HOW DO WE EXPRESS OUR OUTRAGE AT RUSSIA?

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Since Russia invaded Ukraine in 2022, the United States and its allies have searched for the best way to express their horror and dismay. At the level of values, the invasion affronts the core principle of liberal internationalism: the outlawing of wars of aggression.[1] In terms of state interests, the attack on Ukraine exposes much of Europe, especially the former members of the Soviet Union, to a heightened risk of military aggression. Political leaders who had preached pragmatic accommodation with the Putin regime feel betrayed and regret their willingness to rely on Russia to meet their energy needs. Outrage results.

In the modern era, states have various measures to express their outrage. The most ancient means for states to do this, and the one against which all other forms of retaliation were measured for much of history, was the use of force ("war"). States would support their armed attacks with economic measures, such as Napoleon's Continental System ("economic sanctions"), when feasible. Another alternative was to privatize retaliation ("private sanctions"). For example, at the time of the founding of the United States, letters of marque and reprisal served as the principal means of privatizing punishment for outrageous conduct. War, either threatened or realized, remained at the center of international conflicts.

We seem to live in a different world today. The United States and its allies have avoided war and private measures while adopting robust economic sanctions against Russia and its running dog, Belarus. Several members of Congress, and not a few former government officials, have argued that these actions do not go far enough and that either war or private sanctions need to be

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1. *See* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 117–18 (2017).

deployed as well. During the first year of the Russian invasion, however, the Biden administration and Congress focused exclusively on economic sanctions, and U.S. allies did not go further. The principal debate has been over what limits currently exist on the executive's power to employ economic measures and whether to provide the President with new authority.

This article argues that the principal object of U.S. expressions of outrage at Russia, as well as those employed by U.S. allies, should be to bring the war to a satisfactory conclusion. It leaves to others to spell out what this endpoint should look like.[2] It maintains, however, that two principles should apply: the human and material cost to Ukraine should be minimized, and Russia should be deterred from using force against Ukraine (as well as all of its neighbors) for the indefinite future. These principles contradict each other, as deterrence is costly and the people of Ukraine will bear the lion's share of those costs. At a minimum, though, the President and Congress should express the country's outrage against Russia in a manner that will not unnecessarily prolong the conflict. Here, "unnecessarily" means without providing a commensurate quantum of deterrence against future Russian force.

The argument proceeds in three parts. It first provides a general legal overview of war, economic sanctions, and private sanctions as instruments for expressing outrage. It then reviews the sanctions that the United States has deployed to date, the existing authority to do more, and legislative proposals to add to that authority. In the last part, the article considers whether the proposals to do more would likely satisfy the object of bringing the war to a satisfactory conclusion or not.

I. STATE EXPRESSIONS OF OUTRAGE

Until the end of the nineteenth century, the United States went to war when that suited its purposes. Over the course of the twentieth century, it gradually shifted its attention from armed force to economic sanctions, although the deployment of the world's greatest military power never was too far off the table. At the end of the twentieth century, it reinvented private sanctions in the

2. *E.g.*, Paul Poast, *The War in Ukraine Will End with a Deal, Not a White Flag*, WORLD POL. REV. (Jan. 20, 2023), https://www.worldpoliticsreview.com/putin-war-ukraine-end-nato-russia-annex-us-aid.

form of civil suits against designated outlaw states brought by victims of atrocities.

A. Armed Force

The two world wars as well as the transformation of military violence brought about by the invention of atomic weapons led states to rethink how they would express their outrage against each other. After the creation of the United Nations, wars remained part of the international landscape, but direct conflicts between great powers (understood as states possessing a credible nuclear deterrent) pretty much disappeared. Proxy wars (Korea, Vietnam, the Middle East, the Balkans, and now Ukraine), as well as state violence deployed within a great power's sphere of influence (Hungary and Czechoslovakia for the Soviet Union, the Caribbean and Central America for the United States), continued. But since the development of atomic weapons, the world has not yet seen an armed conflict carried out on the territory of one nuclear power by another.

