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### **Seizure of Russian State Assets by the G7 and EU Is Legally Justified as a Collective Countermeasure by a Group of Specially Affected States**

- In an earlier paper (see Annex), we explained how the seizure of Russian state assets by the G7 and EU could be justified as a collective countermeasure by a group of States exercising their common legal interest as members of the international community in bringing Russia back into compliance with the *erga omnes* obligation violated by its war of aggression against Ukraine.
- As recognized in that paper, the 2001 Articles on State Responsibility (the “Articles”) left open whether there is a customary international law basis for any and all members of the international community to engage in collective countermeasures in response to violations of *erga omnes* obligations. For the G7 and EU to proceed with seizure on this basis would therefore require a willingness to engage in state practice as a means of progressively developing international law.
- An alternative approach which, as the Articles recognize, is more grounded in existing customary international law, would be for the G7 and EU to act as a group of States that are specially affected by Russia’s unlawful conduct. This approach has the advantage of being based on the well-established right of injured States to engage in collective countermeasures and would not require any further development of the law to be regarded as legitimate.
- Moreover, unlike collective countermeasures predicated on the legal interest of all members of the international community in ending violations of *erga omnes* obligations, the group of States specially affected by any given breach of an international obligation will necessarily be limited. Acting on this basis therefore poses less of a risk of setting a precedent that could be abused by other States in future situations, particularly if a rigorous rationale can be developed for deeming the G7 and EU States as being specially affected by Russia’s invasion of Ukraine.
- Like countermeasures predicated on breach of an *erga omnes* obligation, collective countermeasures taken by a group of specially affected States would have no implications for international law on sovereign immunity because countermeasures are otherwise unlawful actions that are excused as a means of bringing another State’s violations of international law to an end.

### **The Legal Basis for Collective Countermeasures by Specially Affected States**

- The Articles recognize that a State may be injured and therefore entitled to adopt countermeasures against a State in breach of its international obligations where the obligation breached is owed to a group of States or the entire international community and the State adopting the countermeasures is specially affected by the breach. This could be the case when a multilateral treaty is violated or when an obligation arising under customary international law and owed to a multitude of States is breached.

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- The right to adopt countermeasures in this situation is uncontroversial and arises from the status of the adopting State as an injured State. By contrast, the Articles do not classify States as being injured by the violation of an *erga omnes* obligation owed to the international community as a whole, although the Articles do recognize that the non-violating members of the international community share a legal interest in seeing such a breach ended. The Articles left open whether this legal interest alone could serve as the basis for collective countermeasures.
- The International Law Commission's Commentaries on the Articles note that the concept of the "specially affected State" and its articulation in the Articles was borrowed from Article 60 of the Vienna Convention on the Law of Treaties ("VCLT").
  - Under Article 60(2)(b) of the VCLT, a party specially affected by the breach of a multilateral treaty may invoke the breach as a ground for suspending the operation of the treaty between itself and the defaulting State.
  - The legislative history of the VCLT shows that the concept of the specially affected State was adopted in this context as a means of preventing other, uninjured States from taking unilateral advantage of the violation to escape from their treaty obligations.
- Similarly, in the context of collective countermeasures, limiting the group of States that can claim to be injured to either the direct victim of a violation of international law or those States that can show that they are specially affected by the violation, has the effect of narrowing the scope for abuse by other States.
- The Commentaries indicate that "the special impact that a State must have sustained in order to be considered 'injured'" is to be "assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case."
  - According to the Commentaries, "[f]or a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."
  - The Commentaries give the example of a case of pollution of the high seas in breach of the UN Convention on the Law of the Sea which particularly affects "one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed."
- This is consistent with the State practice in this field. For example, in 1983, the UK, Japan, the US and Canada suspended flight permits for Aeroflot, as a collective countermeasure in response to the downing by the USSR of a Korean airliner in breach of the Chicago Convention on International Civil Aviation. What distinguished these States from the generality of parties to the Chicago Convention was that their own nationals had been killed in the incident.

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- When applied to the facts of Russia’s unprovoked invasion of Ukraine, it can be seen both that the G7 and EU States qualify as specially affected within the meaning of the Articles and that the reason they qualify as such sets a high bar for the same legal basis to be invoked as a justification for countermeasures by unfriendly States in future circumstances.

