishing the value of the principal assets. United States and European policymakers have also entertained proposals to collateralize frozen Russian central bank assets to help finance loans to Ukraine.¹³⁶ This approach, too, is merely a unilateral seizure by another name. Its implementation would necessarily rest on the prospect that the “collateral” Russian central bank assets could eventually be confiscated to satisfy debts issued against it. So, too, would the proposal to seize the assets as a kind of “down payment” on reparations owed.¹³⁷ In part as a result of legal concerns,¹³⁸ these proposals have apparently been abandoned.

Europe has gravitated instead toward an alternative plan that would involve leaving the central bank assets in place but taxing their earnings and transferring the proceeds to Ukraine. Unlike plans to confiscate the assets or invest them in ways that could put them at risk of loss, the approach would allow for reversibility “as far as possible,”¹³⁹ as the underlying assets would remain preserved pending Russia’s compliance with its international law obligations. A

134. Cf. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 55, 36 Stat. 2277, 2309 (describing the “usufructuary” relationship between occupying and occupied states under the laws of war).

135. Charlie Savage, *U.S. Establishes Trust with \$3.5 Billion in Frozen Afghan Central Bank Funds*, N.Y. TIMES (Sept. 14, 2022), <https://perma.cc/Z6W4-D3L2>.

136. *Advancing National Security and Foreign Policy Through Sanctions, Export Controls, and Other Economic Tools: Hearing Before the S. Comm on Banking, Housing, and Urban Affairs*, 118th Cong. (2023) (statement of Daleep Singh, Former Deputy National Security Advisor for International Economics), <https://perma.cc/KKT7-DB32> (“We need to look at all creative ways possible to make Russia pay its fair share for the reconstruction of Ukraine . . . and if that means using the central bank reserves that we immobilized as collateral for Ukraine to issue debt, I think that’s something we ought to pursue.”); Timothy Ash, *Who Can Pay for Putin’s War? Step Forward Vladimir*, CTR. EURO. POL. ANALYSIS (Mar. 7, 2023), <https://perma.cc/2B94-5EDJ> (“First, allow frozen Russian assets to be used as collateral so that Ukraine can borrow to fund its defense and for post-war reconstruction Second, G-7 countries can issue requisition bonds in exchange for Russian funds frozen in Western banks. The Russian state would get a par asset in exchange, while the underlying assets are distributed to Ukraine.”).

137. See, e.g., Anne Applebaum, *Give Russia’s Frozen Assets to Ukraine Now*, ATLANTIC (Dec. 18, 2023), <https://perma.cc/AU8C-RLGR>.

138. See Payne & Stupczewski, *supra* note 16.

139. See *infra* notes 190-91 and accompanying text.

plan of this kind, already approved by Belgium¹⁴⁰ and under active consideration by the European Union, could generate up to €3 billion annually.¹⁴¹

B. The Legal Barrier to Unilateral Sanctions: Sovereign Immunity

The aforementioned United States and Canadian laws and similar proposals under consideration elsewhere demonstrate the plasticity of *domestic* legal limits on sovereign asset seizures.¹⁴² They do not, however, resolve seizures' international unlawfulness. The prime international legal barrier these proposals face is the customary international legal principle of sovereign immunity, according to which states and their assets enjoy immunity from other states' jurisdiction and acts of execution or enforcement.¹⁴³ States adhere to that principle in a variety of ways, but "[a]ll states, with a very few exceptions, accept sovereign immunity as something which is legally binding under international law," rather than as a matter of mere comity.¹⁴⁴ The protection of this principle is widely understood to extend to foreign central

140. Jeff Stein, John Hudson & Amanda Coletta, *U.S. Intensifies Push to Use Moscow's \$300 Billion War Chest for Kyiv*, WASH. POST (Oct. 11, 2023, 2:53 PM EDT), <https://perma.cc/6CXM-8WFU> (reporting that the "Belgian government announced the creation of a \$1.8 billion fund for Ukraine paid for by tax revenue from profits generated on seized Russian central bank assets").

141. Monika Pronczuk & Eshe Nelson, *E.U. Moves to Tap Frozen Russian Assets to Help Ukraine*, N.Y. TIMES (Dec. 12, 2023), <https://perma.cc/LHX3-T75H>. In February 2024, the Council of the European Union took the first step toward carrying out this plan by deciding to set aside extraordinary revenues from the assets. See Press Release, *supra* note 16.

142. That said, any statutory authorization to seize Russian central bank assets would still be constitutionally limited, most notably by the Fifth Amendment's Takings Clause. See Evan J. Criddle, *Turning Sanctions into Reparations: Lessons for Russia/Ukraine*, HARV. INT'L L.J. ONLINE (Jan. 30, 2023), <https://perma.cc/QF9E-M37B>. United States domestic law provides the executive the authority to seize assets of a foreign nation when engaged in hostilities therewith, but other exceptions to foreign sovereign immunity are construed narrowly. See *Barapind v. Gov't of Republic of India*, 844 F.3d 824, 829 (9th Cir. 2016); *NML Capital, Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007). United States sovereign immunity protections are provided for under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1609-1611.

143. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99, 146-47, 116-18 (Feb. 3); see also U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 21(1)(c), *opened for signature* Dec. 2, 2004, G.A. Res. 59/38 (not in force) [hereinafter *Convention on Jurisdictional Immunities*] (indicating that property belonging to a foreign nation's central bank is to be considered for "government non-commercial" use, and is therefore immune from measures of constraint in connection with proceedings before a court).

144. Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L L. 853, 874 (2010). The ICJ has explicitly confirmed the existence of "the rule of customary law which requires one State to accord immunity to another." *Ger. v. It.*, 2012 I.C.J. at 140 (emphasis added).

bank assets.¹⁴⁵ Respect for sovereign immunity, among other “legal obstacles,” has given some states—including the United Kingdom, the United States, and the European Union—serious pause when considering possible asset seizures.¹⁴⁶

While it is not unprecedented for the contours of the sovereign immunity principle to contract,¹⁴⁷ the seizures proposed would transgress its current boundaries. The principle of sovereign immunity finds perhaps its clearest expression in the U.N. Convention on Jurisdictional Immunities of States and Their Property, which the ICJ has understood to “shed light on the content of customary international law” regarding sovereign immunity, though the Convention has not yet entered into force.¹⁴⁸ The Convention enumerates certain “[p]roceedings in which State immunity cannot be invoked,” most notably proceedings involving commercial transactions.¹⁴⁹ However, none of those exceptions appears to apply to the Russian central bank assets in question here.¹⁵⁰ Russian central bank assets subject to threats of seizure are, it appears,

145. See Ingrid (Wuerth) Brunk, *Immunity from Execution of Central Bank Assets*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 266 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019). Indeed, central bank assets, pivotal to nations’ participation in international economic exchange, benefit from particularly high protection. See *id.* at 281.

146. See, e.g., Payne & Stupczewski, *supra* note 16 (“Confiscating the Russian assets and handing them over to Kyiv would ease the pressure on the West to finance Ukraine’s war effort, but European officials dismiss it as too legally risky.”); Anton Moiseienko, *Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets*, JUST SEC. (Aug. 17, 2022), <https://perma.cc/LD2M-MBW3> (quoting the “reticence” of the U.K.’s All-Party Parliamentary Group on Anti-Corruption and Responsible Tax “to create an unfortunate precedent” by violating “the fundamental principle of sovereign immunity”); David Lawder, *Yellen Says Legal Obstacles Remain on Seizure of Russian Assets to Aid Ukraine*, REUTERS (Feb. 27, 2023, 10:28 AM PST), <https://perma.cc/U9RT-V3NH> (citing Yellen’s concerns that there are “significant legal obstacles” to confiscating major frozen Russian assets); Matthew Cullen, *The U.S. Is Looking to Use Russian Assets to Aid Ukraine*, N.Y. TIMES (Dec. 21, 2023), <https://perma.cc/WQU4-5XS2> (highlighting that, “[u]ntil recently, Treasury Secretary Janet Yellen had argued that seizing the funds without congressional action would be illegal”).

147. For example, the period following World War II saw an ultimately near-global shift from an “absolute” to a merely “restrictive” theory of sovereign immunity. See Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Attorney General, Dep’t of Just., Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments (May 19, 1952), in 26 DEP’T ST. BULL. 984 (1952) (the “Tate letter”); see also Cameron Miles, *James Crawford and the Law of State Immunity*, 40 AUST. Y.B. INT’L L. 115, 170 (2023) (“[T]he end of the Cold War has guaranteed the restrictive theory’s apotheosis.”); James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT’L L. 820, 831 (1981) (underscoring the Soviet Union’s shift from absolute to restrictive immunity).

148. *Ger. v. It.*, 2012 I.C.J. at 128.

149. Convention on Jurisdictional Immunities, *supra* note 143, art. 10(1).

150. Likewise, it is not clear that the commercial exception, or any other exception, to the United States Foreign Sovereign Immunities Act applies to Russian state assets frozen

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best understood as non-commercial, and thus protected by sovereign immunity.¹⁵¹ Nor would linking the assets to Russia's violations of either *jus ad bellum* or *jus in bello* necessarily dissolve their sovereign-immunity protection, since even *jus cogens* violations do not preclude "the applicability of the customary international law on State immunity."¹⁵²

Some argue that the Convention on Jurisdictional Immunities offers another significant loophole: The Convention appears to apply, they claim, only to actions taken in connection with a judicial proceeding or judgment and not to legislative or executive actions.¹⁵³ To be sure, the Convention's stated focus is on "the immunity of a State and its property from the jurisdiction of the courts of another State."¹⁵⁴ But the treaty defines "court" broadly to encompass "any organ of a State, however named, entitled to exercise judicial functions."¹⁵⁵ If sovereign equality is the animating principle of sovereign immunity, as the ICJ stated in *Jurisdictional Immunities*, acts by the executive branch pose the same fundamental problem as do those same acts committed at

in the United States. For example, the Supreme Court has read the "expropriation exception" to "permit[] the exercise of jurisdiction" only "over some public acts of expropriation," not over property losses inflicted in the course of violations of "international law writ large," including genocide, human rights abuses, and terrorism. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 712-14 (2021).

151. See Convention on Jurisdictional Immunities, *supra* note 143, art. 19(c) (permitting "post-judgment measures of constraint" where "it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes" (emphasis added)); *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 193-94 (2d Cir. 2011); see also Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. 1101, 1137 (2021) ("The definition of 'commercial' in the FSIA statute provides little specific guidance."); see also Brunk, *supra* note 145, at 269-78 (offering a typology of approaches to conferring immunity on central bank assets).
152. *Ger. v. It.*, 2012 I.C.J. at 142. True, the ICJ explained, "*jus cogens* rules always prevail over any inconsistent rule of international law," but "there is no conflict between [*jus cogens*] rules and the rules on State immunity" because the latter "are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State," not "whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful." *Id.* at 140.
153. See Zelikow & Johnson, *supra* note 117 (noting that "all states are allowed to invoke Russia's responsibility to compensate Ukraine" through direct state action and not "a process that involves private lawsuits or new court decisions"); Anton Moiseenko, *Trading with a Friend's Enemy*, 116 AM. J. INT'L L. 720, 726 (2022) ("Under customary international law, states enjoy immunities from jurisdiction and execution in foreign courts. Because the freezing of assets under sanctions is imposed by executive authorities rather than courts, there is considerable uncertainty as to whether immunities apply."); see also Tribe & Lewin, *supra* note 117 (arguing that domestic sovereign immunity law "protects foreign assets only from *judicial process*—not from liquidation by the combined action of Congress and the executive branch").
154. Convention on Jurisdictional Immunities, *supra* note 143, art. 1.
155. *Id.* art. 2(1)(a) (emphasis added).

a judge's behest.¹⁵⁶ Seizures and other related measures are necessarily judicial; they are premised on the decisive disapprobation of the target state's conduct, informed by a finding of unlawfulness, however institutionally veiled.¹⁵⁷ Indeed, in most states, the operation of each branch necessarily implicates powers or authorities held and exercised by the others.¹⁵⁸ Even if sovereign immunity is characterized as a matter of comity¹⁵⁹—a historical view

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156. *Ger. v. It.*, 2012 I.C.J. at 123; Philippa Webb, *From Russia with War: Part Deux*, EJIL: TALK!, at 45:50 (Mar. 24, 2023), <https://perma.cc/JD5C-GSK7> (arguing that although national laws and various treaties related to sovereign immunity by their terms apply only “in connection with judicial proceedings,” sovereign immunity’s derivation from the principle of sovereign equality suggests that sovereign immunity applies to executive, legislative, and judicial action). The ICJ’s statement in *Jurisdictional Immunities* that “[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State” must be read in its context, wherein the Court was distinguishing the procedural immunity concern from the substantive “question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.” *Ger. v. It.*, 2012 I.C.J. at 140. That the scope of this particular statement is narrow is made clear later in the same Judgment, when the Court recognizes an “immunity from enforcement enjoyed by States in regard to their property situated on foreign territory” that is broader than the strictly “jurisdictional immunity enjoyed by those same States before foreign courts.” *Id.* at 146.
157. *But cf. supra* Part I.D (explaining that an international tribunal *could* legitimately reach such a conclusion). Moreover, as Paul Stephan has pointed out, there is no way around judicial involvement in even extrajudicial seizures, as they will likely trigger administrative and constitutional challenges. Stephan, *supra* note 125. Ingrid Brunk objects to this sovereign equality rationale not as invalid but as too broad and complex in application. See Ingrid Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, 91 GEO. WASH. L. REV. 1616, 1637-38 (2023). Yet despite that breadth and complexity, states continue to grapple with sovereign immunity, preferring to tailor the doctrine rather than abandon it. See *id.* at 1617-18. Moreover, the availability of countermeasures doctrine to preclude the wrongfulness of certain violations of immunity may help explain target states’ relatively muted responses to the many *prima facie* violations of their immunity.
158. See Bernard H. Oxman, *Jurisdiction of States*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW para. 6 (Rüdiger Wolfrum ed., 2007), <https://perma.cc/8HWG-VT8R> (“[J]udicial jurisdiction is rarely exercised in the absence of legislative jurisdiction by the same State In civil cases . . . the exercise of judicial jurisdiction nevertheless implicates the legislative jurisdiction of the forum to prescribe the applicable procedural, evidence, and choice of law rules. Moreover, the very exercise of judicial jurisdiction involves important aspects of enforcement.”); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV Introductory Note (AM. L. INST. 2017) (“Legislative bodies exercise prescriptive jurisdiction when they enact statutes, but so does the executive branch when it adopts generally applicable orders or regulations, and so do courts when they make generally applicable common law The applicable rules of U.S. domestic law and of international law depend on the particular kind of authority a state is exercising in a given instance.”).
159. See Ernest Angell, *Sovereign Immunity—The Modern Trend*, 35 YALE L.J. 150, 152-53 (1925) (asserting that the rule of sovereign immunity is based on “comity”).

superseded by the ICJ's sovereign equality rationale—the same conclusion applies. Comity, like sovereign equality, is susceptible to transgression by any branch of government. Like “national judges,” executive actors “are generally ill-suited to administer justice in an impartial and objective way,” given “hard pressure from their own population.”¹⁶⁰

Distinguishing executive from judicial actors also presents a practical challenge in light of the diversity of domestic political systems and governing institutions found within them.¹⁶¹ This might explain the ILC's suggestion, in its commentary on the Convention on Jurisdictional Immunities, that “the scope of judicial functions . . . should be understood to cover such functions whether exercised by courts or by administrative organs.”¹⁶² Thus, even a skeptic of the applicability of sovereign immunity to executive action may recognize that sovereign immunity *does* cover executive actions that “would qualify as judicial” in character.¹⁶³ That could include “changing title to property,” among other actions with a “connection to the exercise of judicial functions.”¹⁶⁴ And when these actions are themselves imbued with exercises of judicial or adjudicative authority, proposals to dodge the sovereign-immunity bar by prohibiting subsequent judicial review do not exempt those actions from condemnation under international law—and the consequences that may follow.¹⁶⁵ The contrary view would effectively eliminate sovereign immunity, as states could simply evade immunities by performing all acts potentially covered by immunities through nominally executive organs.

160. Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1105, 1131 (2011).

161. See *Report of the Commission to the General Assembly on the Work of its Forty-Third Session*, [1991] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1991/Add.I, art. 2, cmt. (3) (“[J]udicial functions are determined by the internal organizational structure of each State”).

162. *Id.*; Brunk, *supra* note 157, at 1642 (noting that the commentary suggests that “some action by administrative agencies would qualify as judicial”).

163. Brunk, *supra* note 157, at 1642

164. *Id.* at 1642-43.