The Russian invasion of Ukraine occurred against the backdrop of the less-than-elegant U.S. withdrawal from its twenty-year occupation of Afghanistan and the gradual winding down of its military presence in Iraq. Russia has more nuclear weapons than does the United States, although its other military capabilities have come into question as a result of its lackluster performance in Ukraine. It has been more than a century since U.S. forces operated on Russian territory, and that was a small deployment in the Far East during the chaos of the Russian Civil War. U.S. strategic thinking generally views Russia as a potential adversary but as a lesser threat than China. Still, the existence of such military power suggests that many interests converge to promote U.S. investments in training, development, and materiel. One of these interests includes showing off U.S. military capabilities to the best advantage.

B. Financial

Since World War II, the United States has developed a taste for wielding economic sanctions as an alternative, rather than a supplement, to the use of armed force. These sanctions have responded not just to actions that offend U.S. direct interests, such as terrorist attacks on U.S. nationals and the seizure of U.S.

nationals and their property, but also to government behavior that offends U.S. values, such as gross human rights violations and suppression of liberal democracy at home. The latter sources of outrage provoke responses only intermittently—important military allies such as Saudi Arabia and Turkey go unmolested—but since the end of the Cold War, the United States has shown a greater willingness to use this tool in its international relations.[3]

Cuba illustrates this preference. True, the Kennedy administration supported violence in a feckless attempt to oust the Castro regime in 1961. The next year it instituted an armed embargo to block Soviet efforts to install nuclear weapons there. But even before these deployments, the first foolhardy and the second perilous if ultimately successful, the United States imposed economic sanctions in response to Castro's increasing embrace of the Soviet Union. President Eisenhower first barred Cuba's access to the U.S. market for sugar. When Cuba retaliated by expropriating the assets of U.S. investors, the sanctions broadened. For more than sixty years now, U.S. firms have been barred from doing business in Cuba, and Cubans from doing business in the United States, aside from narrow exceptions for humanitarian and free-expression products. Travel between the two countries by nationals of either state also became mostly illegal, again with narrow exceptions.

Intermittent adoption of later sanctions against other states by the Johnson and Nixon administrations led Congress to restructure the legal regime for these measures. Under the old Trading with the Enemy Act, in effect since the First World War and broadened significantly just before the start of the Second, the President had almost unlimited power to take measures short of armed force once he declared an "international emergency," a largely undefined category.[4] In 1977, Congress adopted the International Emergency Economic Powers Act ("IEEPA") to rein in this authority.[5] Presidents still could impose travel bans and bar foreign states and nationals from undertaking transactions with U.S. persons or on U.S. territory. The latter produced asset freezes, which put foreign-owned assets under federal supervision so as to

3. *See generally* CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, ECONOMIC SANCTIONS RECONSIDERED (3d ed. 2009).

4. Act of May 7, 1940, ch. 185, §1, 54 Stat. 179 (codified at 50 U.S.C. App. § 5(b).

5. *See generally* International Emergency Economic Powers Act, Pub. L. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701–06).

bar any transactions, including changes of ownership, regarding that property. But with access to the Trading with the Enemy Act cut off, the President no longer could authorize the confiscation of foreign-owned assets unless in connection with a declared war. IEEPA also has a few exceptions, especially for expressive activities thought to be adjacent to, even if not clearly protected by, the First Amendment's guarantee of free speech.[6]

Not long after its enactment, IEEPA became the subject of a Supreme Court case arising from the Iranian hostage crisis.[7] The Carter administration responded to the seizure of the U.S. embassy and diplomats in Tehran, which the Iranian government did not prevent and then ratified, by imposing a comprehensive freeze on assets owned by Iran, Iranian state-owned companies, and most Iranians in good standing with the new regime.[8] It then reached an accord with the Iranian government. This treaty, the Algiers Accords, allowed for the release of some of the assets and the transfer of the remainder to a special fund for reimbursing U.S. persons with legal claims against Iranian persons, in return for the release of the hostages. A new international arbitral body, the U.S.-Iranian Claims Tribunal, had jurisdiction to address private claims against Iran as well as legal disputes between the two countries.[9]

U.S. persons that already had filed lawsuits in U.S. courts and attached Iranian assets in advance of judgment attacked the government's implementation of the Accords. They argued that the government lacked the authority to require litigants to transfer their claims to the new tribunal. This move, they maintained, went beyond the authority granted by IEEPA as well as effecting a taking of property in violation of the Fifth Amendment. In *Dames & Moore v. Regan*, the Court ruled unanimously that portions of the government measures fell outside of IEEPA but still were permitted due to an implicit grant of claims-settlement authority based on past congressional acquiescence in similar measures. Because the government only suspended the litigation, rather than dismissing the cases on the merits, the Court ruled that the Fifth Amendment question as to these claims was not ripe. A majority also ruled that

6. *See* TikTok Inc. v. Trump, 507 F. Supp. 3d 92 (D.D.C. 2020).

7. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

8. Exec. Order No. 12170, 3 CFR 457 (1980); 31 CFR § 535.203(e) (1980).

9. Claims Settlement Declaration, Jan. 19, 1981, https://iusct.com/wp-content/uploads/2021/02/2-Claims-Settlement-Declaration.pdf.

the right to attach property in advance of an enforceable civil judgment did not enjoy protection under the Fifth Amendment.[10]

The other significant event in the life of IEEPA was the 2001 Patriot Act.[11] In response to the 9/11 attacks, Congress increased the executive's sanctioning authority in one narrow respect. It allowed the confiscation of assets connected to a non-state entity (Congress had al-Qaeda in mind) or a state if that actor used armed force against the United States. This provision reflects two legal understandings: first, certain acts of violence could qualify as the kind of activity that triggers a state's right to self-defense under the UN Charter (which uses the term "armed attack"); and second, this right exists not only with respect to state violence but also when a non-state actor uses force in circumstances not supporting the attribution of responsibility to a state. When these conditions were met, the executive could confiscate—rather than just freeze—property, even though such actions were considered wartime measures.

International emergencies aside, Congress has authorized the executive to impose sanctions against international criminal enterprises, terrorist support organizations, and human rights abusers. A further arrow in the economic quiver is the threat of forfeiture of assets implicated in designated criminal activity. Provisions creating a civil-law right to assume ownership of property used in or generated by crimes have been in the federal criminal code forever.[12] These measures do not require conviction of a crime but rather proof by preponderance of the evidence that the property was involved in designated crimes or represents the proceeds or gross receipts of those crimes. They allow the Department of Justice to confiscate property connected to specific criminal activity without having to meet the beyond-a-reasonable-doubt evidentiary standard used in criminal proceedings or to acquire jurisdiction over the property's owners. Especially stringent forfeiture rules apply to the property of persons engaged in planning or carrying out acts of international terrorism.[13]

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10. *Regan*, 453 U.S. at 656.

11. USA PATRIOT Act of 2001, § 106, Pub. L. 107-56, Oct. 26, 2001, codified at 50 U.S.C. § 1702(a)(1)(B).

12. Pub. L. 99–570, title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207, codified at 18 U.S.C. § 981.

13. *Id.* at § 981(a)(1)(G).

IEEPA by its terms forbids persons designated by the executive from engaging in property transactions, effectively freezing their assets.[14] One activity subject to civil forfeiture penalties is the evasion or disguise of transactions subject to an IEEPA freezing order.[15] Thus, if a designated person seeks to disguise ownership of property so as to generate revenue from it, the Department of Justice may confiscate that property. Absent attempts to avoid an IEEPA freeze or use It in other criminal activity, however, the frozen property continues to belong to the designated person. IEEPA anticipates a return of the property to the owner at the end of the international emergency, absent misconduct related to that property.

C. Privatization

By the time of World War I, the United States had ceased to use letters of marque and reprisal as a means of privatizing the use of force in an international conflict. Late in the twentieth century, however, another means of privatizing outrage emerged. Prompted largely by the Lockerbie incident, a Libyan-run terror bombing of a civilian aircraft with great loss of life in the air as well as on the ground in Scotland, the Clinton administration induced Congress to amend the Foreign Sovereign Immunities Act to permit civil suits against states designated as sponsors of terror.[16] Before this enactment, the United States had relied on economic sanctions as a response to state support of terrorism, such as that attributed to Iran in the 1980s. In the fullness of time, Cuba, Iraq, North Korea, South Yemen, Sudan, and Syria joined Iran on the list of designated states.[17]

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14. 50 U.S.C. § 1702(a)(1)(A)–(B).

15. 18 U.S.C. § 981(a)(1)(A) (covering assets involved in violation of 18 U.S.C. § 1956); 18 U.S.C. § 1956(c)(7)(D) (covering transactions intended to evade an IEEPA freezing order).

16. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (amending 28 U.S.C. § 1605(a)); Pub. L. 110–181, div. A, title X, § 1083(a)(1), Jan. 28, 2008, 122 Stat. 338 (superseding and revising 28 U.S.C. § 1605(a)), codified at 28 U.S.C. § 1605(a); *see* Jonathan B. Schwartz, *Dealing with a Rogue State: The Libya Precedent*, 101 AM. J. INT'L L. 553, 563 (2007) (discussing the change Congress made to the sovereign immunity statute as it applied to countries designated as supporters of terrorism).

17. Bureau of Counterterrorism, *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/state-sponsors-of-terrorism (last visited Mar. 12, 2023) (Current designees are Cuba, Iran, North Korea, and Syria.).

Initially, this amendment only stripped a designated state of a defense that it would otherwise use to block a civil suit in a U.S. court. Congress did not create a federal cause of action to require compensation for U.S. victims of state terrorism until later.[18] Nor did the amendment authorize the automatic enforcement of judicial judgments against state-owned assets found within the United States.[19] Moreover, the loss of immunity does not, in theory, remove the right of states to mount a legal defense on other grounds.

As a practical matter, however, any state designated as a sponsor of terrorism already faces IEEPA sanctions, making it unlikely that it has people or property in the United States that could be used to satisfy a civil judgment. To the best of my knowledge, no state ever made an appearance in a civil suit coming within this exception to immunity. Accordingly, plaintiffs inevitably obtained a default judgment once they had made out a prima facie claim. A practice then emerged of lobbying Congress to designate certain assets under U.S. control, typically due to IEEPA sanctions, as a source for funding specifically designated judgments.[20]

Many actors, including the U.S. judge who has handled most of the claims against Iran, have attacked this process as ineffective and perverse.[21] In the few cases where Congress has designated foreign-state assets as available to satisfy terrorism judgments, the designation had no effect on the underlying legal obligation of the United States to return those assets to their foreign owner once the transactions freeze ended. Effectively, the designations transferred property from the United States to the judgment creditors without any material effect on the wrongdoing states. Accordingly, they do not serve as a means of reparation for or deterrence of terrorism. Moreover, the legislative process that produced these designations rests on political factors and connections, not any sense of proportional justice or U.S. policy.[22]

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18. 28 U.S.C. § 1605A(c).

19. Pub. L. No. 105-277, § 117, 112 Stat. 2681-491 (codified at 28 U.S.C. § 1610(f)).

20. *See* Bank Markazi v. Peterson, 578 U.S. 212 (2016).

21. In re Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 37 (D.D.C. 2009).

22. Saraphin Dhanani, *A Cautionary Tale: What Iran and Cuba Can Teach Us About Designating Russia a State Sponsor of Terrorism,* LAWFARE (Jan. 20, 2023), https://www.lawfareblog.com/cautionary-tale-what-iran-and-cuba-can-teach-us-about-designating-russia-state-sponsor-terrorism. The International Court of Justice determined that the confiscation of assets of Iran's central bank to satisfy a judgment against Iran amounted to a violation of the extant U.S.-Iran treaty because it effected an illegal expropriation. Certain

In other words, privatization of outrage through the launching of civil suits has not served U.S. international interests well. In the case that started everything—the Lockerbie victims' suit—Libya reached a settlement with the plaintiffs that tied their compensation to the suspension of other sanctions. The regime and the plaintiffs essentially formed a joint venture opposed to U.S. policy.[23] No later case has cost the targeted regime anything. Congress reaps the glory of standing tough against awful regimes while hiding from voters that U.S. taxpayers, and not the wrongdoers, ultimately will pay the cost of compensating victims.

II. U.S. MEASURES AGAINST RUSSIA

Against this background, the Russian invasion of Ukraine drove the United States to express its outrage over Russian behavior while seeking ways to both assist Ukraine in grappling with the invasion and to reach a peace that protects Ukraine's interests. Neither the United States nor its NATO allies plan to intervene directly against Russia. Rather, they have put together a series of aid packages to keep Ukraine afloat and sanctions packages to punish Russia. Some members of Congress and other supporters of Ukraine seek to compel a designation of Russia as a state supporter of terrorism so as to open the door to civil suits.

