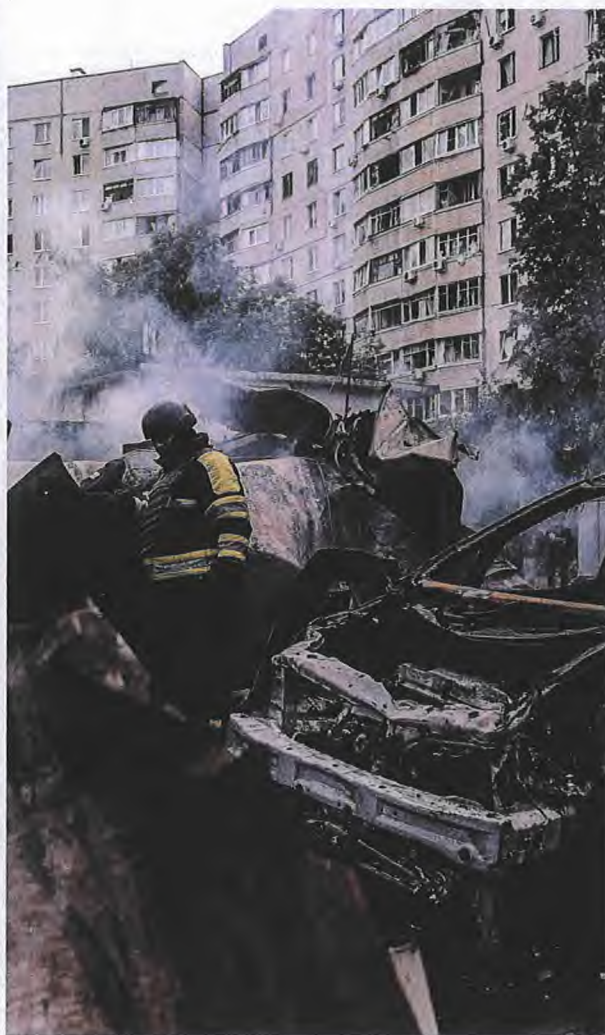


On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine

20 May 2024



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Authors

Professor Dapo Akande

Chichele Professor of Public International Law
Oxford University
Essex Court Chambers, London

Professor Olivier Corten

Center for International Law
Université libre de Bruxelles

Professor Shotaro Hamamoto

School of Government/Graduate School of Law
Kyoto University

Professor Pierre Klein

Center for International Law
Université libre de Bruxelles

Harold Hongju Koh

Sterling Professor of International Law
Yale Law School

Paul Reichler*

Public International Law Practitioner
11 King's Bench Walk Chambers, London

Professor Hélène Ruiz Fabri

Sorbonne Law School
Université Paris 1 Panthéon-Sorbonne

Professor Philippe Sands

University College London
11 King's Bench Walk Chambers, London

Professor Emeritus Nico Schrijver

Grotius Centre for International Legal Studies
Leiden University, the Netherlands

