

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

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I. Executive Summary

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

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

But freezing Russia’s assets is not enough. The United States and its allies can and must do more. Any country that currently holds Russian assets should transfer them to Ukraine. As this report makes clear, repurposing Russia’s frozen reserves in that manner fully comports with existing legal authorities and is the only practicable policy action that will hold Russia accountable for its heinous acts while allowing Ukraine to survive and recover from the war’s devastating effects. In urging the United States

and its allies to undertake this proposal, this report in no way suggests that Ukraine is the sole victim of Russian aggression deserving of monetary relief. Nor does this report exclude the possibility that Russian sovereign assets may be transferred, consistent with U.S. domestic law and international law, to other beneficiaries—including non-Ukrainian victims of Russian atrocities. Quite the contrary, a central goal of this report is to provide a broader blueprint for holding Russia and President Putin accountable for their unprecedented aggression and brazen contempt for the international order.

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

U.S. Domestic Law. In Part III, this report offers an authoritative legal analysis of U.S. law and explains why transferring Russia’s sovereign assets to Ukraine complies with domestic statutory and constitutional law. Although this part of the report may appear to tread familiar ground to some readers, it presents the most thorough exploration to date of the President’s authority to act in response to the crisis in Ukraine. That analysis of the President’s power under U.S. law begins with the undisputed axiom that whoever occupies the position of President possesses expansive authority to conduct foreign affairs on behalf of the United States. Over the years, Congress has authorized the Executive Branch to act

broadly in this arena, providing the President a dynamic and extensive set of tools to carry out the nation’s objectives. And courts, in turn, have interpreted those powers capaciously. This is the foundation from which any discussion of the President’s power to respond to Russia’s illegal war must take shape.

In these extraordinary circumstances, the President’s power flows from the International Emergency Economic Powers Act (“IEEPA”). Through IEEPA, Congress granted the President the authority—in Subsections B and C of the statute—to address certain international emergencies in accordance with enumerated requirements. This report relies solely on authority conferred in Subsection B. Out of deference to the President’s expertise and authority in the realm of foreign affairs, Congress empowered the President to define the scope of his powers under IEEPA. Presidents have long seized on that deference. And the President can act similarly here to achieve the proposed transfer through Subsection B.

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

Subsection B of IEEPA authorizes the President to, among other things, “block” and/or “direct and compel” the “transfer” of “any right, power, or privilege with respect to” Russia’s “property.” Congress did not define the statutory term “transfer,” so its meaning must be derived by using the traditional tools of statutory interpretation. Those tools demonstrate that

“transfer” means the conveyance of a property interest from one entity to another. Accordingly, under Subsection B, the President has the power to “direct and compel” the conveyance of Russian sovereign assets to Ukraine. If there were any doubt about that straightforward interpretation of the statutory text, precedent and historical practice further reinforce what the plain text of IEEPA already makes clear.

Whether the President executes the proposed transfer under his existing powers under IEEPA or under newly enacted legislation, the resulting transfer must still be consistent with the Constitution and other domestic statutes. This report concludes that such a transfer would be. The Constitution would not prohibit the transfer of Russian assets to Ukraine because Russia, as a foreign sovereign, lacks both due process and takings rights under the Fifth Amendment. Nor would any domestic statutes stand in the way of the proposed transfer. Specifically, the Foreign Sovereign Immunities Act does not apply because the transfer involves purely executive action and does not involve the courts. And the Administrative Procedure Act is satisfied because construing IEEPA to allow for the transfer is not just a plausible interpretation of the statute, it is the only reading supported by the statute’s plain text.

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

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

Critics of this report's proposal to transfer Russia's assets to Ukraine have invoked "sovereign immunity" as a basis for hesitation. But that objection is misplaced for multiple reasons. As a threshold matter, the invocation of Russia's sovereign immunity as a defense against an asset transfer rests on a conceptual error. The United States and its allies are not prohibited from transferring Russian assets by virtue of some categorical immunity that shields Russia from any and all actions taken by other sovereigns. Sovereign immunity is a doctrine that insulates sovereign entities from liability in judicial proceedings, not a limitation on a sovereign's foreign policy carried out through executive or legislative action. Instead, the United States and other countries are

constrained by well-established principles of foreign relations and customary international law, including reciprocity, comity, and fair compensation. But here, those principles do not foreclose the proposed transfer because the United States and its allies may transfer Russian assets to Ukraine under the doctrine of countermeasures. And in all events, even assuming that a doctrine like sovereign immunity were relevant, it would not bar the transfer of Russian assets any more than it barred countries like the United States from freezing them (which no one can seriously dispute was permissible under these extraordinary circumstances). At bottom, the doctrine of sovereign immunity provides no shelter for CBR assets.

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

Instead, all countries holding Russian assets have an obligation to impose real, material consequences on Russia in the form of an asset transfer. This move is appropriate on many fronts: (1) transferring Russia's assets to Ukraine

will strengthen the international norm against aggression and discourage countries from violating that norm in the future; (2) the failure to act sends a dangerous message to the rest of the world that aggression, war crimes, and genocide will go unpunished; and (3) it would be a cruel irony to deny Ukraine the funds it needs by invoking respect for Russia’s “sovereignty” and “property rights” when Russia has chosen to trample on the sovereignty and property rights of the Ukrainian people. The policy concerns driving inaction, such as the risk of “de-dollarization” and Russian retaliation, are highly overblown. Russia will not convince other countries to abandon the dollar as a reserve currency, especially given the dollar’s many structural advantages and the absence of any viable alternative. And any supposed fear of

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retaliation or escalation ignores the limitations on Russia’s ability to respond, as well as the lack of such retaliation in response to historic sanctions levied to date. These speculative concerns are no excuse for inaction.

To operationalize the transfer of Russian assets to Ukraine, the United States and other countries holding those assets should establish a workable and efficient transfer mechanism. As other experts have explained, each country holding Russian sovereign assets can create and control an escrow account and then agree to pool the funds in those accounts into an international fund—overseen by an

independent international board—from which distributions can be made to Ukraine for its continued defense and eventual reconstruction. In addition, the United States and its allies should take steps to ensure that the transfer process is not undermined by corruption or the appearance of it. And finally, the funds should be sent directly and swiftly to the Government of Ukraine so that they are immediately available for use in defending and rebuilding the country.

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

At bottom, the United States and its allies have the necessary legal authority and a moral obligation to punish Russia for its brutality and illegal actions by transferring Russian sovereign assets to Ukraine. As this report shows, no legal impediments or practical considerations stand in the way of that bold and necessary action. The Ukrainian people and the international community have been waiting far too long to make Putin pay for the atrocities he has committed.



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