A. Military Measures

Since February 2022, the United States and its allies have rendered Ukraine substantial military assistance, including the embedding of military personnel for training and the provision of intelligence. So far, however, they have tried hard to keep Ukraine from using the weapons they provide on Russian territory (leaving open whether this includes the Ukrainian territory that Russia has purported to annex) or from having their own military resources used directly against Russia. Thus, proposals by Ukraine and some of its more ardent supporters in the West to Impose a no-fly zone against Russia with respect to Ukrainian territory have not gained official favor.

Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment, 2023 I.C.J. Doc. # 164-20230330-JUD-01-00-EN (Mar. 30).

23. Schwartz, *supra* note 16, at 568–69.

In response to pressure from the United States and its allies, the United Nations has done what it can to punish Russia, but that is not much. Russia's veto in the Security Council prevents that body—the only component of the United Nations that can impose sanctions and authorize force in response to breaches of the peace—from doing anything. The General Assembly has issued several resolutions condemning Russia and labeling it a violator of international law, but that does not provide a legal basis for anything.[24] Moreover, although the resolutions have passed by large votes, the states that did not approve them collectively represent the majority of the globe's population. The forty-plus states that have undertaken sanctions on their own initiative, meanwhile, account for more than half of the world's gross domestic product but only a fraction of its population.[25]

B. Economic Measures

Besides assisting Ukraine without waging war itself, the United States' other response to the invasion has been imposing economic sanctions on Russia, Byelorussia, and their nationals. Complicating this program has been legacy sanctions resulting from human rights violations (the 2012 Magnitsky Act) and Russia's 2014 annexation of Crimea (based on IEEPA). The challenge has been to identify new targets for punishment. The main breakthrough in the 2022 sanctions was to freeze the property of Russia itself as well as that of significant state organizations, in particular the Russian Central Bank.

Shortly after the invasion, a few observers argued that the president has authority under IEEPA not only to freeze but to confiscate assets, including all the Russian state property frozen at the onset of hostilities.[26] Some argued that IEPPA's authorization of transfers of covered assets include the power to transfer them to the

24. U.N.G.A. Res. ES-1, Mar. 2, 2022.

25. PAUL B. STEPHAN, THE GLOBAL CRISIS AND INTERNATIONAL LAW—THE KNOWLEDGE ECONOMY AND THE BATTLE FOR THE FUTURE 2–3 (2023).

26. Philip Zelikow & Simon Johnson, *Use the Kremlin's Seized Assets to Pay for Reconstruction,* FOREIGN AFFS. (Apr. 19, 2022), https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better?check_logged_in=1&utm_medium=promo_email&utm_source=lo_flows&utm_campaign=registered_user_welcome&utm_term=email_1&utm_content=20230217.

United States or Ukraine.[27] One professor maintained that Russian-sponsored cyberattacks on U.S. targets satisfied the "armed attack" prong of IEEPA added by the Patriot Act.[28] Another claimed, improbably, that a UN General Assembly Resolution condemning the invasion has the same legal effect as a UN Security Council Resolution requiring confiscation, thus triggering executive powers under the UN Participation Act.[29] Others, me included, pushed back on these arguments. To date, the Biden administration has not claimed any such authority.[30]

Several bills circulating in Congress in 2022, including one that passed the House, would have expanded the confiscation power to include assets of Russian persons frozen under IEEPA in response to the invasion. The Biden administration responded with its own proposal, one that would widen the civil forfeiture authority to extend to privately owned assets derived from "corrupt dealings" with the Putin regime.[31] Ultimately, however, the only measure enacted, an amendment to the 2023 Consolidated Appropriations Act adopted by the lame-duck Congress, authorizes the transfer to

27. Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, LAWFARE (May 12, 2022), https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine; Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, LAWFARE (May 23, 2022), https://www.lawfareblog.com/does-american-law-currently-authorize-president-seize-sovereign-russian-assets.