### **The G7 and EU as Specially Affected States**

- As noted above, whether a State qualifies as specially affected needs to be assessed “on a case-by-case basis, having regard to the object and purpose of the primary obligation breached.”
- As recognized by the UN General Assembly in its Resolution ES-11/1, adopted on 2 March 2022, the primary obligation breached by Russia’s full-scale invasion of Ukraine is the prohibition on wars of aggression, a fundamental norm of customary international law and a key provision of the UN Charter.
  - The object and purpose of this prohibition, as reflected in the preamble to the UN Charter, includes “sav[ing] succeeding generations from the scourge of war” and “maintain[ing] international peace and security.”
  - These broad goals necessarily encompass the more specific objectives of avoiding the humanitarian suffering associated with war, including the displacement of people, as well as the costs of reconstructing economies ravaged by destructive military action.
- On each of these metrics, Russia’s invasion, coupled with its ongoing failure to provide compensation to the Ukrainian victims of its illegal actions, has impacted the G7 and EU States in a way that differentiates them from the rest of the international community.
- First, this group of States is specially affected by the threat to security in the regions surrounding Russia arising from that State’s readiness to launch unprovoked military action against a neighboring State.
  - The G7 and (with limited exceptions) the EU consist of States that either directly border Russia or that belong to collective security arrangements that bind them to come to the defence of neighbors of Russia in the event of a military attack.
  - Consistent with their special interest in the security of this region, G7 leaders adopted a Joint Declaration of Support for Ukraine in July 2023, committing each member to enter into new bilateral security commitments with Ukraine in response to Russia’s aggression. Notably, the EU and its Member States indicated in the Joint Declaration their willingness to join this effort.
  - The overwhelming majority of the financial, political and other support that Ukraine has received to help it resist the Russian military onslaught has come from G7 and EU States.

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- Second, the G7 and EU States are specially affected by the disproportionate burden they bear in housing and caring for refugees displaced from Ukraine as a result of Russia's invasion.
  - Ukraine borders five EU Member States which were the natural first ports of call for millions of refugees fleeing Ukraine in the early months of the Russian invasion. The wider EU, as well as the UK, have absorbed millions more, as proximate friendly States wishing to alleviate the humanitarian crisis caused by Russia's actions.
  - News reports and UNHCR statistics indicate that, since the crisis began, G7 and EU States have absorbed at least 4.7 million Ukrainian refugees, approximately 75 percent of the total externally displaced Ukrainian population as of 31 December 2023.
- Third, the G7 and EU are specially affected because, in addition to bearing the great majority of the financial burden of supporting the Ukrainian economy over the two years since Russia began its invasion, they will be expected to pick up a similar proportion of the cost of reconstructing Ukraine in the future if Russia does not pay reparations.
  - According to Germany's Kiel Institute, 97.2 percent of financial aid to Ukraine (i.e., grants, loans and loan guarantees) between January 2022 and October 2023 has been funded by the G7 and EU.
  - G7 and EU States have traditionally accounted for the large majority of overseas development assistance. The OECD Development Assistance Committee ("DAC") reports that the G7 and EU States provided 86.4 percent of official development assistance in 2022 among all countries surveyed by the OECD, or \$212 billion in total.
  - This pattern can be expected to replicate itself when the time comes to reconstruct Ukraine and is likely to be reinforced by the reluctance of other significant world economies (e.g., China and India) to participate for political reasons. To the extent Russia fails to pay the reparations it owes Ukraine as a result of its unlawful invasion, it is therefore reasonable to assume that the G7 and EU States will be expected to cover the major part of the shortfall.

### **Conclusion**

- G7 and EU States have unquestionably been disproportionately impacted by the fallout from Russia's invasion of Ukraine. Much like the example given in the Commentaries to the Articles on State Responsibility, these States are specially affected by Russia's violation of the prohibition on wars of aggression because it is primarily these States that have had to deal with the noxious spillovers of this unlawful conduct.
- In these circumstances, there is a clear justification under the international law of countermeasures for the G7 and EU to move forward with the outright seizure of Russian State assets found within their jurisdictions.

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- Because countermeasures consist of actions that would otherwise be unlawful, justifying the seizure in these terms is the best way to ensure that it has no long-term impact on customary international law relating to sovereign immunity of State assets. Grounding the legal justification for countermeasures in the facts that mark out G7 and EU as specially affected minimizes the risk of setting a broad precedent that could be abused by third States in future.

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## ANNEX

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#### **Justification for Seizure of Russian State Assets Under International Law**

- As the perpetrator of an unlawful war of aggression against Ukraine, there is no question that Russia is liable under international law for the damage it has inflicted upon Ukraine. The question is not whether Russia is obligated to compensate Ukraine but from what sources that compensation will be provided.
- The estimated \$300 billion's worth of assets of the Russian Central Bank and other Russian state institutions that have been immobilized by G7 and other like-minded nations are one important and legally available source of such funds.
- The G7's REPO task force has already publicly [declared](#) that these immobilized funds should not be returned to Russia until there is a resolution of the conflict that addresses Russia's violation of Ukraine's sovereignty and territorial integrity, including a satisfactory mechanism for Russia to pay for all the damage it has caused.
- Policymakers understandably want to know that the logical next step – seizure of the Russian State assets and their transfer to Ukraine and Ukrainian claimants through an agreed international compensation mechanism – is justified under international law, which generally accords such State assets sovereign immunity.
- This paper outlines why the seizure and transfer to Ukraine and Ukrainian claimants of Russian State assets is permitted under international law either as a collective countermeasure in response to Russia's violation of the fundamental rule prohibiting wars of aggression or as an act of collective self-defense.