165. In addition, the seizure of assets without any opportunity for judicial review would almost certainly violate domestic due process protections, to the extent that foreign states are “persons” due the same constitutional “process” to which other defendants are entitled. See Ingrid Brunk, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 690 (2019) (“Foreign states are also entitled to due process under the Fifth Amendment. Contemporary doctrine has lost sight of these basic principles and drawn false constitutional distinctions between foreign states, foreign corporations, and foreign state-owned corporations, putting foreign states at a constitutional disadvantage as compared to private actors, an outcome at odds with the purposes that animated Article III.”). Notably, draft legislation to allow confiscation of Russian central bank assets under United States jurisdiction limits judicial review, permitting only a claim that the action would deny rights under the United States Constitution. See S. 2003, 118th Cong. § 104(f) (2024).

In short, sovereign immunity likely protects sovereigns from measures of constraint, whether undertaken by a judicial, legislative, or executive-administrative actor.¹⁶⁶ Such measures include outright seizures of sovereign assets.¹⁶⁷ Thus, to conduct such seizures without attracting state responsibility would require the invocation of one of what the Draft Articles on State Responsibility term “circumstances precluding wrongfulness.”¹⁶⁸ As the following Subpart suggests, no such circumstance is readily invocable by Ukraine’s allies with respect to the seizure of Russia’s central bank assets. Nor can a recommendation by the U.N. General Assembly legitimize such seizures, though an authoritative international judgment arguably would.

C. (Failed) Arguments for Overcoming Sovereign Immunity

A number of legal theories have been proposed according to which the violation of sovereign immunity might be legally justified and the wrongfulness of sovereign asset seizures might be precluded. These theories typically rely on either self-defense or countermeasures, each of which falls short on doctrinal grounds.¹⁶⁹

In addition to their legal inadequacy, strategic and diplomatic considerations weigh heavily against these proposals and the asset seizures they endeavor to legitimize. Because the United States plays such a hegemonic

166. Jean-Marc Thouvenin & Victor Grandaubert, *The Material Scope of State Immunity from Execution*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 245, 247 (Tom Ruys, Nicolas Angelet & Lucas Ferro eds., 2019).

167. *See id.* at 248 (“[P]ost-judgment measures of constraint that are covered by State immunity include seizure or attachment of property It also includes seizure of property in the hands of, or debts owed to it by, a third party, such as a commercial bank or a foreign company.”); Brunk, *supra* note 157, at 1635 (characterizing “measures of execution” that “would permanently turn the Iranian central bank assets over to judgment creditors” as “measures of constraint”).

168. Draft Articles, *supra* note 18, ch. 5, cmt. (1).

169. Other justifications are conceivable, such as linking seized assets to unlawful conduct by government contractors or state-owned enterprises operating in occupied Ukraine. However, such claims would require lengthy, fact-intensive adjudication with deeply uncertain results given the difficulty of attributing private conduct to states. Furthermore, such justifications would cover only a limited subset of frozen Russian assets. *Cf.* MICHAEL J. KELLY, FEDERICA D’ALESSANDRA, DMYTRO KOVAL, MILENA STERIO & LYDIA KOROSTELOVA, PROSECUTION OF RUSSIAN CORPORATIONS FOR WAR CRIMES IN UKRAINE AS A PRECURSOR TO SEIZURE OF FROZEN CORPORATE ASSETS IN FOREIGN JURISDICTIONS 17-19, 30-32 (2024), <https://perma.cc/2DZS-JQV6> (summarizing the evidentiary challenges involved in linking foreign assets to perpetrators of war crimes and additional steps required to seize those assets post-judgment, to which the sovereign character of central bank assets would add complexity). All this may explain why Ukraine’s allies have yet to adopt such arguments.

role in the global financial system,¹⁷⁰ its sanctions can have real bite. Engaging in outright seizures of sovereign assets might advance United States interests in the short term. Yet breaking the norm of sovereign immunity risks making the United States a less hospitable investment environment, undermining the role of the dollar as the reserve currency of choice and significantly weakening its global financial and political influence.¹⁷¹

1. Seizures in self-defense

Some have proposed the invocation of self-defense, or rather *collective* self-defense, to justify the seizure of assets.¹⁷² Notwithstanding the turn away from the “notion of war as [retributive] justice” after the First World War, and given the prevailing paradigm’s allowance for defensive wars, an invaded state seeking “to force a wrongdoing sovereign to make compensatory reparations” does still benefit from the longstanding “legitima[cy]” of war waged “in defense against an aggressor.”¹⁷³ Following the principle of “collective self-defense” incorporated in the U.N. Charter,¹⁷⁴ “it is arguable that states adopting economic sanctions in support of a third party that fell victim to aggressive war should be entitled to go as far as they could if their own security was affected.”¹⁷⁵

It might seem to follow that Ukraine’s supporters could couch asset seizures or other forms of unilateral reparation as acts of collective self-defense, especially while hostilities are ongoing, without purporting to be belligerents themselves. Indeed, already “third-party countries have responded

170. Carol Bertaut, Bastian von Beschwitz & Stephanie Curcuru, *The International Role of the U.S. Dollar*, FEDS NOTES (Oct. 6, 2021), <https://perma.cc/KJ7U-4KAM>.

171. See Fareed Zakaria *GPS: Interview with Treasury Secretary Janet Yellen*, CNN (Apr. 16, 2023, 10:00 ET), <https://perma.cc/P74F-NBPC> (quoting United States Secretary of Treasury Yellen’s view that seizing frozen Russian assets could spur reluctance in nations to keep their reserves in dollars, that long-term sanctions could weaken the hegemony of the dollar as a reserve currency, and that financial sanctions are thus a tool the United States “tr[ies] to use judiciously”); see also *Why the West Should Be Wary of Permanently Seizing Russian Assets*, *ECONOMIST* (June 9, 2022), <https://perma.cc/JQ92-XTJ8> (noting that “confiscations without a clear legal footing” could “give a further incentive for countries that are not allied with America, or which have unstable relations with it, to bypass the American-led financial system”); Alan Rappeport & David E. Sanger, *Seizing Russian Assets to Help Ukraine Sets Off White House Debate*, *N.Y. TIMES* (May 31, 2022), <https://perma.cc/GJ4M-RXUL> (noting Yellen’s expression of similar views at a May 2022 news conference during which she “appeared to close the door on the United States’ ability to participate in any effort to seize and redistribute [Russian state] assets”).

172. See Moiseienko, *supra* note 153, at 727 (suggesting that “collective self-defense . . . could conceivably render confiscation lawful”).

173. Gabriella Blum, *The Crime and Punishment of States*, 38 *YALE J. INT’L L.* 57, 63 (2013).

174. U.N. Charter art. 51, ¶ 1.

175. Moiseienko, *supra* note 153, at 729.

to the war [in Ukraine] by taking or considering measures that have historically been used only by warring parties,” including “bann[ing] ‘Russian’ ships based not just on the registration of the vessel but also on the nationality of the owners,” such that “the line between peace and war has blurred.”¹⁷⁶ The ILC’s Draft Articles support this approach, with the Commentary stating that a state may invoke self-defense as a circumstance precluding wrongfulness “provided that such non-performance is related to the breach of” the obligation to refrain from the threat or use of force.¹⁷⁷ That is true even “between States formally at ‘peace’ with each other.”¹⁷⁸ Yet it is cautious to make clear that the relevant article precludes the wrongfulness of conduct of “a State acting in self-defence *vis-à-vis* an attacking State,” and it concludes somewhat obliquely that it “leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.”¹⁷⁹ The discussion does not reference collective self-defense.

There is an important limitation to any action justified under the doctrine of collective self-defense: states could not reasonably invoke it as a justification of asset seizures once the threat or use of force (whether against them or against Ukraine alone) is no longer operative.¹⁸⁰ A race to seize as many assets as possible in the meantime would not materially affect Russia’s ability to finance the invasion, since asset freezes have already deprived Russia of the ability to use them for that purpose.¹⁸¹ Perhaps most important of all, the states considering the seizure of Russia’s assets, including the United States, understandably wish to refrain from suggesting that they have entered, in their own capacity, into a state of belligerency with Russia.¹⁸² An explicit

176. Ingrid Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT’L L. 687, 695 (2022).

177. Draft Articles, *supra* note 18, art. 21, cmt. (2).

178. *Id.*

179. *Id.* art. 21, cmt. (5). Federica Paddeu offers a persuasive interpretation of Article 21 of the Draft Articles that is narrow, arguing that “Article 21 cannot justify (or excuse) the impairment of *any* and *every* right by self-defensive force.” See FEDERICA PADDEU, JUSTIFICATION AND EXCUSE IN INTERNATIONAL LAW: CONCEPT AND THEORY OF GENERAL DEFENCES 175-224 (2018).

180. The international right of self-defense allows a state to defend itself from “armed attack,” but that right is generally understood to be limited by the principles of necessity, imminence, and proportionality. Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. INT’L L. 563, 563 (2013).

181. *Cf. Why the West Should Be Wary of Permanently Seizing Russian Assets*, *supra* note 171 (arguing that, “[r]ather than resorting to asset confiscations” which do not impact Russia’s ability to fund the war, “the West must strengthen Ukraine’s war effort”).

182. See *KleptoCapture: Aiding Ukraine through Forfeiture of Russian Oligarchs’ Illicit Assets: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 10 (2022) (Statement of Adam M. Smith, Former Senior Advisor to the Director of the United States Office of Foreign Assets Control), <https://perma.cc/N5DY-AKWT> (warning of “potentially serious
footnote continued on next page”).

invocation of self-defense or collective self-defense to justify antagonistic seizures would be in tension with this delicately delineated abstention. Moreover, seizures justified by self-defense are properly used for self-defense, not reparation.¹⁸³

2. Seizures as countermeasures

Some legal scholars have argued that countermeasures doctrine can be used to permit the seizure of frozen Russian central bank assets.¹⁸⁴ But this is wrong for two key reasons.

First, “[c]ountermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations . . . namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured state.”¹⁸⁵ Yet seizures for reparations are not designed to induce compliance but rather to enjoin or force it. This puts seizures “in fundamental tension with the basic structure of countermeasures.”¹⁸⁶ Countermeasures are to be taken “with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment.”¹⁸⁷ In putting in place countermeasures, states are not to create “new situations which cannot be rectified whatever the response of the latter State to the claims against it.”¹⁸⁸ Countermeasures doctrine is premised on persuasion and thus cannot be bent to justify asset confiscation. This applies

escalatory and other collateral consequences” if the Biden administration formally determined that “the United States and the Russian Federation were in armed conflict” or “hostilities”).

183. Cf. Draft Articles, *supra* note 18, art. 21, cmt. (5) (“The essential effect . . . is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State.”).

184. See LAURENCE H. TRIBE, RAYMOND P. TOLENTINO, KATE M. HARRIS, JACKSON ERPENBACH & JEREMY LEWIN, RENEW DEMOCRACY INITIATIVE, THE LEGAL, PRACTICAL, AND MORAL CASE FOR TRANSFERRING RUSSIAN SOVEREIGN ASSETS TO UKRAINE 58 (2023), <https://perma.cc/46QU-JC2A>; Dapo Akande et al., On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia’s War of Aggression Against Ukraine 13 (2023), <https://perma.cc/GK9J-VAF7>.

185. See Draft Articles, *supra* note 18, art. 49, cmt. (1) (emphasis added).

186. Brunk, *supra* note 157, at 34 (“Using countermeasures to seize money for reparations, rather than as a measure to induce the payment of reparations, is in fundamental tension with the basic structure of countermeasures.”); Draft Articles, *supra* note 18, art. 49(1) (“An injured State may only take countermeasures against a State . . . in order to induce that State to comply with its obligations.”); Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. 7, 53 (Sept. 25) (declaring that a lawful countermeasure’s “purpose must be to induce the wrongdoing State to comply with its obligations”).

187. Draft Articles, *supra* note 18, art. 48, cmt. (6).

188. *Id.* art. 49, cmt. (7).

not only to outright seizures but also to other quasi-seizures. Seizures *force* rather than *induce* compliance. That undercuts the very *raison d'être* of countermeasures doctrine.¹⁸⁹

Second, proposals for asset seizures violate the *reversibility* requirement, according to which countermeasures must be “limited to the non-performance for the time being of international obligations of the State taking the measures” and must, “as far as possible, be taken in such a way as to permit the resumption of performance.”¹⁹⁰ As the commentary to the Draft Articles explains, “as far as possible” does not create a loophole that third-party states could exploit to justify irreversible measures but rather obliges states faced with several possible measures to select one that is reversible.¹⁹¹

A claim that lifting sovereign immunity meets the reversibility requirement might go as follows: A state in which Russian assets are located could suspend sovereign immunity as a countermeasure. With immunity lifted, the assets would then be vulnerable to seizure. When Russia’s internationally wrongful behavior ceases (the invasion of Ukraine ends and reparations paid), the countermeasure would be reversed and immunity restored. Hence, the argument might go, the countermeasure (suspension of immunity) is reversible.¹⁹²

This story, however, is too clever by half. The reversibility requirement cannot be circumvented so easily. To begin, the correct focus of the reversibility analysis is the suspension of *performance* of an obligation, not merely the suspension of the obligation in the abstract. The point of immunities is not the immunity per se but the protection of the assets that immunity provides. Lifting sovereign immunity and seizing the assets would undermine that protection even if the sovereign immunity is restored after the

189. The inducement logic that undergirds the reversibility requirement as the ICJ articulated it in *Gabčíkovo-Nagymaros Project*, see Draft Articles, *supra* note 18, art. 49, cmt. (9), helps explain why seizures that short-circuit (rather than induce) compliance likely do not qualify as countermeasures even if the assets are perfectly fungible, as some have argued. See Akande et al., *supra* note 184, at 13. The fungibility theory could have troubling consequences if accepted. Cf., e.g., DUSTIN A. LEWIS & NAZ K. MODIRZADEH, HARV. L. SCH. PROGRAM ON INT’L L. & ARMED CONFLICT, TAKING INTO ACCOUNT THE POTENTIAL EFFECTS OF COUNTERTERRORISM MEASURES ON HUMANITARIAN AND MEDICAL ACTIVITIES: ELEMENTS OF AN ANALYTICAL FRAMEWORK FOR STATES GROUNDED IN RESPECT FOR INTERNATIONAL LAW 9 (2021), <https://perma.cc/C59S-UD2Q> (noting the “detrimental impacts on humanitarian and medical activities” potentially attributable to “the fungibility theory”).

190. See Draft Articles, *supra* note 18, art. 49(2)-(3).

191. *Id.* art. 49, cmt. (9).

192. Cf. Tribe et al., see *supra* note 184, at 58-59 (arguing that the countermeasure would entail the suspension of normal relations between the two countries and that “[o]nce Russia resumes compliance with international law, that suspension would be reversed and Russia’s legal relations with G7 countries would be normalized”).

assets are taken. In short, it is the seizure of assets that must be reversible, not merely the suspension of the sovereign immunity obligation.¹⁹³

Laurence Tribe and others have argued that seizures of Russian assets can satisfy the reversibility requirement because transferred assets may either be credited to Russia's ultimate obligation to pay reparations to Ukraine (as a "down payment" of sorts) or, alternatively, "unspent assets" in excess of its reparative obligation could be repaid by Ukraine to Russia.¹⁹⁴ The claim that the transfer of frozen assets is a down payment is again a form of forced compliance, not induced compliance. And the idea that "unspent assets" will be transferred back to Russia by Ukraine is passing fanciful, not to mention that the failure to return the *spent* assets would be a violation of the reversibility requirement.

Countermeasures must be "temporary in character" and "as far as possible reversible in their effects in terms of future legal relations between the two States,"¹⁹⁵ and they must not inflict "irreparable damage on the responsible State" while in operation.¹⁹⁶ Moreover, when presented with a number of options of countermeasures, a state's choice must be informed by the reversibility requirement.¹⁹⁷ The seizure of hundreds of billions of dollars of state assets does not meet these requirements. This proposal is certainly not the

193. The Draft Articles explicitly clarify that "[w]here countermeasures are taken . . . *the underlying obligation is not suspended*, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure." Draft Articles, *supra* note 18, art. 22, cmt. (4) (emphasis added). This is also clear from the distinction the ILC draws between the suspension of treaty obligations on the one hand and countermeasures on the other. *Id.* ch. II, cmt. (4) ("Countermeasures involve conduct taken in derogation from a subsisting treaty obligation . . ."). And though a state may suspend treaty obligations under certain conditions, customary international law norms, including sovereign immunity, may not be revoked unilaterally. See Lea Brilmayer & Isaias Yemane Tesfaldet, *Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J. ONLINE 217 (2011), <https://perma.cc/A9KH-B28Z> ("[T]he *opinio juris* requirement for CIL provides that even to qualify as customary law in the first place a norm must be perceived as binding. A norm that is intended to be unilaterally revocable would not qualify . . ."). Some seizure proponents' reliance on a so-called "legal-relations conception of reversibility" is therefore misplaced. See Tribe et al., *supra* note 184, at 58-59.