28. Tribe, *supra* note 27.

29. Lawrence H. Summers, Philip D. Zelikow & Robert B Zoellick, *The moral and legal case for sending Russia's frozen $300 billion to Ukraine*, WASH. POST, Mar. 20, 2023, https://www.washingtonpost.com/opinions/2023/03/20/transfer-russian-frozen-assets-ukraine. They rely specifically on E.O. No. 12817, 57 Fed. Reg. 48433 (1992), which, pursuant to a Security Council resolution, ordered the seizure of frozen Iraqi assets for transfer to a UN-administered fund to pay reparations to victims of the Iraq invasion of Kuwait. The Order relied expressly on the UN Participation Act, 22 U.S.C. 287c. The Security Council, of course, has not ordered any measures against Russia in the present crisis. Moreover, the Supreme Court later cabined the President's authority under the UN Participation Act. Medellín v. Texas, 552 U.S. 491, 529–30 (2008).

30. *See* Paul B. Stephan, *Seizing Russian Assets*, 17 CAP. MKTS. L.J. 276, 276 (2022) (highlighting how U.S. and international law permits seizing of Russian assets); *see also* Evan Criddle, *Opinion—Rebuilding Ukraine Will Be Costly. Here's How to Pay*, POLITICO (Mar. 30, 2022), https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649 (addressing the expenses incurred to rebuild Ukraine); *see also* Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets (discussing the challenges to hurdle through international law if Russian assets are frozen).

31. *See KleptoCapture: Aiding Ukraine through Forfeiture of Russian Oligarchs' Illicit Assets: Hearing on Testimony of Adam M. Smith Before the S. Comm. on the Judiciary* (2022), https://www.judiciary.senate.gov/meetings/kleptocapture-aiding-ukraine-through-forfeiture-of-russian-oligarchs-illicit-assets.

Ukraine of funds confiscated under existing civil forfeiture authorities regarding the invasion.[32]

As things stand, then, the United States and its allies have frozen many Russian assets, totaling perhaps as much as $300–$500 billion in value. In the United States, some portion of the frozen property might be confiscated were the government able to connect that property to criminal activity such as sanctions evasion. In the case of property owned by Russia directly or through state-controlled legal entities such as the Central Bank, however, the likelihood of criminal activity involving that property, and therefore of forfeiture, is slight. Foreign central bank deposits in U.S. banks, for example, rarely if ever are tainted with a history of fraud or similar criminal conduct.

Another legal cloud hangs over possible civil forfeiture of property belonging to Russia or companies that it controls. In *Türkiye Halk Bankasi A.S. v. United States*, the Court left open the door to according immunity to state-owned companies against criminal prosecutions.[33] Were that position to prevail, the courts would have to consider whether state entities also would enjoy immunity from civil forfeiture. Even though the Foreign Sovereign Immunities Act by its terms does not bar civil suits that fall its exceptions to immunity, the legal incapacity of state entities to commit crimes that are predicate to civil forfeiture might stand as a barrier.[34] Even if Congress were to fix the problem with an express authorization of criminal liability and related civil forfeiture for state assets, retroactive application of the fix might be problematic.[35]

In sum, the United States at present has only limited authority to confiscate property as part of an economics sanction program. Canada has adopted, but not yet exercised, a confiscation power for use against Russia, and some figures within the European

32. Consolidated Appropriations Act, 2023, Pub. L. 117–328 § 1768, 136 Stat. 4459.

33. Turkiya Halk Bankasi A.S. v. United States, 143 S.Ct. 940, 947 (2023) (holding that the Foreign Sovereign Immunities Act does not extend to criminal prosecutions but leaving open the possibility of common-law immunity for foreign sovereigns and their agents and instrumentalities).

34. *Cf.* Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 820 (6th Cir. 2002) (discussing criminal immunity of state actor under FSIA bars civil claim based on predicate criminality).

35. *Compare* Landgraf v. USI Film Products, 511 U.S. 244, 267 (1994) (explaining that civil retroactivity is not per se unconstitutional) *with* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1607 (2020) (acknowledging the principle of nonretroactivity as "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic").

Union propose to do the same.[36] Until these plans become operational, however, the only persons with reason to worry about asset forfeiture are private ones, such as the Russian oligarchs who also have much to fear from the Putin regime.