#### **Seizure of Russian State Assets as a Collective Countermeasure**

- Seizure of Russian State assets would be excused (i.e., could not give rise to a legitimate complaint on Russia's part) if the measure was presented as a countermeasure designed to encourage Russia to cease its violations of international law.
- Customary international law, as partially codified in the International Law Commission's Articles on State Responsibility adopted by the UN General Assembly in its Resolution 56/83 of December 12, 2001, permits injured States to suspend their performance of international law obligations towards a State "which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations."
- This rule clearly encompasses countermeasures taken by Ukraine, which is the State most obviously injured by Russia's aggression. G7 and other States would be on firm ground if, at the request of Ukraine, they seized Russian state assets as a means of reinforcing the pressure on Russia to comply with its international obligations.
  - The Articles on State Responsibility recognize that, when the obligation being violated is owed to the entire international community – as is the case with the prohibition on wars of aggression – every other State has a legal interest in ending the non-compliance.

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- The Articles left open, for future development in light of developing State practice, the issue of whether, in such circumstances, these other States may take countermeasures in the collective interest at the request of the injured State. A powerful argument for recognizing collective countermeasures as legitimate under international law is that limiting the right to injured States would benefit only powerful States that can resort effectively to such self-help and disadvantage weaker States that do not have similar recourse.
- Accordingly, such collective countermeasures are not ruled out by the Articles, even if the International Law Commission believed there had been too little State practice before 2001 to allow the International Law Commission to codify collective countermeasures as part of customary international law.
- In fact, the adoption of collective countermeasures by third states in response to a fundamental violation of international law has been a far more common occurrence since 1945 than appreciated by the International Law Commission. This state practice has included trade restrictions and the termination of landing rights in violation of existing treaty commitments in response to acts of aggression such as the Soviet Union's invasion of Afghanistan in 1980 and Iraq's invasion of Kuwait in 1991.
- In the exceptional circumstances created by Russia's invasion of Ukraine, the G7 and other likeminded States should not hold back from taking action that would contribute to the further development of customary international law on collective countermeasures. On the contrary, the current situation calls out for countries to introduce appropriate countermeasures to address a fundamental challenge to international peace and security—unlawful and unprovoked aggression perpetrated by a Permanent Member of the UN Security Council which then abuses its veto to block an effective UN response.
- When confronted with novel threats to international peace and security in the past, international law has necessarily evolved in response to the new situation. The facts surrounding Russian aggression against Ukraine demand nothing less today.
- Critically, if presented as a countermeasure, seizure of Russian State assets would have no implications for international law on sovereign immunity because countermeasures are otherwise unlawful actions that are excused as a means of bringing another State's violations of international law to an end.
- The seizure of Russian state assets can be carried out in a manner that complies with the various conditions for countermeasures prescribed by the Articles on State Responsibility:
  - According to the Articles, the countermeasure must be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." The World Bank [estimates](#) that, as of February 2023, the cost of reconstruction and recovery in Ukraine had grown to \$411 billion. Barring unanticipated developments, this figure will continue to rise rapidly every week. It follows that the seizure of the estimated \$300 billion in Russian State assets believed to be immobilized worldwide cannot be considered disproportionate to the havoc wreaked in Ukraine by Russia.

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- The Articles require that, as far as possible, countermeasures should be “taken in such a way as to permit the resumption of performance of the obligations in question.” If the countermeasure is considered to be the seizure and transfer of immobilized Russian State assets, the countermeasure could be reversed if and when Russia complies with its obligations by replacing the seized assets with financial instruments of corresponding value. Alternatively, if the countermeasure is considered to be the suspension of Russia’s sovereign immunity, that immunity could readily be restored by a subsequent act once Russia has brought itself into compliance with its obligation to cease its war of aggression and pay compensation to Ukraine.
- Under the Articles, the countermeasure should generally be notified to the target State in advance, and the State proposing to adopt the countermeasure should offer to negotiate with the target State. Any legal instruments adopted by third states authorizing the seizure and transfer of Russian State assets as a countermeasure could readily incorporate provision for Russia to be notified in advance of the seizure and given the opportunity to negotiate the cessation of its invasion and the payment of reparations to Ukraine. Not only would this comply with the preconditions for a legitimate countermeasure, it would constitute smart diplomacy.
- The Articles specify that a countermeasure must be terminated when the target State has complied with the international obligation whose previous breach was the reason for the imposition of the countermeasure. In the event that Russia ceases its military actions against Ukraine and pays in full the reparations due to that country, States taking countermeasures would give renewed effect to Russia’s sovereign immunity and, if necessary, could arrange for reimbursement to Russia of any resulting overpayment of the compensation due to Ukraine.
- In addition to the above, given that the seizure of Russia’s State assets would be characterised as a countermeasure in the collective interest, it would also be prudent that, before the G7 and likeminded States take action, Ukraine issue an express and formal written request to seize and transfer, under an agreed international mechanism of compensation, the Russian State assets to Ukraine and Ukrainian claimants.