194. Tribe et al., *supra* note 184, at 59.

195. Draft Articles, *supra* note 18, ch. 2, cmt. (6).

196. *Id.* art. 49, cmt. (9). *Contra* Tribe et al., *supra* note 184, at 59 (questioning whether the Draft Articles require any reversibility of the "economic effects" of countermeasures).

197. Even if, *arguendo*, seizures were "lawful and effective countermeasures," an "injured State" would still "ha[ve] a choice" of alternatives, including extended asset freezes, and thus the Draft Articles would still require the selection of "one which permits the resumption of performance of the obligations suspended," again consistent with "the duty" (not merely a "preference,") "to choose measures that are reversible" "as far as possible." Tribe et al., *supra* note 184, at 59; Draft Articles, *supra* note 18, art. 49, cmt. (9).

most reversible of the options on the table; once seized assets are transferred to Ukraine, there is no guarantee that they will ever be restored.

A group of leading international lawyers have argued that seizing Russian sovereign assets can be justified by countermeasures doctrine so long as they are transferred to an international compensation mechanism. They argue that, “by transferring assets to an international compensation mechanism, States would cause Russia to comply with its obligation to ‘make full reparation’ to Ukraine.”¹⁹⁸ That would, they argue, “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.”¹⁹⁹ So long as the assets are transferred to an international body that will preserve them, this argument stands. If, however, the compensation mechanism transfers the assets to Ukraine, then the argument fails. For as soon as assets are depleted, the power of the countermeasure to induce compliance, as well as the reversibility of the countermeasure, evaporates. Unfortunately, the proposal contemplates just such transfers, claiming, puzzlingly, that “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.”²⁰⁰ Granted, money is fungible. In theory, money that is owed could be repaid. And yet for the countermeasures to be reversible, there must be some realistic prospect that money, once dispersed, could be recovered. Here, given the amount of money at issue and the financial straits in which Ukraine finds itself, that is beyond unlikely. Transferring states are, moreover, highly unlikely to make up the shortfall if Ukraine fails to repay the transferred funds.

The argument that seizures can be justified by countermeasures doctrine, if adopted, would set a dangerous precedent, making sovereign immunity—and thus state assets—extraordinarily vulnerable the world over. It should not be forgotten that countermeasures are measures which are *otherwise illegal*, and they are only permissible if they are exercised in limited circumstances and in accordance with key conditions, including reversibility and proportionality. Aggressive invocation of countermeasures doctrine where these conditions do

198. See Akande et al., *supra* note 184, at 11.

199. *Id.*

200. *Id.* at 22. The paper argues that “both measures would be lawful if taken in response to a breach [of an *erga omnes* character] . . . ; intended to induce cessation of the wrongful conduct . . . ; if they were proportionate . . . ; and designed to terminate upon the wrongdoer’s compliance with its legal obligations . . . ; and if they were reversible.” *Id.* Given that the seizure of assets is neither intended to induce compliance nor is reversible once the assets are dispersed, it is hard to see how transfer of assets to the victim, here Ukraine, would, in fact, meet these obligations.

not hold—as in the case of seizures or confiscations—risks the very proliferation of unlawful conduct that the Draft Articles carefully sought to confine.²⁰¹

D. Why Following the Law Is in Ukraine’s Best Interests

As this Part shows, legal theories purporting to justify asset seizures are inconsistent with existing international law. Some might urge taking these steps regardless. Indeed, in late 2023, the United States and Europe floated plans to seize frozen Russian assets not for the purpose of reparations but simply to fund the war in the face of growing public reluctance to continue aiding Ukraine.²⁰² While our goal in this Article is primarily to address legal arguments, we note that there are many practical reasons for Ukraine and its allies to adhere to international law.²⁰³

In the short term, Vladimir Putin has promised reciprocal seizures of Western assets and the cessation of diplomatic relations with the United States.²⁰⁴ In the longer term, the consequences to the United States of exposing cross-border assets to reciprocal expropriations and creating instability and unease in the international economic system could be dire.²⁰⁵ In addition, seizures of Russian central bank assets might trigger a broader de-dollarization—the flight of sovereign assets out of United States jurisdiction and currency, which would decrease the potency of future United States

201. *Countermeasures in Cyberspace*, in THE OXFORD PROCESS ON INTERNATIONAL LAW PROTECTIONS IN CYBERSPACE: A COMPENDIUM 488, 501 (2022), <https://perma.cc/27DX-NLCF> (featuring discussion by NATO Legal Advisor John Swords on the importance of limiting principles for countermeasures); Draft Articles, *supra* note 18, ch. 2, cmt. (2) (“Like other forms of self-help, countermeasures are liable to abuse. . . Chapter II [of the Draft Articles] seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.”).

202. David E. Sanger & Alan Rappeport, *U.S. and Europe Eye Russian Assets to Aid Ukraine as Funding Dries Up*, N.Y. TIMES (Dec. 21, 2023), <https://perma.cc/DM4S-HT94>.

203. See Michael McFaul, Oona A. Hathaway, Maggie Mills & Thomas Poston, *Opinion, Should We Seize Russian Funds to Pay for the War in Ukraine? Commentators Weigh In.*, WASH. POST (Nov. 16, 2023, 6:00 AM EST), <https://perma.cc/9AVV-CRS5> (making related arguments).

204. Andrew Roth, *Russia Warns US and Europe over Reports Ukraine May Get Its Seized Assets*, GUARDIAN (Dec. 22, 2023, 11:04 EST), <https://perma.cc/L3T9-3A7N>; Paolo Tamma & James Politi, *Washington Puts Forward G7 Plan to Confiscate \$300bn in Russian Assets*, FIN. TIMES (Dec. 27, 2023), <https://perma.cc/77F3-VMKJ>.

205. *Cf. Why the West Should Be Wary of Permanently Seizing Russian Assets*, *supra* note 171, (“In the long run, the precedent set by confiscations without a clear legal footing would expose all cross-border assets, including Western ones, to tit-for-tat appropriation by governments.”).

sanctions regimes—while also limiting the extent to which the United States and its allies benefit from sovereign immunity in the future.²⁰⁶

For Ukraine and its allies, illegal seizures risk compromising the legal and moral narrative around which a large part of the international community has coalesced against Russian aggression—one that has so far relied on the legal legitimacy of the Ukrainian war effort and the efforts of its allies.²⁰⁷ Perhaps in the medium or long term, international law will evolve to require reparations more directly and immediately. Indeed, we believe our proposal in Part III could contribute to strengthening respect for and enforcement of the reparations obligation. By contrast, forced seizures could short-circuit that process.

Ukraine’s greatest asset in the war with Russia has been the lawfulness of its cause, the illegality of Russia’s aggression, and the consequent narrative that Ukraine has been able to build around its role as a defender of the international legal order.²⁰⁸ As voiced by Ukrainian President Zelenskyy and repeated and emphasized among Ukraine’s Western supporters, Russia’s invasion of Ukraine marks not only an attack on Ukraine’s territorial sovereignty, but on the global legal order.²⁰⁹ Paul Stephan’s formulation of the dilemma is particularly instructive:

United States policymakers should not be comfortable about flouting international law, even if the law produces a result they find repugnant. Since the end of the Cold War, United States foreign policy has presented the international rule of law as one of the linchpins of the global society that the United States wants to build. . . . [T]ransparent violation of a category of rules that the United

206. See Rappeport & Sanger, *supra* note 171 (“Ms. Yellen and others have argued that [seizing Russian Central Bank assets] could make nations reluctant to keep their reserves in dollars, for fear that in future conflicts the United States and its allies would confiscate the funds.”). Admittedly, some de-dollarization is already taking place, especially among states that are or are likely to be subject to United States sanctions. See Serkan Arslanalp & Chima Simpson-Bell, *US Dollar Share of Global Foreign Exchange Reserves Drops to 25-Year Low*, IMF BLOG (May 5, 2021), <https://perma.cc/X6A4-EC9P>; Marc Jones, *JPMorgan Flags Some Signs of Emerging De-Dollarisation*, REUTERS (June 5, 2023, 10:43 AM PDT), <https://perma.cc/VXP3-Q7UF> (explaining that, although the dollar is still the dominant currency in global markets, “[s]ome signs of de-dollarization are emerging” and are likely to persist, given efforts from “BRICS” nations (Brazil, Russia, India, China, and South Africa) “to challenge the dollar’s hegemony”). Nonetheless, the seizure of central bank assets—an act previously seen as off the table—could trigger a broader movement away from the dollar.

207. Hathaway, *supra* note 116.

208. Oona A. Hathaway, *How Russia’s Invasion of Ukraine Tested the International Legal Order*, BROOKINGS INST. (Apr. 3, 2023), <https://perma.cc/73TE-H5NG>.

209. See *Full Transcript of Zelenskyy’s Speech Before Congress*, N.Y. TIMES (Dec. 21, 2022), <https://perma.cc/N4F4-BBRV>; see also Remarks by President Biden and President Zelenskyy of Ukraine in Joint Statement, Kyiv, Ukraine (Feb. 20, 2023, 10:49 AM EET), <https://perma.cc/F9L4-PWWL> (“Right now, in Ukraine, the destiny of the international order . . . is decided.”).

States normally supports . . . undermines the ability to use international law to shape a more peaceful and prosperous world.²¹⁰

This strategic Manichaeism has proven essential to Ukraine's cause. Ukraine and its allies should not undermine that source of strength by ignoring international law when it becomes inconvenient.

More recent proposals to seize Russian assets, not for reparations, but to fund the war, are also not in Ukraine's best long-term interests. Many states are newly enthusiastic about these plans because of concerns that popular support for funding the war is waning.²¹¹ Seizing Russian assets to pay for the war appears to be an attractive alternative. And yet using the frozen assets to fund the war means that those funds will be exhausted and nothing left for reparations or rebuilding.

Unilateral seizures of Russian assets also threaten to undercut Russia's incentive to negotiate and eventually return to compliance with its international obligations to cease aggression and provide reparations.²¹² In contrast, the proposal outlined in Part III reflects a commitment to upholding both of these obligations to the international community without spurning other prevailing and longstanding norms, including sovereign immunity, in which all countries have interest for the stability of international diplomatic, cultural, and economic exchange. An extended freeze adds some moral and legal bite to the condemnation of Russia's aggression without risking further erosion of international law.²¹³

III. Countermeasures: The Way Forward for Reparations

The fact that the proposals discussed in Part II are flawed does not imply states must acquiesce in Russia's violation of its obligation to make reparation for its unlawful use of force. Indeed, inaction risks further eroding this

210. Stephan, *supra* note 125.

211. Andy Cerda, *About Half of Republicans Now Say the U.S. Is Providing Too Much Aid to Ukraine*, PEW RSCH. CTR. (Dec. 8, 2023), <https://perma.cc/2VNT-U7KQ>.

212. Cf. Nicolas Véron & Joshua Kirschenbaum, *Now Is Not the Time to Confiscate Russia's Central Bank Reserves*, BRUEGEL (May 16, 2022), <https://perma.cc/PF5F-CXZM> (“[I]f [Ukraine's supporters] confiscated the Bank of Russia's reserves now, [they] would deny themselves options that could prove valuable in terms of offering Russia a way out or gaining leverage in future negotiations. . . . In some scenarios, the possibility of returning the Bank of Russia's reserves could be a powerful bargaining chip.”).

213. One might draw a parallel to the law of sovereign immunity in the investor-state arbitral context, where *enforceability* is permitted to express legal responsibility, even as *execution* remains impermissible. See Ylli Dautaj, *Enforcing Arbitral Awards Against States and The Defence of Sovereign Immunity from Execution*, 16 MANCHESTER J. INT'L ECON. L. 389, 420 (2019) (“[E]ven if the host-state successfully invokes the shield of sovereign immunity [against execution], that does not itself equal impunity.”).

obligation's authority, leaving Russia and other aggressors with little incentive to eventually comply. If the international community is committed to upholding and giving effect to the reparations obligation, it must devise a new path forward.

This Part argues that countermeasures doctrine can mark that path. While countermeasures doctrine does not support the *seizure* of Russian funds for the immediate rebuilding of Ukraine—and thus will not entirely satisfy the demands of many Ukrainians—it does provide a vital tool for willing states to continue to hold assets frozen unless and until Russia provides reparations.

We begin by explaining how countermeasures doctrine may be used to justify freezing Russian assets. While several states have taken steps to freeze Russian assets,²¹⁴ few have offered an international legal justification for those asset freezes. Here, we provide a clear legal basis for those asset freezes. We show that current freezes can be justified as countermeasures, specifically “collective” countermeasures,²¹⁵ and also that those freezes can be kept in place even after the war is over. We argue that as long as Russia has failed to meet its obligation to provide adequate reparations, the asset freezes may remain in place. We thus argue for two novel uses of countermeasures doctrine—first, to justify asset freezes after the end of the illegal war and, second, to justify asset freezes not only by Ukraine but by third parties as well—unless and until Russia satisfies its obligation to provide reparations.

A. Countermeasures and Asset Freezes

Unlike seizing sovereign assets, using sovereign asset freezes as sanctions is a widespread state practice.²¹⁶ On one view, the law buttresses this practice, at least in the sense that asset freezes do not violate sovereign immunity. Yet there is no clear consensus on this point, leaving significant uncertainty regarding freezes' lawfulness.²¹⁷ In part, this is because although asset freezes are almost always undertaken as sanctions responsive to internationally wrongful acts,

214. *Value of Assets of the Bank of Russia Frozen due to Sanctions due to the War in Ukraine as of March 2022, by Country*, STATISTA (Apr. 11, 2023), <https://perma.cc/6MJV-JGJ8> (listing countries that have frozen assets of the Central Bank of Russia).

215. As discussed below in Part III.C.1, these countermeasures are “collective” in the sense that they are premised on violations of collective obligations, or obligations *erga omnes*.

216. See MARTIN DAWIDOWICZ, *THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW* 242-43 (2017) (noting various historical examples of sovereign asset freezes).

217. Brunk, *supra* note 157, at 1651 (“[I]t is unclear in many situations whether the measure itself (especially sanctions such as assets freezes) violates international law at all, meaning the measure might be a retorsion, not a countermeasure.”); Ingrid Brunk, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?*, *LAWFARE* (Mar. 7, 2022), <https://perma.cc/A6BM-YH6D>; see also Anton Moiseienko, *The Freezing of the Russian Central Bank's Assets*, 34 *EUR. J. INT'L L.* 1007, 1015 (2023), <https://perma.cc/D7ZY-89EP>.

states rarely label their sanctions as “countermeasures” because doing so might be seen to concede that the sanctions would otherwise be wrongful.²¹⁸ Yet, as we will explain, asset freezes may also be *prima facie* unlawful and thus require countermeasures doctrine to avoid liability for their use.

Most critically, the sovereign-equality rationale against asset seizures likely also applies to asset freezes.²¹⁹ The notion that “immunity rules do not apply” to freezes and other economic sanctions relies on the questionable executive-judicial distinction critiqued above.²²⁰ It puts state assets in the “absurdly paradoxical position of being inviolable and immune from judicial measures, but at the mercy of administrative or executive actions,”²²¹ such as freezes. This position not only leads to an absurd result, but it is not consistent with international law. The international law of sovereign immunity bars measures of constraint regardless of whether, as a matter of domestic law, they are imposed via judicial order, legislative promulgation, or executive action.²²²

The seize-freeze distinction is also slippery where privately owned assets are concerned. Both measures might violate bilateral or multilateral treaty obligations, such as those arising under a bilateral investment treaty, the World Trade Organization (WTO) Agreements, or even the Articles of Agreement of the International Monetary Fund.²²³ Other customary

218. Countermeasures doctrine precludes the wrongfulness of what would otherwise be an unlawful act. Hence reliance on countermeasures in support of a measure suggests that the measure would otherwise be unlawful.

219. Thouvenin & Grandaubert, *supra* note 166, at 247 (arguing “that the principle of ‘immunity from constraint,’” as a “consequence of . . . the principle of sovereign equality of States, covers not only pre- and post-judgment proceedings, but also all kinds of public constraint the forum State could exercise over the foreign State’s property, including those which are independent of any judicial proceedings, to the extent that it infringes the foreign State’s sovereignty”); *see also* Jean-Marc Thouvenin, *Gel des Fonds des Banques Centrales et Immunité D’exécution* [*Freezing of the Funds of Central Banks and Immunity from Execution*], in IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM 209, 215 (Anne Peters, Evelyne Lagrange, Stefan Oeter & Christian Tomuschat eds., 2015) (emphasizing that a central-bank asset freeze imposes an obstacle to the target state’s exercise of its sovereignty). Asset freezes may themselves be understood as measures of constraint. *See id.* at 214.

220. *See supra* notes 153-68 and accompanying text.

221. Tom Ruys, *Non-UN Financial Sanctions Against Central Banks and Heads of State: In Breach of International Immunity Law?*, EJIL: TALK! (May 12, 2017), <https://perma.cc/Q8UD-UGNB>; *see also* Jan-Anders Paulsson, *Sovereign Immunity from Execution in France*, 11 INT’L LAW. 673, 674 (1977) (observing that the view that “[o]nly the finalization of [a conservatory] attachment (i.e., the definitive divestment of title) should be covered by the notion of *execution* for the purposes of . . . sovereign immunity . . . has simply not been accepted”).

222. *See supra* notes 153-68 and accompanying text.

223. *See* Klaus Westrick, *The Legality of Freeze Orders and the Extra-Territorial Effect of Foreign Freeze Orders in Germany in The Light of The Iranian Events*, 9 INT’L BUS. LAW. 105, 108 (1981).

obligations could also be at issue, including the norm against uncompensated expropriation, since the practical effect of freezes, given inflation and the opportunity cost of foregone investments, is to deprive the asset owner of a not insignificant portion of the total value of the assets to which it otherwise could have access.²²⁴

These concerns sharpen with respect to asset freezes imposed over long periods of time. The U.N. Security Council “has rarely imposed targeted financial sanctions without specifying an end date or, at least, ‘a commitment to review’ the measures,” from which fact some have inferred “that coercive measures must be inherently time bound,” whether mandated by the Security Council or not.²²⁵ When asked to opine on a decade-long freeze (albeit of an individual’s assets, not a sovereign’s), the Court of Justice of the European Union noted that such temporal length might “call into question the finding . . . according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets.”²²⁶

Fortunately, unlike seizures, freezes *are* substantially reversible and can reasonably be construed as designed to induce compliance.²²⁷ Thus, countermeasures doctrine can be invoked to preclude any international wrongfulness that might otherwise attach to asset freezes, even if imposed indefinitely pending Russia’s payment of reparations.²²⁸ In other words, given

224. See Evan Criddle, *Rebuilding Ukraine Will Be Costly. Here’s How to Make Putin Pay*, POLITICO (Mar. 30, 2022, 12:11 PM EDT), <https://perma.cc/UXJ2-PP6G> (“International law permits the United States and its allies to freeze Russian assets as a countermeasure only if the assets are preserved so they can be released once Russia resumes compliance with its legal obligations. In contrast, permanently confiscating Russia’s assets . . . would constitute an illegal expropriation.”).

225. Daley J. Birkett, *Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council and States*, 20 HUM. RTS. L. REV. 502, 511 (2020).

226. Case T-85/09, *Yassin Abdullah Kadi v. Comm’n*, 2010 E.C.R. II-5234.

227. See Draft Articles, *supra* note 18, ch. II, cmt. (6) (“[S]ince countermeasures are . . . taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment . . . they are temporary in character and must be as far as possible reversible in their effects.”). Even an asset freeze may not be *entirely* reversible—a frozen asset might depreciate over time, for example. But the Draft Articles require reversibility only “as far as possible,” and in this case, asset freezes appear to be, at least among the countermeasures likely to be “effective,” the “one which permits the resumption of performance of the obligations suspended” to the greatest extent. *Id.* art. 49, cmt. (9).

228. Others have similarly concluded that asset freezes are unlawful acts for which the invocation of countermeasures is appropriate. See, e.g., Criddle, *supra* note 142 (“[T]he United States and its partners should make clear that they are using asset freezes and other economic sanctions as countermeasures.”); DAWIDOWICZ, *supra* note 216, at 224
footnote continued on next page

that asset freezes can satisfy the doctrine's procedural and substantive conditions, a state may impose such freezes—potent sanctions in their own right—without incurring any international legal liability of its own. While asset seizures fail to meet the doctrine's criteria, freezes can be undertaken as bona fide countermeasures, shielding them from accusations of unlawfulness and indeed legitimizing them as conditionally appropriate self-help.²²⁹

B. Countermeasures and Reparations

Countermeasures, including asset freezes, by definition may only be taken “against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations.”²³⁰ Crucially, a state that refuses to pay reparations it owes has failed to comply with its international obligations. Countermeasures designed to induce payment are a suitable response to that failure.

1. The legal obligation to provide reparations

Injured states have long been understood to have a claim for restitution or reparation from the state responsible for the injury.²³¹ As expressed by the International Court of Justice, it is “a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”²³² The correlative customary international obligation to provide reparations for injuries caused by internationally wrongful acts has enjoyed formal judicial recognition since at least 1928, when the Permanent Court of International Justice issued its seminal *Factory at Chorzów* decision.²³³ Likewise, the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts enshrine a responsible state's “obligation to make full reparation for the injury caused by the internationally wrongful act.”²³⁴ “Full reparation” is customarily understood to require compensation and, where possible, restitution, as well as satisfaction in the form of, for example, an acknowledgment of the wrong done

(discussing unilateral coercive measures undertaken against Syria in 2011, including the “*prima facie* unlawful freezing of assets”).

229. See Pozen, *supra* note 18, at 58.

230. Draft Articles, *supra* note 18, art. 49(1).

231. See E. DE VATTEL, 1 LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE [THE RIGHTS OF THE PEOPLE, OR THE PRINCIPLES OF THE NATURAL LAW] bk. II, ch. XVIII, § 342 (James Brown Scott ed., Carnegie Inst. of Wash. 1916) (1758).

232. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. 7, 91 (Sept. 25).

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

234. See Draft Articles, *supra* note 18, art. 31(1).

or some other “expression of regret.”²³⁵ For individuals, moreover, it is well established that where there is a violation of a right, there is a right to an effective remedy. This right is outlined in the main international and regional human rights instruments²³⁶ and elaborated upon in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²³⁷

Following the adoption of the U.N. Charter, with its fundamental prohibition on the use of force,²³⁸ the international legal norm specifically requiring reparations for violations of that prohibition has gained widespread recognition. Although “reparations as such [were] never actually paid” in any Cold War-era conflicts, warring parties frequently agreed to mutually renounce reparations, implicitly acknowledging and thereby reinforcing the default rule that such reparations would otherwise be obligatorily due.²³⁹ Elsewhere, absent bilateral agreement²⁴⁰ or a reparations mandate issuing from the U.N. Security Council,²⁴¹ states have rarely paid reparations for wrongfully waged wars.²⁴² Using countermeasures doctrine to compel reparations could help remedy this compliance gap and give effect to the virtually undisputed right of injured states—including Ukraine, following Russia’s aggression against it—to obtain reparations.

235. *Id.* arts. 34-37(2).

236. *See* G.A. Res. 217 (III) A, art. 8, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 2, ¶ 3(a), Dec. 19, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3; American Convention on Human Rights: “Pact of San José, Costa Rica” art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights art. 7, June 27, 1981, 21 I.L.M. 58; Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221.

237. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

238. U.N. Charter art. 2, ¶ 4.

239. Sullo & Wyatt, *supra* note 38, paras. 26-27.

240. *Cf.* Kidane, *supra* note 8, at 86 (describing the Ethiopia-Eritrea Claims Commission as relying upon the mutual agreement of the parties).

241. *Cf.* Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, in *WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT* 29, 29 (Timothy J. Feighery, Christopher S. Gibson, & Trevor M. Rajah eds., 2015) (discussing the creation and funding of the UNCC, by U.N. Security Council mandate, to pay claims against Iraq for its unlawful invasion and occupation of Kuwait).

242. *See supra* note 114 and accompanying text.

2. Failure to pay reparations is an “internationally wrongful act”

To give effect to its well-settled right to reparations, a materially injured state may invoke countermeasures doctrine specifically in response to a responsible state’s failure to fulfill its obligation to pay reparations owed for an internationally wrongful act. The Draft Articles suggest that the failure to pay reparations is an internationally wrongful act—either as a constituent or coterminous element of the primary wrongful act or as a violation of the secondary reparations obligation arising therefrom. Article 31 states that “[t]he responsible State is under an obligation to make full reparation,” which is the “immediate corollary of a State’s responsibility” legally independent of the “right of an injured State” to reparations.²⁴³ Given that obligation, countermeasures might justifiably be adopted to induce responsible states to make full reparation.²⁴⁴

The commentary also cites the Permanent Court of International Justice’s (PCIJ) determination, in the treaty dispute *Factory at Chorzów*, that the “obligation to make reparation” is the “indispensable complement of a failure to apply a convention.”²⁴⁵ The tribunal’s reasoning in that case indicates that the obligation to pay reparations for a breach, even if implicit, is legally equivalent to explicit treaty obligations, the violation of which would offer a virtually incontestable basis for some degree of countermeasure by the injured state.²⁴⁶ Special Rapporteur Arangio-Ruiz, in his Fourth Report on State Responsibility, similarly concluded that countermeasures could extend to “the pursuit by the injured State either of cessation of the wrongful conduct . . . or of *naturalis restitutio*, pecuniary compensation, and the various forms of satisfaction in order to erase the injurious consequences—material or moral—

243. Draft Articles, *supra* note 18, art. 31(1); *id.* art. 31, cmt. (4); *see also* ANDRÉ DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 194 (1996) (“Performance of the obligation(s) to provide reparation, including cessation, constitutes the means for the author State to discharge the responsibility incumbent upon it as a result of its internationally wrongful act. . . . The obligation to provide reparation . . . is established *ipso jure* upon the commission of the wrongful act, and a claim by the injured State is not necessary to establish the secondary legal relationships.”).

244. *See supra* note 24 and accompanying text.

245. Draft Articles, *supra* note 18, art. 31, cmt. (1) (quoting *Factory at Chorzów* (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26)).

246. *See* Ger. v. Pol., 1927 P.C.I.J. (ser. A) No. 9, at 21 (“C’est un principe de droit international que la violation d’un engagement entraîne l’obligation de réparer dans une forme adéquate. [It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.]”).

of the infringement of that relationship.”²⁴⁷ The commentary to Article 49 reiterates this conclusion.²⁴⁸

The international arbitral tribunal’s decision in *The Naulilaa Incident*, which dealt with the doctrine of reprisals (a predecessor to countermeasures doctrine), also supports the proposition that a proportional response to wrongful conduct may include reparation for the offense.²⁴⁹ This is consistent with the prevailing view that “[r]eprisals . . . must be in some proportion to the wrong done and to the amount of compulsion necessary to get reparation.”²⁵⁰

3. Causation as constraint

States may only take countermeasures to compel reparations if there is a sufficient causal nexus between the target state’s wrongful act and the injured state’s compensable damage. The ILC explicitly incorporated a causation requirement in the Draft Articles, asserting that “causality in fact is a necessary but not a sufficient condition for reparation,” since the attribution of an “injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process.”²⁵¹ Many international tribunals have observed that some injuries may be too “uncertain to be appraised” and proven, or simply “too indirect and remote to become the basis, in law, for an award of indemnity.”²⁵²

247. Gaetano Arangio-Ruiz (Special Rapporteur), *Fourth Rep. on State Responsibility*, U.N. Doc. A/CN.4/444, ¶ 3 (1992).

248. Draft Articles, *supra* note 18, art. 49, cmt. 8 (“[C]ountermeasures . . . may also be taken to ensure reparation . . .”).

249. Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (The Naulilaa Incident) (Port. v. Ger.), 2 R.I.A.A. 1013, 1026 (1928) (“La représaille . . . tend à imposer, à l’État offensé, la réparation de l’offense. [The retaliation . . . tends to impose, on the offending State, reparation for the offense.]”).

250. 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 39 (1st ed. 1905); *cf.* JUDITH GARDAM, *NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES* 49 (2004) (“Overall, it is difficult to assert with confidence in light of State practice prior to the adoption of the United Nations Charter that proportionality was ever clearly established as a requirement of legitimate reprisals. . . . It has always been assumed, however, in the post-Charter era that necessity and proportionality are an integral component of any theory justifying the resort to force, including reprisals.”).

251. Draft Articles, *supra* note 18, art. 31, cmt. (10); *see also* Patrick W. Pearsall, *Causation and the Draft Articles on State Responsibility*, 37 ICSID REV. 192, 201 (2022) (arguing that international law incorporates a concept of “proximate cause” akin to that found in the common law of tort).

252. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1931 (1941); *see also, e.g.*, Mixed Claims Commission (U.S./Germ.), Administrative Decision No. II, 7 R.I.A.A. 23, 30 (1923) (“Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects [I]ndirect losses are covered, provided only that in legal contemplation Germany’s act was the efficient and proximate cause and source from which they flowed.”).

This includes the ICJ, which in its *Bosnia v. Serbia* judgment defined “the extent of the obligation of reparation borne” according to “whether there [was] a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered.”²⁵³ The Court found that this “nexus” required “a sufficient degree of certainty” that the injury “would in fact have been averted if the Respondent had acted in compliance with its legal obligations.”²⁵⁴

The ICJ more recently addressed the question of causal nexus in *Armed Activities*, a “case of damage resulting from war,” noting that, at least “[i]n a situation of a long-standing and large-scale armed conflict . . . the causal nexus between the wrongful conduct and certain injuries . . . may be readily established.”²⁵⁵ While the same judgment concluded that generally “it falls to the party seeking compensation to prove the existence of a causal nexus,”²⁵⁶ it also emphasized that the reparation phase “call[ed] for some flexibility” in terms of the “standard of proof required.”²⁵⁷

The Security Council has acknowledged the importance of imposing a similar limiting principle on damages. The Security Council resolution establishing the UNCC extended Iraq’s liability to “any *direct* loss, damage . . . or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.”²⁵⁸ The UNCC did not necessarily interpret that provision rigidly—for example, it held Iraq liable for damage immediately caused by coalition forces’ attacks, even though the coalition’s response might reasonably have been deemed an intervening cause.²⁵⁹ Yet, in

253. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, 234 (Feb. 26).

254. *Id.*

255. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2022 I.C.J. 13, 48 (Feb. 9). *But cf. id.* (“For some other injuries, the link . . . may be insufficiently direct and certain to call for reparation. It may be that the damage is attributable to several concurrent causes, including the actions or omissions of the respondent. . . . The Court will consider these questions as they arise, in light of the facts and the evidence available.”).

256. *Id.*

257. *Id.* at 56 (“[G]iven that a large amount of evidence has been destroyed or rendered inaccessible over the years since the armed conflict . . . the standard of proof required to establish responsibility is higher than in the present phase on reparation, which calls for some flexibility.”).

258. S.C. Res. 687, ¶ 16 (Apr. 3, 1991) (emphasis added).

259. See U.N. Comp. Comm’n, Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim (the “WBC claim”), U.N. Doc. S/AC.26/1996/5/Annex, ¶ 86 (Dec. 18, 1996) (holding Iraq “liable for any direct loss, damage or injury whether caused by its own or by the coalition armed

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adopting “the criterion of ‘directness,’” the Security Council sought to require a direct causal nexus.²⁶⁰

It follows that states should also weigh causation when deciding whether a given reparations claim merits vindication by countermeasures. As with any invocation of countermeasures doctrine,²⁶¹ this calculus is initially self-judging, but it is subject to *ex post facto* evaluation by an appropriate tribunal. In the case of collective countermeasures responding to the crime of aggression,²⁶² the harm done as a direct result of the unlawful armed attacks likely renders the causal calculus relatively objective and straightforward.²⁶³

4. Sustaining countermeasures post-conflict

The issue of proximate cause does not unsettle the foregoing conclusion that a failure to pay reparations owed is itself a wrongful act that provides the basis for continuing countermeasures until satisfactory reparation is made. In accordance with Article 2 of the Draft Articles, a state commits an internationally wrongful act for so long as it engages in attributable “conduct consisting of an action or omission” that “constitutes a breach of an international obligation.”²⁶⁴ A joint reading of Articles 2 and 31 suggests that, by refusing to pay reparations duly owed, a state commits a continuing internationally wrongful act and exposes itself to countermeasures responsive specifically to the failure to repair.²⁶⁵

forces” and rejecting “Iraq’s contention that the allied air raids broke the chain of causation”).

260. Draft Articles, *supra* note 18, art. 31, cmt. (10).

261. A reflexive version of such an inquiry must be conducted, even if implicitly, in order for a state to characterize *itself* as having been directly or materially injured by a given wrongful act and accordingly to proceed with imposing bilateral countermeasures. See Mary Ellen O’Connell, *Controlling Countermeasures*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 49, 50 (Maurizio Ragazzi ed., 2005) (“[Countermeasures] are measures of self-help that allow self-judging by the victim of the alleged wrong.”).

262. See *infra* Part III.C.2.

263. Cf. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 103 (June 27) (“There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks.”). This approach would exclude, for example, reparations for damages associated with the inflated global prices of energy and agricultural goods caused by an invasion.

264. Draft Articles, *supra* note 18, art. 2.

265. If payment of reparations for a prior wrongful act constitutes an international obligation, and if a breach of an international obligation constitutes an internationally wrongful act, then omitting to pay reparations constitutes an internationally wrongful act, see *id.* arts. 2, 31, in response to which injured states may take countermeasures.

Article 12 appears to quash any lingering doubt: a breach is a breach “regardless of [the obligation’s] origin or character.”²⁶⁶ As the *Rainbow Warrior* tribunal put it, “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility.”²⁶⁷ Critically, on this theory, states may sustain countermeasures designed to compel reparations for injuries caused by the initial wrongful conduct—in this case, the conflict associated with Russia’s aggressive use of force—even after that initial conduct has ceased.²⁶⁸

C. Collective Countermeasures for Purposes of Reparation

Ukraine has already begun a domestic effort to repurpose roughly \$500 million in confiscated Russian assets to fund reconstruction.²⁶⁹ Shortly after Russia’s full-scale invasion in early 2022, the Civil Cassation Court within the Supreme Court of Ukraine decided that sovereign immunity does not protect the assets of the Russian Federation.²⁷⁰ However, because Ukraine has jurisdiction over only a small fraction of the total Russian assets frozen worldwide, Ukraine’s unilateral efforts to compel (or directly obtain) reparation have borne limited fruit.²⁷¹

Outside of Ukraine, sanctions responsive to Russia’s invasion have frozen tens of billions of dollars of property and assets belonging to Russian oligarchs,²⁷² along with assets of the Russian central bank worth an estimated \$300 billion.²⁷³ We argue here that countermeasures doctrine permits states to continue to freeze Russian central bank assets to compel reparations under a

266. Draft Articles, *supra* note 18, art. 12.

267. The Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (N.Z. v. Fr.), 20 R.I.A.A., 215, 251 (1990) (emphasis added); *see also* Draft Articles, *supra* note 18, art. 12, cmt. (4) (quoting *Rainbow Warrior* at 251).

268. Countermeasures have been used to compel reparations in at least one instance: “the downing of the KAL 007 flight by the Soviet Union and the . . . suspension of air services agreements arguably to induce the payment of reparation.” *See* Ingrid Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, 91 GEO. WASH. L. REV. 1616, 1654 (2023).

269. *See Statement by Prime Minister of Ukraine Denys Shmyhal at a Government Session*, UKR. GOV’T PORTAL (Jan. 10, 2023, 17:13), <https://perma.cc/5VU6-82PB>.

270. *The Civil Cassation Court Within the Supreme Court Reiterated Its Legal Position on the Absence of Judicial Immunity of Russia, Adding Further Arguments*, UKR. JUDICIARY (June 9, 2022, 10:47), <https://perma.cc/XPP5-S6PV>.

271. Oleksandr Vodiannikov, *Compensation Mechanism for Ukraine: An Option for Multilateral Action*, OPINIOJURIS (May 13, 2022), <https://perma.cc/2AFQ-JGM9>.

272. *See* Cosmo Sanderson, *Ukraine Pushes for War Claims Commission*, GLOB. ARB. REV. (Oct. 10, 2022), <https://perma.cc/XW8E-U4EY>.

273. *See* Moiseienko, *supra* note 153, at 721.

doctrine of collective countermeasures. Specifically, we argue that collective countermeasures can be made in response to a state's violation of an obligation *erga omnes*—that is, obligations arising “towards the international community as a whole” in the protection of which all states have a “legal interest.”²⁷⁴ Here, that test is met in light of Russia's ongoing unlawful war of aggression against Ukraine in clear violation of Article 2(4) of the United Nations Charter and the uncompensated harm that has resulted from it.²⁷⁵

1. The legal foundation for collective countermeasures

The ILC's Draft Articles disclaim any attempt “to regulate the *taking of countermeasures* by States other than the injured State.”²⁷⁶ Yet they suggest that non-injured states may invoke state responsibility—a necessary condition for the taking of countermeasures—when *erga omnes* obligations are at stake. Article 48(1), reflecting the influence of the ICJ's *Barcelona Traction* decision,²⁷⁷ establishes that “[a]ny State other than an injured State is entitled to invoke the responsibility of another State” if “the obligation breached is owed to the international community as a whole.”²⁷⁸ In addition to “cessation of the internationally wrongful act, and assurances and guarantees of non-repetition,” a state other than the injured state “may claim from the responsible State . . . performance of the obligation of reparation . . . in the interest of the injured State.”²⁷⁹ Thus, while States other than the injured state “may not demand reparation in situations where an injured State could not do so,”²⁸⁰ they *may*

274. *The Barcelona Traction, Light and Power Compnay, Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 32 (Feb. 5). In principle, an *erga omnes* requirement limits third-state involvement in disputes of a narrowly bilateral character. States may still aid a directly injured state in vindicating the latter's right to pursue countermeasures even absent a violation *erga omnes*, assuming such aid entails only per se lawful measures. Cf. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 11-12 (2005) (noting that the use of countermeasures “to secure specific forms of reparation . . . involves a range of complex issues . . . on which there is very little concrete practice”). The obligation to abstain from acts of aggression is a seminal obligation *erga omnes*. See U.N. Charter art. 2, ¶ 4; *Belg. v. Spain*, 1970 I.C.J. at 32.

275. See U.N. Charter art. 2, ¶ 4.

276. Draft Articles, *supra* note 18, pt. III, ch. II, cmt. (8) (emphasis added).

277. *Belg. v. Spain*, 1970 I.C.J. at 32.

278. Draft Articles, *supra* note 18, art. 48(1). The Draft Articles “are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.” JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 43 (2013).

279. Draft Articles, *supra* note 18, art. 48(2)(a)-(b).

280. *Id.* art. 48, cmt. (13).

invoke the responsibility of another state for an internationally wrongful act and claim reparation when “acting in the interest of the injured party.”²⁸¹

A 2022 ICJ decision involving alleged breaches of obligations *erga omnes partes* (obligations owed to all parties to a treaty)²⁸² supports the limited resort to collective countermeasures for such violations. In its judgment in *The Gambia v. Myanmar*, the ICJ found that The Gambia had “standing to invoke the responsibility of Myanmar for the alleged breaches of its obligations.”²⁸³ It rejected Myanmar’s argument that “the opposite conclusion would lead to a proliferation of disputes and raise questions concerning the entitlement of ‘non-injured’ States to claim reparation on behalf of alleged victims who are not their nationals.”²⁸⁴ Even in its much earlier *South West Africa* judgment, “perhaps the purest embodiment of the bilateralist view,”²⁸⁵ the ICJ allowed that “[s]tates may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice,” provided “that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law.”²⁸⁶

What remains unclear, however, are the steps an interested but not materially injured state may take, after having invoked another state’s responsibility, to *effectuate* its demands for cessation or reparation on behalf of the directly injured party. The Draft Articles offer little guidance on collective countermeasures, even for violations of obligations *erga omnes*. At the time of their drafting, the ILC “concluded that there was insufficient evidence in State practice to support the inclusion of a right to take third-party countermeasures.”²⁸⁷ The resulting ambiguity was apparently intentional:

[T]he ILC, wary of the implications that the recognition of such a general right could have in the preservation of the international legal order, decided not to

281. *Id.* art. 48, cmt. (12).

282. Article 48(2) treats obligations *erga omnes partes* as identical for these purposes to obligations *erga omnes*. Compare *id.* art. 48(1)(a) with *id.* art. 48(1)(b), to which *id.* art. 48(2) refers, drawing no other distinction, as “paragraph 1.”

283. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Preliminary Objections, 2022 I.C.J. 477, 518 (July 22).

284. *Id.* at 513.

285. Michael N. Schmitt & Sean Watts, *Collective Cyber Countermeasures?*, 12 HARV. NAT’L SEC. J. 373, 391 (2021).

286. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, 32 (July 18). The disjunctive suggests that states’ legal interests could derive from rules of law other than treaties, including customary norms.

287. DAWIDOWICZ, *supra* note 216, at 240 (explaining that, in the ILC’s view, “there was ‘no clearly recognised entitlement’ to resort to third-party countermeasures”).

include . . . express reference to the right of states other than the injured as defined in Article 48 to resort to countermeasures . . .²⁸⁸

Instead, while the final version of Article 54 “recognizes the right of states . . . to resort to lawful measures to ensure cessation of the wrongful act and reparation,” it notably “avoids the use of the term ‘countermeasures’ . . . while at the same time not ruling out future developments in this respect.”²⁸⁹ The historical evidence accords with the commentary to Article 22, which emphasizes that “Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State,” neither approving of nor “exclud[ing] that possibility.”²⁹⁰

James Crawford advocated the inclusion in the Draft Articles of provisions affirmatively allowing states to take countermeasures when requested by an injured State or in response to “serious breaches of obligations to the international community as a whole.”²⁹¹ Meanwhile, the provision in Article 54 allowing “indirectly affected states” to take “lawful measures . . . to ensure cessation of the breach and reparation in the interest of the injured State” seems to gesture toward the possibility of collective countermeasures, given that an interpretation of “lawful measures” as including only *prima facie* lawful measures “would render the provision superfluous.”²⁹² On this view, reading “lawful measures” to exclude countermeasures “would only restate the proposition that international law allows states to engage in non-prohibited actions.”²⁹³

These exercises in history and interpretation suggest that the ILC was unwilling to foreclose the development of custom to permit collective countermeasures. However, this analysis in itself is at best persuasive, not

288. ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* 85 (2010).

289. *Id.*

290. Draft Articles, *supra* note 18, art. 22, cmt. (6).

291. James Crawford (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility*, U.N. Doc. A/CN.4/507/ADD.4, addendum ¶ 413 (2000); see also James Crawford, Jacqueline Peel & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 982 (2001) (maintaining that Article 54's reference to “lawful measures” was intended “not to prejudice any position on the lawfulness or otherwise of measures taken by states other than the injured state in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole”).

292. Marco Longobardo, *The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes*, 23 J. CONFLICT & SEC. L. 383, 388 (2018).

293. *Id.*

dispositive, particularly in light of the non-treaty character of the Articles.²⁹⁴ Evidence of the evolution of customary international law since the Articles' adoption, considered in the following Subpart, may be more decisive.

2. Collective countermeasures in response to violations *erga omnes*

Customary international law develops from a general and consistent practice of states ("state practice") that "is accepted as law (*opinio juris*)."²⁹⁵ Both elements support the lawfulness of the use of collective countermeasures in response to violations of obligations *erga omnes* (literally "obligations owed toward all"). States have increasingly pursued a "widespread and representative affirmative" practice of adopting or supporting collective countermeasures, with only rare diplomatic protests.²⁹⁶ This pattern perhaps dispels the uncertainty the ILC claimed to face regarding collective countermeasures' status under customary international law. Especially given the support for and deployment of such countermeasures by non-Western states in recent years against Syria, a survey of state practice since the adoption of the Draft Articles "seems to support the conclusion that customary international law does permit the imposition of collective countermeasures against violations of obligations *erga omnes*," although "statements of *opinio juris* by the acting States" are "less frequent."²⁹⁷

Some such statements have, however, been made, including by developing countries. Perhaps most notably, in 1982, the Group of 77 "affirmed the legitimacy of the intensification, adoption and application of economic sanctions and other measures in the struggle against apartheid" and "emphasized the rights of developing countries, individually and collectively,

294. Compare David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 857-58 (2002) (discussing the Draft Articles' limited legal authority compared to, for example, widely adopted treaties), with CRAWFORD, *supra* note 278, at 43 (arguing that the Draft Articles are regarded as a codification of the customary international law of state responsibility).

295. United Nations International Law Commission, *Draft Conclusions on Identification of Customary International Law*, U.N. Doc. A/73/10 (2018), at Conclusion 2.

296. DAWIDOWICZ, *supra* note 216, at 242-43 (noting that (1) "Commonwealth Member States" supported "third-party countermeasures against Nigeria . . . by expressing a willingness to freeze the assets of then Nigerian Head of State"; (2) "Arab League Member States," and "a very large number of States, as members of the so-called 'Group of Friends of the Syrian People,'" supported "third-party countermeasures against Syria in the form of asset freezes against President Al-Assad and the Central Bank of Syria"; and (3) a "number of (mostly) Eastern European States" supported "third-party countermeasures," including asset freezes, against Yugoslavia).

297. Przemysław Roguski, *Collective Countermeasures in Cyberspace—Lex Lata, Progressive Development or a Bad Idea?*, in 20/20 VISION: THE NEXT DECADE 25, 32 (T. Jančárková, L. Lindström, M. Signoretti, I. Tolga & G. Visky eds., 2020). The author emphasizes that "collective countermeasures are only permissible against violations of *collective* obligations," that is, obligations *erga omnes* or *erga omnes partes*. See *id.* at 36.

to adopt such sanctions and other measures,” even absent a Security Council mandate to do so.²⁹⁸ These measures included sweeping embargoes imposed by states party to the General Agreement on Tariffs and Trade (GATT).²⁹⁹ Some states “acknowledged that the embargo violated their respective GATT obligations towards South Africa,” but none expressly invoked the exceptions in GATT Articles XIX-XXI, which might have allowed them to characterize their sanctions as “retorsion based on a treaty right.”³⁰⁰ Hence, they relied implicitly on countermeasures doctrine instead.

More recently, a decidedly “collectivist” approach appears to have taken hold in the cyber context, “broaden[ing] the notion of injured states, and therefore the availability of countermeasures.”³⁰¹ A discussion on collective countermeasures convened in 2022 under the auspices of the Oxford Process on International Law Protections in Cyberspace reached the conclusion that “[t]he legality of the resort to collective countermeasures is still hotly debated among both States and academics.”³⁰² However, within this debate, the discussion’s framing suggested two tiers of collective countermeasures, with countermeasures taken “in response to violations of *erga omnes* obligations (as in the case of Ukraine)” seen as less controversial than those “taken at the request of an injured state even absent breaches of obligations *erga omnes*.”³⁰³

298. *Sixth Annual Meeting of Ministers for Foreign Affairs of the Member States of the Group of 77*, ¶ 8, reprinted in VI THE COLLECTED DOCUMENTS OF THE GROUP OF 77, at 524, 525 (Mourad Ahmia ed., 2015).

299. See Dawidowicz, *supra* note 24, at 403-04.

300. See DAWIDOWICZ, *supra* note 216, at 116. It appears even less likely that GATT Article XXI(b)(iii)—the core national security exception—could excuse sweeping economic sanctions by distant third states following the WTO *Russia—Measures Concerning Traffic in Transit* panel report, which excluded “political or economic conflicts with other Members or states,” even if “urgent or serious in a political sense,” from Article XXI(b)(iii)’s scope, “unless they give rise to defence and military interests, or maintenance of law and public order interests.” See Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 7.74-7.75, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019). But cf. Tania Voon, *Russia—Measures Concerning Traffic in Transit*, 114 AM. SOC’Y INT’L. L. 96, 101 (2020) (noting the continued uncertainty regarding the scope of Articles XXI(b)(ii) and XXI(c), which implicate supplies for the military establishment and obligations under the U.N. Charter).

301. Schmitt & Watts, *supra* note 285, at 386. Schmitt previously rejected the permissibility of collective countermeasures, see Michael N. Schmitt, “*Below the Threshold*” *Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT’L L. 697, 731 (2014), but “[h]is position has evolved in light of the evolving threat environment and discussions with government policy-makers in many countries.” Schmitt & Watts, *supra* note 285, at 373 n.*.

302. *Countermeasures in Cyberspace*, *supra* note 201, at 490.

303. *Id.* at 491. Estonia and New Zealand have “refer[red] to asymmetries in states’ cyber capabilities to make the case for collective countermeasures” absent a violation *erga omnes*, but “others, like France, consider collective cyber countermeasures to be unlawful” in such circumstances. *Id.*; see also Miles Jackson & Federica Paddeu, *The*
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The relatively permissive view that collective countermeasures supportive of materially injured states are lawful even absent a violation *erga omnes*³⁰⁴ has been criticized as an invitation to “international vigilantism.”³⁰⁵ If empowered to use collective countermeasures to respond to an “international crime” without having directly incurred an injury, states might “tak[e] action against each other” in “bad faith” and “invok[e] their remedial rights . . . to cloak their behavior with a spurious legality.”³⁰⁶ That said, one might fear similar abuse, if only to a lesser degree, of states’ fairly settled prerogative to deploy *first-party* countermeasures. At the same time, a prohibition on collective countermeasures might impose its own costs by “depriv[ing] states of opportunities to engage together on their shared governance project” in order “to rally behind the violated norms and to insist that these norms apply equally to all states.”³⁰⁷ As some scholars and developing states complained during negotiations over the Draft Articles, “bilateral countermeasures strongly favour States that are more powerful.”³⁰⁸ Without resort to collective countermeasures, then, the “conditions of *de facto* inequality prevailing in the

Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures? 3-4 (2023) (unpublished manuscript), <https://perma.cc/7MVB-AKM3> (contrasting the well-established if still “somewhat controversial” idea that “[s]tates can resort to countermeasures where the obligation breached is owed to the international community as a whole” with the “more original and striking claim” that a state other than an injured state may take countermeasures “even where the obligation breached by the wrongdoing [s]tate is a *bilateral* obligation”).

304. See, e.g., *Countermeasures in Cyberspace*, *supra* note 201, at 524 (“A permissive view . . . would enable smaller states to seek the aid of stronger states . . . in order to enforce violations that would otherwise go unremedied Equally important is the expressive function of affirming collective commitment to the primary rules at stake, and signaling that future violations . . . will incur predictable and proportionate costs.”).
305. See D.N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT’L L. 151, 201-02 (1988).
306. *Id.*
307. Monica Hakimi, *Constructing an International Community*, 111 AM. J. INT’L L. 317, 349 (2017); cf. PATRICK BUTCHARD, THE RESPONSIBILITY TO PROTECT AND THE FAILURES OF THE UNITED NATIONS SECURITY COUNCIL 199-200 (2020) (identifying nonforcible collective countermeasures as an alternative to unilateral, forceful intervention pursuant to the “responsibility to protect” in the context of a breach of an obligation *erga omnes*).
308. Dawidowicz, *supra* note 24, at 336-37, n.17 (collecting citations to scholarly commentators and governments holding this view); see also U.N. GAOR, 47th Sess., 29th mtg., ¶¶ 58-59, 62, 70, U.N. Doc. A/C.6/47/SR.29 (Nov. 5, 1992) (documenting the views of Cuba, Algeria, and Pakistan “that powerful or rich countries could easily enjoy an advantage over weak or poor countries in the exercise of” countermeasures and that a “fail[ure] to take into account the *de facto* inequalities between States would only give legal sanction to a practice which was questionable to say the least, particularly as there was no supranational authority capable of remedying the situation”).

international community” are likely to “effectively leave many of the most serious breaches without redress.”³⁰⁹

Fears of rapidly proliferating unlawfulness of the kind the ILC’s Draft Articles sought to prevent underscore the importance “of distinguishing the use of [collective] countermeasures . . . in response to violations of obligations *erga omnes*” from those adopted “absent *erga omnes* violations.”³¹⁰ Requiring a violation of obligations *erga omnes* sets a “sensible guardrail” on the use of collective countermeasures, helping to prevent a spiral of reprisal.³¹¹ Uses of collective countermeasures that meet this requirement would also by that token be distinguishable from the purported countermeasures that the ICJ rejected in *Nicaragua*. There, the Court found that “[t]he acts of which Nicaragua [was] accused,” which were not sufficiently grave to qualify as violations *erga omnes*, “could not justify counter-measures taken by a third State.”³¹² When considering the adoption of the Draft Articles, some members of the U.N. General Assembly similarly viewed “a serious breach of an essential obligation owed to the international community” as “the only exception” allowing “any State to take countermeasures at the request of any injured State.”³¹³ This view enjoyed “overwhelming support” among commentators and governments in the years following the Draft Articles’ adoption.³¹⁴

3. Collective countermeasures to compel reparations

Assuming that materially injured states may use countermeasures to compel reparations, collective countermeasures for the same purpose appear permissible under countermeasures doctrine as it has developed over the last two decades, provided that the failure to pay reparations arises from a

309. Davidowicz, *supra* note 24, at 337. *But see* Federica Paddeu, 77 CAMBRIDGE L.J. 427, 429 (2018) (reviewing MARTIN DAWIDOWICZ, *THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW* (2017)) (“Arguably, third-party countermeasures (like countermeasures more generally) can be (and have been) used as political tools by the powerful to oppress, and bend the will of, the weak.”).

310. *Countermeasures in Cyberspace*, *supra* note 201, at 501.

311. *Id.*

312. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 127 (June 27); *see also* Schmitt & Watts, *supra* note 285, at 391 (underscoring that *Nicaragua* “cannot be read as unequivocally rejecting peaceful countermeasures undertaken by a non-injured state, in support of an injured state and at the clear request of the latter”).

313. U.N. Secretariat, *Rep. of the International Law Commission on the Work of its Fifty-Second Session (2000): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Fifty-Fifth Session*, ¶¶ 179-81, U.N. Doc. A/CN.4/513, (Feb. 15 2001), <https://perma.cc/D4HA-M5MZ>.

314. *See* DAWIDOWICZ, *supra* note 216, at 269 & n.191 (citing scholarly and ILC commentary to support this dominant doctrinal view).

violation of an obligation *erga omnes*.³¹⁵ Certainly, the core objective of collective countermeasures “must be to bring a stop to conduct constituting a persistent breach of a multilateral obligation,” but it also “might be accepted that if the injured state . . . do[es] not obtain the reparations they are entitled to,” non-injured states may impose countermeasures “aimed at stopping the ongoing failure to meet the obligation to make reparations.”³¹⁶

The ICJ has described obligations *erga omnes* as obligations arising “towards the international community as a whole,” in the protection of which all states have a “legal interest.”³¹⁷ Meanwhile, *jus cogens* or peremptory norms are those which are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”³¹⁸ States’ frequent failures to pay reparations may suggest that the obligation to do so does not qualify as *jus cogens* under this stringent test. That said, the fact that the reparations obligation is not *jus cogens* is not necessarily dispositive of its *erga omnes* status.³¹⁹ Scholars appear to disagree as to whether these two categories are coextensive.³²⁰ However, the view that they do coincide appears to rest on the notion that they both “aim at the same result, that is, to prevent States from freely disposing of, and disregarding, values safeguarded by international customary rules” as “an interest of the whole international community.”³²¹

The ICJ has recognized numerous obligations *erga omnes* the violation of which arguably causes no direct injury to any state at all, including obligations

315. Cf. TAMS, *supra* note 274, at 11-12 (noting that the use of countermeasures “to secure specific forms of reparation . . . involves a range of complex issues . . . which international lawyers have only begun to address, and on which there is very little concrete practice”).

316. Christian Dominicé, *The International Responsibility of States for Breach of Multilateral Obligations*, 10 EUR. J. INT’L L. 353, 363 (1999).

317. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 32 (Feb. 5).

318. Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331 (May 23, 1969).

319. Pierre-Marie Dupuy, *Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of ‘Obligations Owed to the International Community as a Whole,’* 23 EUR. J. INT’L L. 1059, 1063 n.13 (2012) (noting that while “all peremptory norms of international law are *erga omnes* . . . the reverse is not true”).

320. Compare *id.* with Antonio Cassese, *The Character of the Violated Obligation*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 415, 416-18 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010) (“[I]t appears that in fact—from the point of view of State responsibility—the distinction between the two categories (*erga omnes* obligations deriving from customary international rules, and obligations deriving from peremptory norms) is without merit.”); see also A.J.J. de Hoogh, *The Relationship Between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective*, 42 AUSTRIAN J. PUB. & INT’L L. 183, 193 (1991) (“[T]he Court in the *Barcelona Traction Case* . . . is usually interpreted as referring to norms of *jus cogens*.”).

321. Cassese, *supra* note 320, at 418.

that “derive . . . from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”³²² Ultimately, qualification of an obligation as *erga omnes* (or not) rests on “the importance of the rights involved”³²³ and the contravention of every State’s interests in upholding those rights and the values they embody.³²⁴ In any case, “[s]ince all States are injured States in case an international crime is committed, it follows that their protests will also reaffirm their right to demand reparation.”³²⁵ By the same token, all states are “entitled” to “support any claim for reparation made by another State (especially a directly injured State)” in the wake of an violation *erga omnes*.³²⁶ Hence, a state materially injured by an *erga omnes* violation is not the only state that may put in place countermeasures to compel reparations; all states may support reparations through collective countermeasures.

More recently, in its 2019 Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the ICJ reiterated that, because “respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right.”³²⁷ In *Chagos*, the Court emphasized both the United Kingdom’s “obligation to bring to an end its administration of the Chagos Archipelago” and the obligation of all states to “co-operate with the United Nations to complete the decolonization of Mauritius.”³²⁸ The distinction drawn between these two obligations seems incongruous with the view that the international community’s legal interests and the responsible state’s original *erga omnes* violation (in this case, the act of colonization) are precisely coextensive, such that the former is entirely extinguished when the latter ceases. Indeed, in addition to the United Kingdom’s obligation to decolonize, the ICJ also noted in *Chagos* that the General Assembly (not the United Kingdom alone) ought to address “the resettlement on the Chagos Archipelago of Mauritian nationals,”³²⁹ which the

322. Belg. v. Spain, Judgment, 1970 I.C.J. 3, 32.

323. *Id.*

324. *But cf.* TAMS, *supra* note 274, at 117-18 (noting that the Court’s jurisprudence is inconclusive and not transparent with respect to how an obligation is validly qualified as *erga omnes*). For more on *erga omnes* and *erga omnes partes* obligations, see Alaa Hachem, Oona A. Hathaway & Justin Cole, *A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing*, COLUM. J. TRANSNAT’L L. (forthcoming 2024).

325. DE HOOGH, *supra* note 243, at 148.

326. *Id.* at 148, 158.

327. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, 139 (Feb. 25).

328. *Id.*

329. *Id.*

United Kingdom had previously “decided against” for reasons of cost.³³⁰ By analogy, one might recognize the international community’s ongoing, collective interest not only in Russia’s cessation of aggression (comparable to the ending of colonial administration in *Chagos*) but also in Russia’s payment to Ukraine of reparations (akin to the *complete* decolonization, including *resettlement*, recognized in *Chagos* as a matter of concern for the entire U.N. General Assembly).³³¹

4. Conditions for the lawful application of collective countermeasures

Maintaining the proportionality of collective countermeasures will require cooperation, even if only to reach a collective agreement on the quantum of compensation or other reparation due. If numerous states join in deploying collective countermeasures,³³² the cumulative impact may be disproportionate to the severity of the violation *erga omnes* to which they respond, even if each individual state’s countermeasures are individually proportional to the injuries that the violation caused.³³³ After all, the requirement that countermeasures be proportional still holds, even if multiple states participate. This coordination challenge is mitigated when the collective measures to be taken are clearly defined by a judicial decision or Security Council resolution. On the other hand, it becomes particularly troublesome when “the involved states . . . have to determine for themselves whether the conditions for the applicability of a circumstance precluding wrongfulness have been met,”³³⁴ including the condition of proportionality in the case of countermeasures doctrine.

With respect to collective countermeasures undertaken to compel reparation, countermeasures should adhere to the general principle of law

330. *Id.* at 127.

331. See Yoshifumi Tanaka, *The Legal Consequences of Obligations Erga Omnes in International Law*, 68 NETH. INT’L L. REV. 1, 28 (2021) (noting the General Assembly’s subsequent resolution intended to fulfill its obligations under the *Chagos* opinion).

332. *But cf.* DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 98 (2007) (“[A]n undistributed duty . . . to which everybody is subject is likely to be discharged by nobody.”).

333. The requirement of proportionality is expressed in Draft Articles, *supra* note 18, art. 51 (“Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”).

334. Helmut Philipp Aust, *Circumstances Precluding Wrongfulness*, in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 169, 178-79 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

prohibiting “double recovery.”³³⁵ As expressed in *Factory at Chorzów*, “the same compensation” may not “be awarded twice over.”³³⁶ Likewise, the Draft Articles make clear that the “obligation to compensate is limited by the damage” caused by the responsible state’s wrongful act.³³⁷ That material damages are at least conceptually quantifiable suggests that they might serve as a relatively objective metric by which to assess the proportionality of collective countermeasures taken to compel reparation, though in assessing proportionality, “questions of principle arising from the alleged breach” are also “essential.”³³⁸ Maintaining proportionality is likely to require some degree of cooperation among the states applying collective countermeasures, even if only to reach collective agreement on the amount of compensation or other reparation due, or the methodology to be used in the assessment thereof.³³⁹ Maintaining proportionality likely requires coordinating not only how much reparation is due but also what countermeasures individual states will take in an effort to compel compliance with the reparation obligation. Such coordination is best achieved through an international mechanism established for that purpose, as discussed in Part IV below.

D. Implications and Drawbacks of Relying on Countermeasures

Relying on countermeasures—and especially collective countermeasures—to secure reparations has drawbacks. First, relying on countermeasures, whether first-party or collective, requires giving up on gaining reparations until the state against whom the countermeasures are used agrees to comply.³⁴⁰ In the interim,

335. Pierre d’Argent, *Reparation, Cessation, Assurances and Guarantees of Non-Repetition*, in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 208, 240 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

336. *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 59 (Sept. 13).

337. Draft Articles, *supra* note 18, art. 47, cmt. (9); *see also id.* art. 36 (“The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”).

338. Air Service Agreement of 27 March 1946 Between the United States of America and France, *supra* note 19, at 443 ¶ 83 (Dec. 9, 1978).

339. *Cf. Countermeasures in Cyberspace*, *supra* note 201, at 502 (“Some participants were of the view that the proportionality requirement may entail a duty of cooperation in the sphere of collective countermeasures.”). The seizure or transfer of Russian assets—the wrongfulness of which countermeasures doctrine is unlikely to preclude—would exacerbate the coordination challenge, although the Allies’ reparations mechanism after the Second World War offers a model for allocating such assets pursuant to a predetermined reparations balance. *See* Buxbaum, *supra* note 51, at 325-26 & n.7 (describing “the Paris Agreement’s distribution arrangements,” including a system of “credits” for the “German external assets” each country seized in its territory).

340. Our proposal does not preclude donor-provided funds, which have played a pivotal role in aiding recovery and funding limiting reparations in numerous instances of intrastate
footnote continued on next page

the use of extended countermeasures to induce reparations still promises at least one important benefit: By increasing the likelihood of reparations and thus potential creditors' expectations of repayment, extended asset freezes to induce reparations may allow victim states like Ukraine to borrow funds for reconstruction at lower interest rates.³⁴¹ Ultimately, of course, a determined adversary may *never* pay reparations, choosing instead to allow the assets to remain frozen indefinitely. Indeed, Russia may have already written off the frozen assets and thus may not be motivated to come to the table by the continued retention of those assets. That is, we acknowledge, a real cost to this approach. As we explain below, however, we think it has offsetting benefits.

There is a second concern about relying on countermeasures in the way suggested earlier in this Part—and that is that it envisions expanded use of countermeasures, especially collective countermeasures, in ways that could have ramifications beyond the Russia-Ukraine conflict and beyond reparations altogether.

There has been a longstanding debate about the legality of collective countermeasures. As noted earlier, the ILC did not weigh into that debate, choosing instead to remain agnostic on the legality of collective countermeasures.³⁴² If adopted by the United States and other major players in the global economy, the approach outlined here would be seen as an endorsement of collective countermeasures. One might expect them to be used more often by states as a result.

That could be a positive development. After all, countermeasures are a decentralized means of international law enforcement. The use of collective countermeasures to enforce obligations *erga omnes* takes what is sometimes a weakness of international law—the absence of a central trans-substantive enforcement authority—and flips it on its head, empowering *every* state to become the enforcement authority. But that can be dangerous, too. Recall that

conflict. The case of Sierra Leone provides a relevant example, where international donations made modest reparations possible, even though the Special Court for Sierra Leone did not explore restitution in its judgments. See EVA OTTENDÖRFER, PEACE RSCH. INST. FRANKFURT, *THE FORTUNATE ONES AND THE ONES STILL WAITING: REPARATIONS FOR WAR VICTIMS IN SIERRA LEONE 14-16* (2014), <https://perma.cc/UMU6-8Z6Z>; see also EVANS, *supra* note 79, at 184 (“The Special Court . . . has so far failed to even explore aspects of restitution in its judgments.”). Given its much vaster scale, the Russian invasion of Ukraine presents more difficult financial and moral questions to would-be international donors. Here again, lessons from the approach after the Second World War are instructive, including the value of marshaling resources on an *ex gratia* basis, though such donations fall short of true moral satisfaction in terms of Russia’s just deserts.

341. This is, in effect, the same *kind* (albeit a lesser degree) of benefit as if the assets were promised as bona fide collateral, subject to seizure upon default. As explained above at note 136 and the accompanying text, a full-blown collateral approach would be unlawful and not qualify as a countermeasure.

342. See *supra* Part III.C.1.

countermeasures doctrine is needed only because the actions that states are contemplating taking in response to an internationally wrongful action are *themselves* otherwise unlawful actions. Countermeasures doctrine effectively allows each state to do a wrong in response to a wrong. Limiting lawful countermeasures to the state directly harmed thus has benefit of keeping the unlawful measures from spiraling out of control. Once *every* state can justify its own lawbreaking as a countermeasure, the system is almost destined to descend into lawlessness.

Countermeasures (and collective countermeasures) need not be limited to actions such as asset freezes. Countermeasures typically entail economic sanctions of various forms (for example, tariffs or restrictions on imports and exports), but they need not be so limited. A countermeasure can involve suspending any of the thousands of international legal obligations that most states owe to other states, as long as the measure meets the constraints on countermeasures, including proportionality and reversibility. Consider, for example, one of the classic examples of countermeasures: the refusal by the United States to allow French flights involving a “change of gauge” to land in the United States as long as France prohibited such flights to land in France.³⁴³ And while in-kind countermeasures are preferred because proportionality is easier to ensure, countermeasures need not necessarily be in-kind as long as they are proportional. This flexibility is what makes countermeasures doctrine so powerful—and potentially dangerous.

Despite these risks, there are reasons for cautious optimism. First, the version of collective countermeasures envisioned here is limited to obligations *erga omnes*. Relatively few international legal obligations meet this high standard.³⁴⁴ Second, countermeasures doctrine requires that any countermeasure be reversible.³⁴⁵ Hence, if states do engage in unlawful behavior to bring another state into compliance, they are expected to do so in ways that can be promptly reversed. And countermeasures doctrine requires proportionality.³⁴⁶ That means states cannot take disproportionate responses, whether individual or collective, in response to an unlawful action.

We acknowledge that collective countermeasures are still largely untested, and therefore there is little agreement as to how states acting collectively can ensure that their responses are proportional to the original harm done. Below, we propose institutionalizing a system for collective countermeasures in support of reparations for Ukraine precisely to address many of the concerns

343. See *supra* note 19 and accompanying text.

344. See MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 217 (1997) (underscoring the ICJ’s “dictum that obligations *erga omnes* are few”).

345. See *supra* Part II.C.2.

346. Draft Articles, *supra* note 18, art. 51.

that might arise if collective countermeasures are used in the way proposed here, including concerns about proportionality. Institutionalizing collective countermeasures in this way would help ensure that the effort to obtain lawful reparations is not used to justify rampant illegality. It would also create a structure for addressing reparations in the future—and perhaps offer an example that could be followed by other efforts to use collective countermeasures, whether in response to a cyber operation, environmental threat, or other act of international illegality for which a collective response might be justified.

IV. A Proposal for Realizing Reparations in Ukraine and Beyond

Part of the potency of collective countermeasures as a method of compelling reparations is that this approach does not, as a legal matter, require the formal imprimatur of any multilateral institution or international tribunal. Nor must these measures necessarily involve numerous states. Even a single state can take “collective” countermeasures when it acts to compel reparations on behalf of another, materially injured state.³⁴⁷ However, as this Part will argue, institutionalization could imbue collective countermeasures—which might otherwise remain the narrow prerogative of economically powerful nations—with greater moral force by plausibly linking the measures to the will of a broader coalition of states. In addition to its potent symbolism, the involvement of an international institution like the U.N. General Assembly would increase the legitimacy and efficacy of the collective countermeasures framework. That would, in turn, facilitate the replicability of collective countermeasures to realize reparations in a range of circumstances involving state violations of obligations *erga omnes*.

A. A Proposal for Institutionalizing Collective Countermeasures

We propose that the General Assembly lay the groundwork for a reparations system by establishing an international registry of frozen assets. Article 14 of the U.N. Charter empowers the Assembly to “recommend measures for the peaceful adjustment of any situation . . . which it deems likely to impair the general welfare . . . including situations resulting from a violation of the provision of the present Charter.”³⁴⁸ Using this authority, the General Assembly could recommend the creation of a registry of frozen assets, to be

347. *See id.* art. 48, cmt. (12); *supra* Part III.C.1.

348. U.N. Charter art. 14 (emphasis added). The marginal cost of institutionalizing reparations could simply be borne by the United Nations or a subset of its members, or added to the balance of reparations owed. This was the approach used with respect to the escrow fund for UNCC. *See* S.C. Res. 778, ¶ 5 (Aug. 26, 1992).

made available for the payment of claims. That registry could serve to gather and organize funds, clarifying the value, status, and location of frozen assets. That information could inform future negotiations and create pressure on Russia to comply with its international obligations.

The frozen assets registry could be established through an agreement between the United Nations and consenting states. To accomplish this, the United Nations General Assembly would pass a resolution requesting the Secretary-General negotiate an agreement with the governments of any interested state or group of states.³⁴⁹ Because the General Assembly has no compulsory powers, it could not compel states to participate in the registry. It could, however, establish a registry available for voluntary participation by any state; the United Nations could then enter into an international agreement with participating states that would then have binding force.³⁵⁰ That agreement could specify that states registering frozen assets agree to either transfer those assets to a future U.N.-approved authority to fund a reparations mechanism after the war, or to unfreeze the assets upon a U.N. determination that Russia has otherwise satisfied its reparations obligation. It could also provide that participating states agree to cooperate with the ICC and other international justice mechanisms, should compensation be awarded through the prosecution of crimes committed during the war.

This frozen asset registry would exist alongside the new Register of Damage already established by the Council of Europe after a General Assembly resolution supported its creation in late 2022.³⁵¹ The damage registry backed by most of the Council of Europe's member states and the European Union³⁵²

349. The vote would require a two-thirds majority of the members present and voting. U.N. GEN. ASSEMBLY, RULES OF PROCEDURE OF THE GENERAL ASSEMBLY, at 23, U.N. Doc. A/520/Rev.17 (2008). Such resolutions are not subject to a Security Council veto. We acknowledge that a favorable General Assembly vote is far from a foregone conclusion. However, the favorable vote of the General Assembly to establish a registry of claims is suggestive that a similarly positive vote could be obtained for a registry of frozen assets.

350. For an example of an agreement between the United Nations and a member state, see, for example, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117.

351. See G.A. Res. ES-11/5, *supra* note 6, ¶ 4.

352. See Council of Europe Comm. of Ministers, *supra* note 7. As earlier announced, the Netherlands has agreed to host the registry at the Hague. See *Mizhnarodnyy Reyster Zbytktiv, Zavdanykh Ukraini Rosiys'koju Ahresiyeyu, Bude Roztashovanyu u Haazi (Mizhnarodnyy Reestr Zbitkiv, Zavdanih Ukraini Rosiys'koju Agresieju, Bude Roztashovanyy u Haazi) [The International Register of Damages Caused to Ukraine by Russian Aggression Will Be Located in the Hague]*, MINISTERSTVO YUSTYTSIYI UKRAYINY (MINISTERSTVO YUSTIYI UKRAINI) [MINISTRY OF JUST. OF UKR.] (Feb. 17, 2023), <https://perma.cc/4FKX-UDZJ>.

will doubtlessly inform any future negotiations with Russia regarding its reparative obligations. The General Assembly has previously established a damage registry as a subsidiary organ, pursuant to the ICJ's advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.³⁵³ The United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory records damages arising from the construction of the separation wall by Israel in the Occupied Palestinian Territory.³⁵⁴ A registry of frozen assets, while distinct from a registry of damages, entails similar functions.³⁵⁵ Once a frozen assets registry is established, the U.N. would be better situated to structure the details of a compensation mechanism, having a view of not only the scale of the damages, but also the potential funding available to redress them.

This proposal would make it possible to monitor compliance with the countermeasures doctrine under international law. As funds would not be disbursed until conditions of Russia's consent have been met, the reversibility requirement of countermeasures doctrine would be satisfied. The institutional structure would also address the proportionality concerns raised by collective countermeasures,³⁵⁶ centralizing asset freezes in a visible registry, measured against the quantum set by the damage registry, would assuage concerns that countermeasures against Russia could grow disproportionately to the damage wrought against Ukraine.

B. The Advantages of Institutionalizing Collective Countermeasures

1. Strengthening the effectiveness and legitimacy of collective countermeasures

Aggregating frozen assets resulting from collective countermeasures under the auspices of the United Nations would improve the chances of success by organizing and aligning the individual efforts of many nations, lowering the transaction costs for Russia to engage in negotiations for reparations by

353. See G.A. Res. ES-10/15 (Aug. 2, 2004); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 198, 201-02 (July 9).

354. G.A. Res. ES-10/17, ¶ 3(a) (Jan. 27, 2007).

355. Like a damages registry, it would rest in part on powers granted in Articles 7 and 22 of the U.N. Charter. See U.N. Charter art. 7 ("Such subsidiary organs as may be found necessary may be established in accordance with the present Charter."); *id.* art. 22 ("The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.").

356. See *supra* Part III.C.4.

making the United Nations the central locus of the process, and improving the legitimacy of the process by reducing politicization.

Introducing the organizing force of the General Assembly into the countermeasures effort against Russia would transform what promises to be a long and high-pressure period of holding assets from an individual state effort into a collective one. Considering the dizzying array of legal theories and approaches to the freeze-to-seize problem, it appears unlikely that nations will reach a consensus regarding how long to extend the freezes and whether, or under what circumstances, they should either conclude the freezes or seize the assets for Ukraine's benefit. Aggregating information regarding frozen assets in a registry would strengthen the global commitment to a particular theory of collective countermeasures, with the potential additional benefit of relieving internal political pressure to either end the freezes before Russia complies or violate international law and seize the assets.³⁵⁷

Organizing all of the collective countermeasures under a central authority would also clarify the stakes for Russia, increasing the likelihood of cooperation. Collecting Russia's assets under a central institution increases the incentive to negotiate with that entity. Negotiating with a central institution would reduce transaction costs and assure Russia that it would not have to negotiate individually with each state that holds frozen assets. A collective, moreover, would wield more bargaining power than would individual nations.³⁵⁸ A central institution can promise an end to the full range of sanctioning freezes, creating a significant incentive to arrive at a negotiated agreement.³⁵⁹

Establishing a registry of frozen assets and monitoring them through a central international authority would also reduce the likelihood of assets being drained due to corruption. This is particularly important in the context of

357. Aggregating countermeasures could prevent a "race to the bottom" scenario, where no nation wants to accept the risks of either disbursing, releasing, or maintaining Russian sovereign assets without assurance that other states will also do so. This is a commonly observed collective action challenge, making the intervention of international institutions particularly useful. Simon Caney, *Cosmopolitan Justice and Institutional Design: An Egalitarian Liberal Conception of Global Governance*, 32 SOC. THEORY & PRAC. 725, 735 (2006).

358. The frozen assets are estimated to be around \$300 billion. See Moiseenko, *supra* note 153, at 721. The damage to Ukraine was already over \$400 billion in March 2023. See Knickmeyer, *supra* note 4.

359. See, e.g., Buchheit & Stephan, *supra* note 8 (noting that proposed draft legislation in the United States Congress permitting unilateral confiscation of frozen Russian assets could complicate negotiations processes); see also *id.* (explaining (1) that Russia may prefer to hold out until the fate of its assets has been determined in each jurisdiction; (2) that "[t]his dispute could not take place, however, if the assets were to pass to an entity that could spend the money only on reparations"; and (3) that the condition in (2) "would be satisfied if the recipient of the funds were a body or facility created by an international agreement that clearly limits what the body could do with the funds.").

Ukraine, which has a history of government corruption.³⁶⁰ The increased visibility of frozen assets would make the misappropriation of those assets more difficult. And creating a centralized institutional structure as a foundation for a future claims process would make it more likely that claims payments would be carefully monitored. That, in turn, should encourage more states to participate in supporting the process since they would have greater assurances that funds would end up in the hands of those entitled to them. Finally, institutionalizing the collective countermeasures against Russia would improve the legitimacy of those actions. Particularly because collective countermeasures against Russia were taken largely by wealthy elite G-7 nations, who are among Russia's most ardent geopolitical opponents under regular circumstances, they may be criticized as merely pretextual attempts to land a blow against Russia rather than a legal and legitimate response to a violation of *erga omnes* obligations. Aggregating assets under a General Assembly registry with agreed conditions that no expropriations or seizures would be made against the assets without Russian consent would lend legitimacy to the countermeasures effort against Russia, taking them out of the realm of political or national security-motivated decisions of the few and instead vesting in them the judgment of a broad coalition. Because this transferral includes the promise that nations not make use of frozen assets to achieve individual political objectives, it would strengthen the legitimacy of the continued freezing of Russian state assets.³⁶¹

2. Democratizing countermeasures

The idea of a special status granted to the "Great Powers" of the United Nations is as old as the Charter itself. The enormous power of the Great Powers, who are permanent members of the Security Council following World War II, was justified by them in part based on the great responsibilities that they bore to establish and maintain global peace and security.³⁶² There was widespread acknowledgment, even among critics of the Charter's institutional design, that the permanent members had earned a special status

360. See Thomas de Waal, *Fighting a Culture of Corruption in Ukraine*, CARNEGIE EUR. (Apr. 18, 2016), <https://perma.cc/TD27-V33X>.

361. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 560 (1993) (noting that collective legitimation limits the extent to which particular actors can impermissibly pursue their individual agendas).

362. See U.N. Conference on International Organization, *Fourth Meeting of Commission III*, at 108, U.N. Doc. 1149 III/11 (Vol. XI) (June 20, 1945); see also U.N. Conference on International Organization, *First Plenary Session*, at 139, U.N. Doc. 15 P/3 (Vol. I) (Apr. 26, 1945) ("[T]he greater the power any State commands, the heavier its responsibility to wield its power with consideration for others.").

within the organization by virtue of their role in establishing the peace.³⁶³ And yet the permanence of that control, far past a time when the permanent five members' role in the world might be said to justify it, has become a source of discontent and criticism of the United Nations.³⁶⁴

There is no perfect overlap between the permanent members of the Security Council and the elite club of nations now in possession of frozen Russian state-owned assets. Russia is, after all, both a permanent member of the Security Council and a target of the asset freezes. And yet, the dynamic of concentrated power among a global elite continues. While there is limited information about the location of frozen central bank assets, it appears that the majority are in the European Union, particularly Brussels, with more limited amounts located in China, Japan, the United States, Australia, and Canada.³⁶⁵ Many of these nations also wield outsized power by virtue of their financial status. Centralizing power in the hands of the global financial elite, especially

363. Despite some apprehension about the unanimity requirement, the permanent special status granted to the “Great Powers” of World War II received widespread support. *See, e.g.*, U.N. Conference on International Organization, *Second Plenary Session*, at 184, U.N. Doc. 20 P/6 (Vol. I) (Apr. 27, 1945) (“We know how much we owe our great Allies. . . . We know likewise that, in the organization to be set up, their heavy duties, their great responsibilities, assign to them a special part that we are willing to dedicate.” (statement of the Delegation of Belgium)); *see also First Plenary Session, supra* note 362, at 129-34 (recording statements by the Delegation of the Republic of China and the Delegation of the Soviet Union); HATHAWAY & SHAPIRO, *supra* note 1, at 183-214 (describing negotiations over the Charter, including the decision to establish five permanent members of the Security Council with special status).

364. *See, e.g.*, Press Release, General Assembly, As Russian Federation’s Invasion of Ukraine Creates New Global Era, Member States Must Take Sides, Choose Between Peace, Aggression, General Assembly Hears, U.N. Press Release GA/12406 (Mar. 1, 2022), <https://perma.cc/X6SS-3KAX> (“It is times such as this that bring to the fore and underscore long overdue Council reform of the veto power and an archaic body that remains a prisoner of its past to the detriment of collective security, as has been regrettably witnessed in Ukraine.”); *see also* Stewart Patrick, *Cutting the Gordian Knot: Global Perspectives on UN Security Council Reform*, CARNEGIE ENDOWMENT FOR INT’L PEACE (June 28, 2023), <https://perma.cc/62ET-EAJ7> (noting how shifts in global power and its centers of moral authority over the last eight decades of the United Nations’s existence, without corresponding structural reform, has rendered the Security Council “trapped in amber”).

365. *See* BANK OF RUSS., BANK OF RUSSIA FOREIGN EXCHANGE AND GOLD ASSET MANAGEMENT REPORT NO. 1, at 6 chart 3 (2022), <https://perma.cc/2B69-VP9Z> (depicting the geographical distribution of foreign exchange and gold assets prior to the Ukrainian invasion); Press Release, U.S. Dep’t of the Treasury, Fact Sheet: Disrupting and Degrading—One Year of U.S. Sanctions on Russia and Its Enablers (Feb. 24, 2023), <https://perma.cc/TB3T-28WU> (“The multilateral Russian Elites, Proxies, and Oligarchs (REPO) Task Force . . . has immobilized about \$300 billion worth of Russian Central Bank assets.”); *see also* Chris Cook, Henry Foy & Laura Dubois, *G7 Draws up Plans to Backstop Debt-Raising for Ukraine with Russian Assets*, FIN. TIMES (Feb. 3, 2024), <https://perma.cc/5VVS-C9SJ> (“Around €191bn of Moscow’s assets are held in Euroclear, a Brussels-based securities depository.”).

when wielded in the interest of *erga omnes* obligations, sidelines the interests of nations that wield less financial power. Particularly with the dramatic proliferation of sanctions in the last twenty years,³⁶⁶ nations with greater financial power have again created a powerful subgroup that wields independent enforcement powers to the exclusion of economically less powerful plenary members.³⁶⁷

Shifting that authority to the United Nations, overseen by the General Assembly, would democratize the control and strengthen the legitimacy of asset freezes. Of course, the decision of whether to take independent countermeasures in the first instance would remain with the states that control the assets. Looking forward, however, the locus of authority to exercise and maintain this economic leverage would be placed in the hands of a broader range of states. Wider distribution in the agency of enforcement, in turn, would potentially strengthen the egalitarian values of the institution and improve the community commitment to justice.³⁶⁸ Some degree of democratization of the enforcement of reparations obligations is critical to applying the precedent of Ukraine to the pursuit of accountability in other contexts. If only a small number of powerful states have the power to decide when reparations are to be enforced, the obligation will suffer from uneven enforcement—and its legitimacy will suffer as a result.³⁶⁹

3. Setting a positive precedent

In considering how to obtain accountability for Ukraine in the wake of the war in Ukraine, scholars have spilled a great deal of ink considering how far the General Assembly may venture into what has traditionally been considered the Security Council's purview.³⁷⁰ Not for the first time—and very likely not

366. For example, the use of economic sanctions in the United States has increased 933% from 2000 to 2021. See U.S. TREASURY, THE TREASURY 2021 SANCTIONS REVIEW 2 fig. (2021), <https://perma.cc/E8LV-QZQX>.

367. Simon Caney expands on this assertion in a critique of the institutional design of the WTO. He notes that democratized participation aids in collective action challenges that plague international institutions, one aspect of which is making effective enforcement mechanisms equally at the disposal of all members, not just one economically powerful subgroup. Where the enforcement mechanisms available to economically powerful nations dwarf those of smaller nations, the institution loses efficacy in its ability to constrain the action of individual states in service to the whole. See Caney, *supra* note 357, at 737, 745-47.

368. See *id.* at 736, 745.

369. See *infra* Part IV.C.

370. See, e.g., Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression—The Role of the U.N. General Assembly*, JUST SEC. (Feb. 14, 2023), <https://perma.cc/H8PN-MCHQ>; Michael P. Scharf, *Power Shift: The Return of the Uniting for Peace Resolution*, 55 CASE W. RESRV. J. INT'L L. 217, 220 (2023); Oona A. Hathaway, Maggie Mills & Heather
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for the last—the Security Council veto has precluded the possibility of action by the Security Council in response to the war in Ukraine.³⁷¹ The political mobilization in the organization surrounding the current conflict therefore presents not only an opportunity to obtain reparations for Ukraine, but also to clarify that the General Assembly has the power to establish and support reparative mechanisms.

As has been discussed, the U.N. General Assembly has already recommended the creation of a damage registry, which the Council of Europe subsequently established.³⁷² The Assembly could take additional steps to establish a more comprehensive reparations mechanism. Although it has “[r]ecognize[d] . . . the need for the establishment . . . of an international mechanism for reparation for damage,”³⁷³ the details of this process have not yet emerged. Indeed, the direct creation of an international claims mechanism would break new ground for the General Assembly, but it does not appear that such a move would be *ultra vires*. As previously noted, under Article 7(2), the General Assembly has the authority to establish “[s]uch subsidiary organs as may be found necessary.”³⁷⁴

The Assembly has exercised this authority to create a subsidiary judicial mechanism with the authority to issue binding judgments on consenting parties. In 1949, the General Assembly exercised its Article 22 power to create the U.N. Administrative Tribunal (UNAT), which judged and issued binding decisions regarding international administrative matters (such as employment

Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, JUST SEC. (May 5, 2023), <https://perma.cc/99Y4-N8HZ>; Devika Hovell, *Council at War: Russia, Ukraine and the UN Security Council*, EJIL: TALK! (Feb. 25, 2022), <https://perma.cc/SGU8-Z64Z>.

371. *Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions*, UN NEWS (Sept. 30, 2022), <https://perma.cc/9NN5-L8QV>; *Russia Blocks Security Council Action on Ukraine*, UN NEWS (Feb. 26, 2022), <https://perma.cc/4QPJ-Y76V>.

372. See *supra* notes 6-7 and accompanying text.

373. G.A. Res. ES-11/5, *supra* note 6, ¶ 3.

374. U.N. Charter art. 7(2). Article 22 provides a more tailored version of this authority, stating that the Assembly has the power to create subsidiary organs necessary to fulfill its functions. *Id.* art. 22. It is not always clear which of these powers is being relied upon, but some scholars argue that 7(2) provides a more general grant to support the creation of a mechanism that performs functions that the parent organization cannot itself perform, a reading supported by the ICJ in its *Effects of Awards* holding. See DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS 92-95* (2000) (citing *Effects of Awards of Compensation by the United Nations Administrative Tribunal, Advisory Opinion*, 1954 I.C.J. 47, 57-58 (July 13)) (asserting that Article 7(2) of the U.N. Charter grants both the Security Council and General Assembly “general authority” to establish subsidiary bodies to perform functions the body itself cannot perform, provided the body possesses either express or implied power under the Charter to create the organ).

contracts).³⁷⁵ The ICJ affirmed the General Assembly's constitutional authority to create a judicial subsidiary organ, even though the Assembly itself does not have the Charter powers to directly issue binding legal decisions—holding that the Assembly has the legal capacity to establish “an independent and truly judiciary body pronouncing judgments without appeal within the limited field of its functions.”³⁷⁶

The General Assembly has competence to create a subsidiary body in the international criminal context as well. Maintaining international peace, as the *raison d'être* of the United Nations, is also an independent mandate of the Assembly.³⁷⁷ This means that, should the creation of a subsidiary organ become necessary to fulfill that mandate, the Charter confers authority on the Assembly to create such an organ.³⁷⁸ Article 1 establishes that one of the means for maintaining international peace and security is “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations that might lead to a breach of the peace.”³⁷⁹ Indeed, the Assembly *has* operated in this context before. In 2016, it established the International, Impartial and Independent Mechanism (IIIM) to support future criminal prosecutions under international law.³⁸⁰ The General Assembly also recommended the conclusion of a treaty for the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to support the prosecution of international crimes based in Cambodian jurisdiction.³⁸¹

The General Assembly does not have the authority to establish an international claims commission with the authority to bind non-consenting states.³⁸² But no such authority is necessary; the proposal relies upon the

375. See G.A. Res. 351 (IV), Establishment of a United Nations Administrative Tribunal (Dec. 9, 1949). The General Assembly's power to create the Tribunal was affirmed by the International Court of Justice. See *Effects of Awards of Compensation by the United Nations Administrative Tribunal*, 1954 I.C.J. at 57-58.

376. *Effects of Awards of Compensation by the United Nations Administrative Tribunal*, 1954 I.C.J. at 53.

377. See *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163 (June 20) (holding that, though the Security Council maintains primary responsibility over this area, “[t]he Charter makes it abundantly clear . . . that the General Assembly is also to be concerned with international peace and security”).

378. See U.N. Charter art. 7.

379. U.N. Charter art. 1.

380. See G.A. Res. 71/248, ¶ 4 (Dec. 21, 2016).

381. G.A. Res. 57/228, *supra* note 99, annex.

382. Articles 10 and 11 of the U.N. Charter grant the General Assembly broad authority to discuss, consider, and recommend a range of matters. U.N. Charter arts. 10, 11. General Assembly recommendations therefore rely on consent, as opposed to the Security

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consent of participating states, and the funds would not be transferred nor disbursed without Russia's consent.

There is, it is worth noting, an active proposal to create a Special Tribunal to try the Crime of Aggression in Ukraine through a treaty between the U.N. and Ukraine, on the recommendation of the General Assembly.³⁸³ If the U.N. were to create this tribunal, it could attach a reparations mechanism to the tribunal's judgments, as with the ECCC, which was likewise created pursuant to an Assembly resolution.³⁸⁴ That mechanism would, admittedly, face similar limitations to those for international court judgments described in Part I—the reparations would be limited to the assets of the individuals convicted and to the harm caused by the crimes for which they are convicted. Unlike with the ECCC,³⁸⁵ however, the likely defendants here are not destitute. Putin, who is most responsible for the illegal war, reportedly has a fortune of hundreds of billions of dollars.³⁸⁶

Though the authority for the institutionalization of reparations through a recommendation of the General Assembly is well supported by the Charter's text and institutional practice, it still breaks new ground for the U.N. In addition to the benefits of developing and solidifying interpretive doctrines for the U.N. Charter,³⁸⁷ creating a mechanism for institutionalizing reparations would place a similar option on the menu of options for future conflicts. That would, in turn, facilitate decision-making, providing a focal point that could make it easier to arrive at a mechanism that would provide a real possibility of reparations in future conflicts.³⁸⁸ Particularly given the historically uneven

Council, which may enact enforcement measures under Chapter VII of the Charter. *See* U.N. Charter ch. VII.

383. *See, e.g.,* Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SEC. (Sept. 20, 2022), <https://perma.cc/H227-HG3N>.

384. *See* G.A. Res. 57/228, *supra* note 99, annex; Internal Rules (Rev. 10), *supra* note 99, at 23 (providing for Civil Party action for the purpose of “collective and moral reparations”).

385. *See, e.g.,* Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 666 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010) (citing the “unlikelihood of recovery” because the defendant “appears to be indigent”).

386. *See* Allison Morrow, *How Much Is Vladimir Putin Worth? Almost No One Knows for Sure*, CNN (Feb. 28, 2022, 5:50 PM EST), <https://perma.cc/BXS7-LV8A>.

387. *See, e.g.,* Lorenzo Gasbarri, *The Notion of Institutional Practice in United Nations Law*, 24 MAX PLANCK Y.B. UNITED NATIONS L. ONLINE 3, 12 (2021) (arguing that institutional practice advances interpretation of constitutive instruments by triggering subsequent state practice and agreement).

388. *See* Thomas Gehring, Christian Dorsch & Thomas Doerfler, *Precedent and Doctrine in Organisational Decision-Making: The Power of Informal Institutional Rules in the United Nations Security Council's Activities on Terrorism*, 22 J. INT'L RELS. & DEV. 107, 116 (2019) (“The existing appraisal of a given crisis as reflected in a previous decision, for example as a threat to international peace and security, is likely to provide a strong focal point for
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enforcement of reparations obligations, developing a tangible and replicable precedent could facilitate better outcomes for future victims of conflict.

C. A Path Toward Reparations Beyond Ukraine

After decades of frequent indifference to uncompensated suffering elsewhere, some states are understandably critical of the double standard apparently at play in the race to aid a European victim of aggression.³⁸⁹ Ukraine is not the only state to which reparations may be owed.³⁹⁰ However, reckoning with the historical injustice of reparations obligations left unfulfilled does *not* require repeating these moral failures with respect to Ukraine. On the contrary, justice demands an assertive yet lawful approach to securing reparations in the present conflict. Harnessing the exceptional support Ukraine enjoys could revivify the reparations obligation to the benefit of all states.

Using collective countermeasures to compel reparations, ideally supported by international institutionalization, can meet this demand. By seeking to induce Russian compliance here, the international community could set an important precedent for a more robust approach to upholding the reparations obligation in the future. Collective countermeasures could then be used to recognize and relieve harms suffered due to future state violations of obligations *erga omnes*.

The intervention of the Saudi-led coalition in the ongoing armed conflict in Yemen, for example, underscores the wide-ranging potential of collective countermeasures to compel reparations. In Yemen, the consent of the government in exile to the involvement of the Saudi-led coalition likely

the appraisal of the same crisis in later decisions, because it would be very difficult to identify a more widely accepted coordination solution.”); see also Duncan Snidel, *Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 932 (1985) (“Established traditions or shared principles [in international coordination] are likely to provide the basis for the emergence of norms or conventions [N]either state has incentive to depart from an established convention: The prevailing expectations of how the other state will behave . . . provide a compelling reason for each state to adhere to it in order to gain the benefits of coordination.”).

389. See Sarah Cliffe, *The West Is Fully Behind Ukraine. Developing Countries See a Double Standard*, BARRON’S (May 20, 2022, 3:45 AM EDT), <https://perma.cc/7GFC-HGP7>.

390. Though the examples discussed herein involve armed conflict among multiple states, the same collective countermeasures framework may be used to compel reparations for any *erga omnes* violation by one state causing material injury to another. Of course, state responsibility is an essential ingredient. Its absence may legally preclude the application of this framework in some circumstances in which the *moral* case for reparations is robust. See, e.g., Max du Plessis, *Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery*, 25 HUM. RTS. Q. 624, 634-35 (2003) (describing the difficulty of establishing state responsibility for slavery as a matter of international law).

vitiates any *jus ad bellum* responsibility that might otherwise attach to the coalition's members.³⁹¹ However, an aggressive invasion is not the only violation *erga omnes* from which a reparations obligation might arise. The coalition, which notably has benefitted from United States support,³⁹² has been accused of repeated, severe violations of international humanitarian obligations.³⁹³ States concerned with these violations could undertake collective countermeasures to compel the members of the coalition to provide reparations for injuries caused by violations for which they are responsible. Notably, these countermeasures need not be limited to extended asset freezes but could include other countermeasures, such as the suspension of certain trade and investment obligations. Admittedly, many states may be unwilling to take measures that provoke the coalition members' ire, but the availability of collective countermeasures means that accountability is no longer hostage to a UNSC veto.

This brings us to both a limitation—and arguably a strength—of collective countermeasures. Collective countermeasures become more powerful as more states participate in them. Action by a broad coalition of states can impose significant costs on even economically and militarily powerful wrongdoers. That kind of coalition is likely to emerge only when states are persuaded of the unlawfulness of the target state's behavior. Collective countermeasures are only as powerful as the argument behind them is persuasive. Ukraine has succeeded in the current war because it has made a compelling case that it is the subject of an unlawful invasion. For other states to take advantage of this approach, they, too, would need to persuade others that the target state has acted unlawfully. In such cases, countermeasures could concretize international disapprobation and reinforce the compulsory character of the obligation to pay reparations.

As the process of reparations for Ukraine moves forward, states participating in the reparations scheme must not only consider how to solve the problem at hand but also confront a broader set of concerns about uncompensated international law violations. Some nations will favor an approach that is narrowly tailored to Ukraine and hard to replicate in order to

391. Oona A. Hathaway, Alexandra Francis, Alyssa Yamamoto, Srinath Reddy Kethireddy & Aaron Haviland, *The Extent and Validity of Yemen's Consent to the US's Use of Force*, JUST SEC. (Apr. 18, 2018), <https://perma.cc/DQG5-RBHU>.

392. See Joyce Sohyun Lee, Meg Kelly & Atthar Mirza, *Saudi-Led Airstrikes in Yemen Have Been Called War Crimes. Many Relied on U.S. Support*, WASH. POST (June 4, 2022), <https://perma.cc/UPU2-X4AM>.

393. See Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1, 4 (2019). The ICJ has characterized violations of international humanitarian law as "essentially of an *erga omnes* character." See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9).

avoid ramifications for their own future behavior. For the process of reparations in Ukraine to be legitimate, however, states should resist that approach. Finding a solution to the problem of reparations in Ukraine requires recognizing that broader reparative efforts for violations committed during war are long overdue.

Such steps have the potential not only to address current and future injuries but, perhaps most importantly, to create incentives to deter violations in the future. If reparations for illegal warfare were to become more predictable, it would reinforce the international law norms prohibiting unlawful aggression and other illegal uses of force. In doing so, a reparations mechanism would reaffirm and strengthen the international legal principle at the heart of the international legal order.

Conclusion

This Article has argued that assets frozen in response to Russia's waging of an illegal war may remain frozen at the close of the war as long as Russia has failed to meet its international legal obligation to pay reparations. Moreover, states may apply collective countermeasures by continuing to freeze Russian central bank assets in an effort to induce Russia to meet its reparations obligation. After all, the failure to pay reparations owed for an act of aggression is itself a wrongful act of an *erga omnes* character. As a result, the doctrine of countermeasures precludes the imposition of asset freezes unless and until Russia agrees to make full reparations, or, at the very least, to "do[] all it can reasonably do to . . . mitigate the damage" caused by its invasion.³⁹⁴

Our proposal for a collective reparations mechanism does not deliver all that Ukraine and its allies wish. While collective countermeasures provide an invaluable tool enabling states that are not a party to the conflict to support Ukraine's demands for accountability for Russia's violations of *erga omnes* obligations, they do not offer Ukrainians the immediate support they want and need. Under our proposal, Russia's assets would be indefinitely frozen, but Ukraine would not receive reparations until Russia finally agrees to a reparations scheme (with the possible exception of a modest annual sum that could be obtained through taxing the earnings on the assets). Yet a system of collective countermeasures, institutionalized through the United Nations, would create pressure to bring Russia to the table. It would give Ukraine an extraordinarily valuable bargaining chip as it seeks to negotiate peace. And by

394. James Crawford, *Counter-Measures as Interim Measures*, 5 EUR. J. INT'L L. 65, 68 (1994). Crawford argues that the objective of a countermeasure "to redress [a] grievance" may only be "regarded as met" once this mitigation condition is fulfilled. *Id.* at 67-68.

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relying on and developing a doctrine that could be employed by other states in the future, rather than depending on one-off (and illegal) legislative proposals to seize Russian assets, our proposal charts a path not only for repairing the harms suffered by Ukraine but also for repairing the losses suffered by any other state subjected to an unlawful war in the future.