C. Weaponizing Private Litigation

Another proposal that enjoys some support in Washington, but remains unlikely, is the designation of Russia (and perhaps Belorussia) as a state sponsor of terrorism. Under U.S. law, the President has essentially unreviewable power to make such a designation. If he were to do so, Section 1605A of the Foreign Sovereign Immunities Act would come into play.[37] Under this provision, any person with a claim based on death or injury caused by certain acts could sue Russia and, after obtaining a default or contested judgment, execute the judgment against any property subject to an IEEPA freeze.[38]

The principal legal question that would arise were the President to do this is what acts would provide a claim against Russia under this exception. Section 1605A comprises "extrajudicial killings;" another statute, the Torture Victims Protection Act, states that this term does not encompass any "killing that, under international law, is lawfully carried out under the authority of a foreign nation."[39] This implies that claims based on killings constituting war crimes could be brought. Other acts prohibited by international humanitarian law, such as targeting civilians or disproportionate uses of force where death is not the outcome, might go uncovered.

The deeper policy issue, however, would be aligning payouts to successful plaintiffs against a systematic program to fund

36. Statutes of Canada, Ch. 10, Budget Implementation Act, 2022, No. 1, pt. 5, Div. 31 (2022); Statement by Members of the European Council, Feb. 23, 2023 ("We will also support Ukraine's reconstruction, for which we will strive to use frozen and immobilised Russian assets in accordance with EU and international law."), https://www.consilium.europa.eu/ en/press/press-releases/2023/02/23/statement-by-the-members-of-the-european-council.

37. *See* 28 U.S.C. § 1605A (stating the covered acts include "torture, extrajudicial killing, aircraft sabotage, hostage taking").

38. *See id.* § 1610(f)(1)(A); *see also* Bank Markazi v. Peterson, 578 U.S. 212, 218 (2016) (explaining the President's authority under the International Emergency Economic Powers Act).

39. Torture Victims Protection Act of 1991, Pub. L. No. 102-256, § 3(a), Mar. 12, 1992, (106 Stat. 73).

Ukrainian resistance and reconstruction. The cost of putting Ukraine back on its feet will be great, and the sums available to do this are limited. Under conditions of budgetary stringency, compensation of the relatives of victims of war crimes, however compelling a cause, may not count as the top priority. Moreover, access to the U.S. civil justice system and entrepreneurial plaintiffs' attorneys might not be the most compelling criteria for deciding how to distribute reparations in the wake of the war.

III. SANCTIONS AND PEACE

The fundamental question remains what mix of measures—military action, economic sanctions, and private actions—is most likely to bring the war to a prompt and satisfactory conclusion. On the one hand, complete capitulation by either side is unlikely. Ukraine enjoys substantial western support and regards Russia as an existential threat. It would surrender only if it lost all capacity for resistance. Russia would capitulate only as a consequence of a regime change that assessed good relations with the West as more important than any other considerations, most likely after a complete and humiliating military defeat that somehow avoids the use of nuclear weapons. Neither of these scenarios seems likely.[40]

Were a complete and unconditional defeat of Russia in the cards, building confiscation into the sanctions would in retrospect seem prescient. Some might argue that displays of resolve would increase the pressure on Russia to quit if not necessarily surrender. An analogy can be made to the chicken-game ploy, played by having two cars in a collision course. Supposedly, the way to win is to throw one's steering wheel out the window, demonstrating to the other driver the impossibility of winning. As many have observed, that solution works only if the other driver is not even more committed to not losing. When it comes to war, the analogy may not be a good fit.

If it becomes evident to both sides that a grinding, miserable stalemate is by far the most likely future of the conflict, the possibility of a deal becomes realistic. Minimizing the interval between the envisioning of a deal and bringing it about seems imperative, given that the alternative is senseless death and destruction. The question that follows is what kinds of sanctions

40. Poast, *supra* note 2.

might not make framing a deal easier but instead could delay its implementation.

The best way to analyze this problem is to suppose two alternative worlds: one where the United States and its allies have frozen significant amounts of Russian-connected assets, and the other where a substantial portion of those assets, especially those owned by Russia and its agencies and instrumentalities, have been confiscated. The first set of questions is whether confiscation will make more resources available to Ukraine than otherwise and whether Ukraine's gains will bring the parties to the bargaining table sooner. The second is whether unwinding confiscations so as to shorten the interval between envisioning a deal and realizing it will be costly and time-consuming compared to unwinding freeze orders.