**Seizure of Russian State Assets as an Act of Collective Self-Defense**

- Separate from the rationale for presenting the seizure of Russian State assets as a collective countermeasure, seizure of the assets would be lawful as an act of collective self-defense.
- Article 51 of the UN Charter expressly recognizes “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” Ukraine, of course, is a Member of the United Nations.
- This right of self-defense is not dependent on the membership of the State under attack in a pre-existing collective security arrangement, such as that embodied in NATO. When a state that is subject to an armed attack requests assistance, any third party may invoke collective self-defense as a justification for assisting the requesting state to repel the attack, including by the use of force.

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- Notably, in the current situation, there appears little prospect of the UN Security Council acting in response to the armed attack on Ukraine, given Russia's veto. In these circumstances, the inherent right of collective self-defense assumes even greater importance.
- Collective self-defense can take numerous forms other than direct military confrontation with the aggressor State. For example, by providing weapons and training to the Ukrainian armed forces at the request of the Government of Ukraine, numerous States are already exercising one dimension of their right to engage in the collective self-defense of Ukraine in response to Russia's unprovoked invasion. These States have been clear that this support does not make them a party to the conflict initiated by Russia.
- Russia's aggression has taken an economic form, as well as a military form. By attempting to destroy Ukraine's economic infrastructure and terrorize its population, Russia seeks to bring Ukraine's economy to its knees and to end its resistance to the unlawful invasion. By impeding Ukraine's grain (and other) exports, Russia seeks not only to deny Ukraine vital export earnings but also to exert pressure on third countries that are dependent for their food security on Ukraine's exports.
- These economic components of Russia's war of aggression underline that collective self-defense will often require an economic, non-military response. If international law permits States to provide weapons for use against an aggressor as a measure of collective self-defense, it logically also allows them to take proportionate economic measures at the request of a State under armed attack with the same objective of ending the aggression.
- This is how the right has been interpreted by States in the past. For example, in 1982 when the European Community and Canada imposed sanctions on Argentina after its invasion of the Falkland Islands exceeding those previously authorized by the UN Security Council, Canadian officials justified those non-military measures as an exercise of collective self-defense.
- Today, Ukraine is asking States in possession of immobilized Russian State assets, such as Russian Central Bank funds, to confiscate those assets so that they may be transferred to Ukraine and Ukrainian claimants as compensation for the devastation inflicted on that country by Russian aggression.
- Complying with that request would constitute a justified act of collective self-defense as it would strengthen Ukraine's ability to resist the economic pressure imposed on it by Russia's unlawful war, as well as constituting a powerful incentive to Russia to end its aggression and bring itself into compliance with its international obligations.
- Such action would also be consistent with the requirements of necessity and proportionality in the use of collective self-defense.
  - Russia's war of aggression has inflicted hundreds of billions of dollars' worth of material damage on Ukraine, as well as non-material damage in the form of human suffering that is beyond counting. Ukraine is fighting for its very existence against an aggressor with far larger resources as it disposal. Transferring the immobilized Russian resources to Ukraine is essential to help redress this imbalance and to resist the aggression.

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- As previously noted, by no conceivable measure could seizure of the approximately \$300 billion in Russian State assets believed to be immobilized worldwide, be considered a disproportionate response to the estimated \$411 billion (and rising) in damages inflicted by the Russian armed attack on Ukraine.

**Conclusions**

- The statement by the G7 REPO task force conditioning release of Russia State assets on an acceptable resolution of the invasion is a welcome but insufficient step. Refusing to release the assets sends a useful message to Russia but does nothing to provide much needed relief now to Ukraine and Ukrainians suffering the deadly consequences of Russia's unprovoked invasion.
- Bolder action can and should be taken to make Russia pay now for its barbaric conduct towards its neighbor. Seizing and transferring to Ukraine the immobilized Russian state assets already under the control of G7 members and like-minded countries, is something that can be done rapidly if the necessary political vision and will can be summoned. Such action would provide a strong incentive for Russia to end its illegal war of aggression.
- This reasonable step is fully consistent with international law. The seizure and transfer of the Russian State assets is justified either as a collective countermeasure to encourage Russia to comply with its obligations or as a legitimate exercise of the right of collective self-defense.

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