Professor Christian J. Tams

University of Glasgow
11 King's Bench Walk Chambers, London

Philip Zelikow*

Senior Fellow, Hoover Institution
Stanford University

**Paul Reichler or Philip Zelikow are corresponding authors for further inquiries on behalf of the signers.*

Issue

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

I. Summary

1. For the reasons set out below, the authors of this Memorandum – experienced public international lawyers and practitioners from Belgium, France, Germany, Japan, the Netherlands, Nigeria, the United Kingdom, and the United States – having given their most serious consideration to this issue, conclude that it would be lawful, under international law, for States which have frozen Russian State assets to take additional countermeasures against Russia, given its ongoing breach of the most fundamental rules of international law, in the form of transfers of Russian State assets as compensation for the damage resulting directly from Russia's unlawful conduct. Only Russian State assets would be affected. No new measures would be imposed on assets that are genuinely privately owned. In coming to these conclusions, none of us are acting on behalf of sponsors or clients, although one of us, Harold Hongju Koh, does represent Ukraine before certain international tribunals.
2. Our recommendation, set forth below, is that the compensation be provided through an international mechanism, to which the States concerned would transfer the Russian State assets currently under their control. Their jurisdiction may extend, depending on the circumstances, to offshore currency holdings intermediated through their country's correspondent banks. This mechanism could support urgent programs to efficiently and effectively mitigate further damages and aid Ukraine's recovery. It could also be given the authority and capacity to receive and review claims from Ukraine and other injured parties – public and private – and distribute appropriate compensation in line with internationally-agreed standards and procedures. The total amount of compensation would not exceed the amount owed by Russia for the damage it has caused. In the unlikely event that the Russian State assets transferred to the mechanism are found to exceed the amount of damage suffered by Ukraine and other injured States and entities, the excess would be returned to the Russian accounts from which the assets were transferred. Should Russia eventually sign a peace agreement and address its obligations, any assets transferred to Ukraine or other injured parties would be credited to Russia as an offset against its total liability.
3. There is no doubt about the illegality of Russia's invasion of Ukraine, occupation of Ukrainian territory or annexation of large parts of it. By these actions, Russia has violated the most fundamental rules of international law, enshrined, *inter alia*, in the United Nations Charter, Article 2, paragraph 4, which prohibits the use or threat of force against the territorial integrity or political independence of another State. The principle is embodied in UN General Assembly ("UNGA") resolution 2625 (1970), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which reflects customary international law and declares unlawful and inadmissible the acquisition of another State's territory by force. These rules are a cornerstone of the post-World War II international legal order; indeed, they are indispensable to the foundation upon which the entire rules-based order is built.
4. Based on its violation of these fundamental principles, Russia's invasion of Ukraine has been condemned three times in resolutions adopted by the UNGA, which collectively call upon Russia to immediately cease its armed intervention in Ukraine, withdraw its forces from Ukrainian territory, and compensate Ukraine for the damage it has inflicted. On 16 March 2022, the International Court of Justice ("ICJ") ordered provisional measures against Russia, calling on it to immediately

end its military activities against Ukraine. Russia has ignored the UNGA's resolutions and the ICJ's Order on Provisional Measures.

5. In the face of such a blatant violation of a State's international legal obligations, international law permits other States to respond with "countermeasures". Lawful countermeasures are measures that would be unlawful if imposed against an innocent State, that is, one that has not violated its international obligations, but are permitted if they are taken against an offending State and are intended to induce the offending State to cease its unlawful conduct, and comply with its obligation to compensate States that have been injured by that conduct, including to effectuate that compensation with the offending State's assets.
6. Third States, that is, States that have not been directly injured by the offending State's conduct, are permitted by international law to take collective countermeasures against the offending State, in this case Russia, for grave breaches of its obligations under peremptory norms of international law that affect every State in the international system, as here, obligations that have an *erga omnes* character.
7. Moreover, States that have been specially affected by Russia's unlawful acts, or damaged indirectly by the threats, costs or disruptions these acts have

caused, can join in countermeasures employed by other States on these grounds, as well.

8. As an early response to Russia's unlawful invasion of Ukraine, several States where Russian State assets are located took action to freeze those assets so that they would not be available to finance Russia's war of aggression, and these assets remain frozen today. Whether labelled as such or not, these were lawful countermeasures under international law. And they remain so, since Russia's unlawful conduct, to which they were a response, has not ceased. Absent Russia's offending conduct, it would have been unlawful for any State to freeze its assets.
9. In light of the enormous level of damage and destruction Russia has inflicted on Ukraine during nearly two years of war, and the immense cost of reconstruction, some of which has been borne by States holding Russian State assets, calls have arisen for those States to use the frozen assets – an estimated \$300 billion spread across several States – as compensation to Ukraine and other injured parties since, under international law, Russia is obligated to compensate them for all the damage it has caused.¹ Under this approach, any assets transferred to Ukraine or other injured parties would be credited to Russia as an offset against its total liability.