One can safely assume that until a deal is on the table, Russia would be indifferent between having its assets frozen or forfeited. Either way, it would derive nothing from those assets and would have no clear expectation of getting them back. Once a deal emerges, however, Russia would want to recover as much of this property as possible. It might allow the deal to transfer some of the assets to Ukraine in return for a waiver of further liability. But assuming that Russia will let all assets go to Ukraine without some offset that Ukraine might prefer to more war seems implausible.

If Russia would be indifferent about the fate of its frozen assets in the period before a deal becomes possible, surely Ukraine would be indifferent about the source as opposed to the amount of funding. The United States and its allies might care a lot about the source, but only if at the end of the conflict, it faced no obligation to restore to Russia money previously transferred to Ukraine. Yet the baseline entitlement over which Russia would bargain is one of full recovery.

The United States and its allies could choose to lend Ukraine funds rather than make outright transfers, just as the United States did with the United Kingdom during World War II. A peace deal might include some debt forgiveness or restructuring. Ukraine would doubtlessly prefer unconditional grants, but it would choose greater aid with some risk of repayment over a lower amount with no risk.

Relevant to this calculus is the assumption that, as a matter of international law, Russia would be entitled to the return of its

property once the conflict ends.[41] This baseline exists because the legal justification for the confiscation of Russian assets would be the law of countermeasures. These principles, resting on general international law not codified in any treaty, although annotated by the International Law Commission, let states deploy reversible measures to induce a lawbreaking state to end its misconduct. Prominent commentators concede that confiscation might qualify as an appropriate countermeasure but only with the accompanying assumption that the confiscating state will make reparations to the lawbreaker once the latter returns to the straight and narrow. The issue, this literature posits, is reversibility, not confiscation as such.[42]

This brings us to the heart of the problem. How easy would it be for the United States and its allies, having confiscated Russian assets and sent them to Ukraine, to reverse these transactions? In a pure Coasean world involving private actors, the transaction costs may not be so great.[43] For liberal democratic states, a reversal could be very difficult. The forfeiture-and-transfer transaction would be off-budget and thus come under no fiscal limits, although the authority to carry out each leg of the transaction would have to rest on a legislative grant. But reimbursing Russia could come only out of appropriated sums. Legislators may find it easy to spend what they regard as someone else's money, even though as a legal matter the assets become the property of the United States upon forfeiture. Asking voters to tolerate disbursements in favor of a recent enemy, by contrast, would not come easily.

An even greater problem would arise were the President to designate Russia as a state sponsor of terrorism and judgment creditors then were to collect against frozen Russian assets. Reversing these collections would probably constitute a taking in violation of the new owners' rights under the Fifth Amendment. As a result, Congress would have to appropriate the money to replace the amounts collected on these judgments, in effect indemnifying

41. *See* Paul Stephan, *Response to Philip Zelikow: Confiscating Russian Assets and the Law,* LAWFARE (May 13, 2022) (discussing the President's request to Congress to expedite forfeiture of privately-owned frozen Russian assets).

42. James Crawford, *Counter-measures as Interim Measures,* 5 EUR. J. INT'L L. 65, 74–75 (1994). Crawford later was the reporter for International Law Commission, Draft articles on Responsibility of States for International Wrongful Acts, with commentaries (2001), which contains a chapter on countermeasures.

43. *See* Ronald H. Coase, *The Problem of Social Cost,* 3 J. L. & ECON. 1, 15–16 (1960) (explaining the cost of transactions).

Russia for its war crimes. Passing such a law seems challenging, to put it gently.

The main argument against confiscation as part of a sanctions package on Russia, then, is the difficulty of reversing this step. This Impediment would make it harder for Russia and Ukraine to complete a deal to end the hostilities. People might die and destruction might continue, all because of a pointless expression of outrage.

To date, the United States and its allies have not gone down this path. They have used military aid to empower Ukraine while trying, so far successfully, to avoid acts that would push Russia into a new phase of the conflict—one where Russia enters into an armed conflict with Ukraine's supporters. They have cut off Russian nationals and the Russian economy from access to the richest portion of the world, although many populous if poorer states have taken up some of the slack. Ukraine has exercised its own jurisdiction to punish war criminals that have come within its power. The International Criminal Court has just stepped in, to what effect remains a great and potentially terrible question.[44] The case for staying on the present course is strong unless the world changes in ways that we may imagine but not expect.

44. Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms. Maria Lvova-Belova, Mar. 17, 2023, https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin.