

# **Confiscation of Russian Sovereign Assets: Mission Possible and Overdue**

**#MakeRussiaPay**

Legal arguments:  
Overcoming sovereign immunity  
under customary international law

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There is consensus that **Russia should pay for damages and losses** it has caused to Ukraine during its unprovoked war of aggression. The documented damages as of March 2023 reached \$411 billion<sup>1</sup>. Since then, Russian destruction of the Kakhovka Dam alone has caused almost \$14 billion in additional damages to Ukraine<sup>2</sup>. Moreover, the longer this war continues, the greater will be the losses in the light of Russian “scorched earth tactics” of fighting and deliberate destruction of Ukraine’s economy. Given the primary goal of ensuring Ukraine’s victory, all economic measures must be deployed against Russia now to compel it to cease its aggression and withdraw from Ukraine, as well as to limit its ability to wage war indefinitely. Nevertheless, the Russian Central Bank’s assets (RCB assets) amounting to approximately \$300 billion<sup>3</sup> are still kept untouched, with the largest burden of funding Ukraine’s self-defense and recovery efforts currently falling on the shoulders of Ukrainians and Western partners.

Insufficient political will has been shown to make confiscation of Russian state assets happen, despite the fact that this concept has been extensively debated by major international and foreign partners of Ukraine. On November 14, 2022, the UN General Assembly adopted the Resolution ES-11/5<sup>4</sup> in which it was recognized that the Russian Federation must be held accountable for all violations of international law against Ukraine and bear the legal consequences of its internationally wrongful acts. Such responsibility must include making reparations for all the damages, injuries and losses caused. In June 2022, Canada adopted amendments to the *Special Economic Measures Act* allowing for seizure and transfer of Russian state and private assets, yet the law has not been applied against Russia’s state assets. On February 16, 2023, the European Parliament called<sup>6</sup> on the European Commission and the

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1 Ukraine: Rapid Damage and Needs Assessment. February 2022-February 2023. The World Bank, the Government of Ukraine, the European Union, the United Nations. Available at <https://documents1.worldbank.org/curated/en/099184503212328877/pdf/P1801740d1177f03c0ab180057556615497.pdf>

2 Post-disaster needs assessment. 2023 Kakhovka Dam disaster, Ukraine. October 2023. Government of Ukraine and the United Nations. Available at: <https://ukraine.un.org/sites/default/files/2023-10/PDNA%20Final%20and%20Cleared%20-%2016Oct.pdf>

3 Intensive efforts to enable frozen Russian assets to reach Ukraine. Swedish Presidency of the Council of the European Union. April 12, 2023. Available at: <https://swedish-presidency.consilium.europa.eu/en/news/intensive-efforts-to-enable-frozen-russian-assets-to-reach-ukraine/>

4 Resolution adopted by the General Assembly on 14 November 2022. ES-11/5. Furtherance of remedy and reparation for aggression against Ukraine [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_res\\_es\\_11\\_5.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es_11_5.pdf)

5 Special Economic Measures Act, S.C. 1992, c. 17. Government of Canada. Assented to 1992-06-04. Available at <https://laws-lois.justice.gc.ca/eng/acts/s-14.5/page-1.html>

6 European Parliament resolution of 16 February 2023 on one year of Russia’s invasion and war of aggression against Ukraine (2023/2558(RSP)). Thursday, 16 February 2023. Strasbourg. Available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0056\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0056_EN.html)

Council of the EU to create a legal basis for confiscation of Russian assets, and on October 17, 2023, the Parliament adopted its position on the draft regulation establishing the Ukraine Facility, which provides clear grounds for confiscation: collective countermeasures and collective self-defense<sup>7</sup>.

Opponents of confiscation raise various legal, economic and political counterarguments. This note, prepared as a part of the #MakeRussiaPay public campaign held by the civil society organizations International Center for Ukrainian Victory, Anti-corruption Action Center, National Interests Advocacy Network ANTS, is focused on answering the question of **why confiscation of Russian RCB assets is legitimate under international law and compelled by political necessity**, based on collective findings of prominent legal experts displayed in their studies and reports. In addition, from the international finance perspective, there is no real alternative to Western reserve currencies. Therefore, the fears that confiscation may trigger the outflow of other countries' reserves are largely overinflated. Nonetheless, in order to minimize any potential financial risks, **G7 and EU should jointly confiscate RCB assets acting as a coalition.**

All intermediary scenarios proposed by Ukraine's partners, such as the transfer of proceeds from blocked assets, amounting to several billion dollars or euros annually, taxes from such proceeds (e.g. the case of Belgium), imposition of specific tax on companies benefiting from Russian assets etc., are welcome first steps, but cannot be the end goal. Given the scale of damage, they should be considered only as supplementing and not substituting full confiscation. Otherwise, G7 and EU partners will need to collect funds for Ukraine amounting to tens of billions of dollars or euros annually for many years to come, which is hardly a realistic nor an attractive long-term posture for the West to adopt toward Russia.

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<sup>7</sup> Establishing the Ukraine Facility. Amendments adopted by the European Parliament on 17 October 2023 on the proposal for a regulation of the European Parliament and of the Council on establishing the Ukraine Facility (COM(2023)0338 – C9-0210/2023 – 2023/0200(COD))

## **Legal arguments: Overcoming sovereign immunity under customary international law**

The customary rule of jurisdictional immunity of foreign state's property against alienation/confiscation by another state through court decision is considered by some observers and policy-makers as a key barrier for confiscating RCB assets from the viewpoint of international law. Opponents of confiscation of assets argue that Russian state assets are protected by sovereign immunity based on custom (state practice out of a sense of legal obligation or legal permission), as reflected, for instance, in the 2004 UN Convention on Jurisdictional Immunities of States (UN Convention)<sup>8</sup> (implemented by some national acts)<sup>9</sup> together with conclusions of the International Court of Justice (ICJ) in its judgements<sup>10</sup> which in general provide legal basis and justification for this rule.

However, thorough studies show that this sovereign immunity of states is not an absolute barrier for confiscating their assets, and it may be overcome in the Ukrainian case due to the arguments explained below.

### **1. Sovereign immunity of foreign state's property specifically applies only to the confiscation by court decision. It does not cover confiscation through orders of the executive authority**

*This legal argument is explained in detail by the group of lawyers including Dr. Philip D. Zelikow, Yuliya M. Ziskina, Prof. Robert J. Currie KC<sup>11</sup>, Dr. Anton Moiseienko<sup>12</sup>, and others.*

The language of existing international instruments and official commentaries to them directly envisages that sovereign immunity relates only to court judgements<sup>13</sup>. It does not cover treatment by the executive branch of one State regarding another State<sup>14</sup>. Also, due to the popular argument spread in the international law doctrine<sup>15</sup> (based on the history of elaborating such custom),

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8 Which has not had enough notifications to come into force but still remained as overly recognized source of this customary international rule

9 The UK State Immunity Act 1978

10 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening). The International Court of Justice. 3 February 2012

11 Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine. Yuliya M. Ziskina, et al., New Lines Institute For Strategy and Policy. June 2023

12 The Freezing and Confiscation of Foreign Central Bank Assets: How Far Can Sanctions Go? Anton Moiseienko, ANU College of Law. 25 Apr 2023

13 Article 5 of the 2004 UN Convention on Jurisdictional Immunities of States

14 European Convention on State Immunity, Explanatory Report, COUNCIL OF EUROPE [1972]

15 Which, by the way, is recognized as a source of international law according to Article 38 of the ICJ Statute

rules on sovereign immunity were created specifically to avoid national courts from sitting in judgment of another State.

At the same time, there is no general international custom formed to restrict the right of the state to apply policy measures against another state within their international relations. For instance, analysis of state practice showed that almost no states<sup>16</sup> have challenged freezing their assets by the USA and EU (which is also the *executive measure*), based on violation of their sovereign immunity. They tried to enforce numerous other arguments.

## **2. Confiscation of sovereign assets is a lawful collective countermeasure to violations of international law committed by Russia**

As noted by the European Parliament in its draft regulation establishing the Ukraine Facility, confiscating Russian state assets is justified under customary international law “*as a collective countermeasure in response to Russia’s violation of the fundamental rule prohibiting wars of aggression.*”<sup>17</sup> Under the narrow circumstances involved here, whereby a state violates fundamental erga omnes obligations, other states are justified in confiscating the violating state’s assets as a method of compelling that state to redress its unlawful conduct. In a decentralized system such as customary international law, the effectiveness of rules and norms depends on enforcement or the threat of enforcement through countermeasures.

Russia has obviously violated a number of international law *jus cogens* rules and its *erga omnes* obligations, such as the UN Charter’s prohibition of the use of force against the territorial integrity or political independence of any state (Art. 2(4), ICJ provisional orders within Russian-Ukraine dispute on the 1948 UN Genocide Convention<sup>18</sup> to stop military actions in Ukraine, rules of international humanitarian law and human rights law. There is no debate that Russia’s conduct is an internationally wrongful act that carries a duty to compensate the injured states, primarily Ukraine.

According to the UN International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), the injured state (Ukraine) and other states may apply countermeasures against the

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<sup>16</sup> Except for Iran in its dispute with the USA, Certain Iranian Assets (Islamic Rep. of Iran v. United States) but the ICJ rejected their claims based on the argument of violation of the sovereign immunity

<sup>17</sup> Amendments adopted by the European Parliament on 17 October 2023 on the proposal for a regulation of the European Parliament and of the Council on establishing the Ukraine Facility, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0363\\_EN.docx](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0363_EN.docx).

<sup>18</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). The International Court of Justice. 16 March 2022

violator until it ceases its wrongful actions and bears responsibility.<sup>19</sup> According to the Draft Articles on State Responsibility (Art. 51), the countermeasures must be “...*commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question...*” Nothing in the language of applicable instruments and existing state practice prevents confiscating state assets as a countermeasure, provided that doing so corresponds to the criteria of proportionality, temporariness, and reversibility. Moreover, customary international law permits collective countermeasures by other states against a state violating *erga omnes* obligations, including confiscating its state assets, to compel it to redress its conduct.

Indeed, the G7 economic sanctions against Russia and freezing of RCB foreign currency reserves at first days of the full-scale invasion are already examples of collective countermeasures according to the Draft Articles, which have since become overwhelmed by the level of damages caused by the perpetrator. This move neither stopped the war nor prevented further Russian aggression. Ever since, Russia has inflicted minimum of \$411 billion of documented damages to Ukraine as of the end of the first year of full-scale war<sup>20</sup> and additional \$14 billion for the Kakhovka Dam destruction<sup>21</sup>. This figure is much bigger now and will continue growing. Therefore, the countermeasure justly and logically should be toughened. Even the full confiscation of \$300 billion of Russian sovereign assets (approximately)<sup>22</sup> will not match the total amount of damages inflicted to Ukraine so far.

The requirement for confiscation of assets as a collective countermeasure to be reversible is sometimes mistakenly perceived that when the perpetrator (Russia) merely stops the aggression, the measure applied should be reversed fully and all the confiscated assets should be returned. But Russia's international obligations include not only ceasing its aggressive war, but also compensating Ukraine for the damages Russia has inflicted. In particular, the extensive destruction committed by Russia will not be undone by simply withdrawing Russian forces from Ukraine; full compensation is required for Russia to comply with its international obligations.

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19 Int'l L. Comm'n, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), available at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf). See specifically: Russia is obligated to cease and not repeat its acts of aggression (art. 30) and make reparations (art. 31) in the form of restitution (art. 35) (to reestablish the situation that existed before the wrongful act was committed) and compensation (art. 36) (to compensate for damages insofar as such is not made good by restitution). According to the ARSIWA, any state can invoke Russia's responsibility as if it were the primary injured state (ARSIWA arts. 42, 48).

20 Ukraine: Rapid Damage and Needs Assessment. February 2022-February 2023. The World Bank, the Government of Ukraine, the European Union, the United Nations. Available at <https://documents1.worldbank.org/curated/en/099184503212328877/pdf/P1801740d1177f03c0ab180057556615497.pdf>

21 Post-disaster needs assessment. 2023 Kakhovka Dam disaster, Ukraine. October 2023. Government of Ukraine and the United Nations. Available at: <https://ukraine.un.org/sites/default/files/2023-10/PDNA%20Final%20and%20Cleared%20-%2016Oct.pdf>

22 Intensive efforts to enable frozen Russian assets to reach Ukraine. Swedish Presidency of the Council of the European Union. April 12, 2023. Available at: <https://swedish-presidency.consilium.europa.eu/en/news/intensive-efforts-to-enable-frozen-russian-assets-to-reach-ukraine/>

Indeed, the UN General Assembly clearly stated in its 2022 Resolution that Russia should make reparations for all the damages, losses and injuries inflicted. In case Russia complies with international law and decides to cease its aggressive war against Ukraine and voluntarily make reparations to Ukraine in form of compensation, these amounts may be netted from the due payment by the Russian Federation. In this manner, the collective countermeasures are fully reversible, once Russia complies with all of its international obligations toward Ukraine.

### **3. Confiscation of sovereign assets is a lawful act of collective self-defense**

*This legal theory has been thoroughly analyzed by Russell Buchan<sup>23</sup>, Federica Paddeu<sup>24</sup>, Artem Ripenko<sup>25</sup> and others.*

As also noted by the European Parliament in its draft resolution establishing the Ukraine Facility, confiscating Russian state assets is also justified as a measure of collective self-defense under Article 51 of the UN Charter.<sup>26</sup> In March 2022, the Parliament had also invoked collective self-defense in calling on EU Member States to provide weapons to Ukraine and share intelligence. Therefore, given that under collective self-defense, the EU and its Member States can provide weapons, share intelligence, train Ukrainian troops, collective self-defense also justifies non-military measures such as economic sanctions and confiscation of state assets.

Article 51 of the UN Charter recognizes the right of individual or collective self-defense if an armed attack occurs against the UN Member. Russia's aggression has an obvious economic impact on Ukraine via targeted attacks on Ukraine's energy, export and civil infrastructure, economic facilities and factories etc. In 2022, Ukraine's GDP declined by 29.2% according to the World Bank<sup>27</sup>. Ukraine is fighting in the existential war, defending from the aggressor which possesses much more resources and mobilization potential. Transferring the frozen Russian assets to Ukraine would be essential to help redress this imbalance, resist the aggression and would constitute a justified act of collective self-defense.

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23 'Non-Forcible Measures and the Law of Self-Defence' Russell Buchan. (2023) 72(1) International and Comparative Law Quarterly 1-33

24 Self-Defence As A Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility. Federica Paddeu. Available at: <https://core.ac.uk/download/pdf/42340285.pdf>

25 Should Third States Follow Ukraine's Lead and Confiscate Russian State Assets? Artem Ripenko. Voelkerrechtsblog. Available at: [https://voelkerrechtsblog.org/should-third-states-follow-ukraines-lead-and-confiscate-russian-state-as-](https://voelkerrechtsblog.org/should-third-states-follow-ukraines-lead-and-confiscate-russian-state-assets/)  
[sets/](https://voelkerrechtsblog.org/should-third-states-follow-ukraines-lead-and-confiscate-russian-state-as-sets/)

26 Amendments adopted by the European Parliament on 17 October 2023 on the proposal for a regulation of the European Parliament and of the Council on establishing the Ukraine Facility, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0363\\_EN.docx](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0363_EN.docx).

27 The World Bank in Ukraine. Available at: <https://www.worldbank.org/en/country/ukraine>

It should be noted that states do not need to explicitly invoke the doctrine of collective self-defense in order to act on this basis and rely on this legal justification. For instance, the mandate of the EU Military Assistance Mission Ukraine, which has trained thousands of Ukrainian soldiers fighting on the frontline, states that the EU “remains strongly committed to providing further military support to help Ukraine exercise its inherent right of self-defense against the Russian aggression and defend its territorial integrity and sovereignty.” Likewise, EU Member States could justify confiscating Russian state assets on the grounds of helping Ukraine exercise its inherent right of self-defense, including economic defense measures. The legal requirements of necessity and proportionality are clearly met here, as confiscation is necessary to compel Russia to cease its aggressive war and is proportional to (and in fact only a proportion of) the damage inflicted by Russia in Ukraine.

More broadly, in the NATO 2022 Strategic Concept Russia is already mentioned as “*the most significant and direct threat to Allies’ security*” now, even before it attacked the Alliance directly. NATO Secretary General Stoltenberg recently said,<sup>28</sup> “I understand the concerns that our support of Ukraine carries the risk of escalation, but the risk pales in comparison to allowing Putin to win this war. If Putin wins the war in Ukraine, he will likely use violence again.” That is a clear warning that if Ukraine lost the war, Russian aggression would become an imminent threat to the EU countries and their transatlantic allies. It is therefore in G7 and EU’s best interests to ensure that Ukraine has all necessary resources to defend itself and survive as an independent, resilient sovereign state.

#### **4. Existing authorities and current proposals**

Some countries already have legal instruments to move forward with the confiscation with no further delays. The US already has tools in place authorizing the President to block, compel and transfer the respective Russian assets under the *International Emergency Economic Power Act*, IEEPA and such prominent lawyers as Laurence H. Tribe, Raymond P. Tolentino, Kate M. Harris, and others have specifically supported this mechanism in their detailed and comprehensive report<sup>29</sup>. In addition, the US Congress has introduced bipartisan legislation that calls on the President to use this authority to transfer Russian state assets to Ukraine.<sup>30</sup> In addition, Canada is pursuing amendments to its aforementioned *Special*

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28 „Wir werden es nicht zulassen, dass die Gewalt der 1990er zurückkehrt“. Die Welt. Available at: <https://www.welt.de/politik/ausland/article247860460/Nato-Chef-Stoltenberg-Die-Ukraine-kommt-voran-langsam-aber-bestimmt.html>

29 The Legal, Practical and Moral Case for Transferring Russian Sovereign Assets to Ukraine. Laurence H. Tribe, Raymond P. Tolentino, Kate M. Harris, Jackson Erpenbach, and Jeremy Lewin, Renew Democracy Initiative. September 17, 2023. Available at <https://rdi.org/wp-content/uploads/2023/09/2023.09.17-MPP-Report.pdf>

30 REPO for Ukrainians Act, <https://www.congress.gov/bill/118th-congress/house-bill/4175/text>

*Economic Measures Act*, to eliminate the collision with other Canadian national laws blocking seizure of sovereign assets through the court procedure based on immunity of foreign states.

The others, like the EU, UK<sup>31</sup> and Japan, are still developing the tools. In its draft regulation establishing the Ukraine Facility amendment, the European Parliament defined that “(46a) Russia and its allies must pay for the damage caused to Ukraine. The Union and its Member States should... establish a legal basis for the confiscation of Russian public assets for the purpose of financing Ukraine’s reconstruction and compensating the victims of Russia’s aggression...”<sup>32</sup> under the countermeasures and self-defense argument. Belgium made one step forward and announced the plans to send to Ukraine \$2.4 billion collected in taxes on assets frozen in their country<sup>33</sup>. The U.S. Treasury Secretary Janet Yellen also supports taxing profits on RCB assets frozen in G7 countries<sup>34</sup>. Yet, as was stated before, this should be considered only as a step on the way towards full confiscation.

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31 Seizure of Russian State Assets and Support for Ukraine Bill. The Parliament of the UK. Available at <https://publications.parliament.uk/pa/bills/cbill/58-03/0245/220245.pdf>

32 Establishing the Ukraine Facility. Amendments adopted by the European Parliament on 17 October 2023 on the proposal for a regulation of the European Parliament and of the Council on establishing the Ukraine Facility (COM(2023)0338 – C9-0210/2023 – 2023/0200(COD))

33 Belgium expects to use \$2.4 billion in tax on frozen Russian assets to fund Ukraine. Reuters, October 11, 2023. Available at <https://www.reuters.com/world/europe/belgium-expects-use-24-bln-tax-frozen-russian-assets-fund-ukraine-2023-10-11/>

34 Yellen supports using proceeds from frozen Russian assets for Ukraine. PoliticoPro. October 11, 2023 <https://subscriber.politicopro.com/article/2023/10/yellen-supports-using-proceeds-from-frozen-russian-assets-for-ukraine-00120902>