

for a long time, although he ultimately caved in. In the Ukrainian narrative, transferring Russian assets to support Ukraine is the morally correct thing to do; moreover, this would relieve the burden on the Western countries' budgets and mute the increasingly difficult political discussions about the legitimacy of continuing support for Ukraine.

According to Ukraine's deputy justice minister, Iryna Mudra, several steps are required to establish a compensation mechanism.²

” An international commission's decisions on the payment of compensation would carry a great deal of weight and serve as a vehicle for restoring justice and world order.

An inter-state agreement would

provide the legal foundation for a commission that would deal with the claims. Then, a special fund financed with Russian assets would be set up. In addition, an international register of damages, losses and reparations would be created to provide the basis for submitting compensation claims.³ This would mean that an institution established specially for this purpose would handle the relevant cases, rather than Ukrainian authorities or courts. Its decisions would carry greater weight and run less risk of triggering accusations of bias. Moreover, this would not be a simple case of 'victor's justice', but a genuine instrument for restoring justice and global order.

In search of a model for a compensation mechanism

There is no instrument in international law that could be precisely applied to the conditions of Russia's ongoing invasion of Ukraine. The models that Ukraine has suggested for both a compensation commission and a fund to finance compensation payments would thus set a precedent.

Similar institutions to deal with the issue of reparations have usually been set up after wars rather than in the midst of them. This was the case with the commission related to the 1998–2000 Ethiopia-Eritrea conflict and the special commission that was established after Iraq's invasion of Kuwait in 1990. However, the former operated under an agreement between the two states guilty of aggression, which had made claims against each other. It recognised both the Ethiopian (to the tune of \$174 million) and Eritrean claims (totalling \$161 million), but ultimately ended in failure because it relied on their willingness to make the relevant payments, which never happened.⁴ The commission for Kuwait operated under a mandate from the UN Security Council. Although it is currently impossible to establish such a commission due to opposition from Russia and China, in practical terms this solution appears to be closer to Ukrainian demands as the commission for Kuwait also allowed individuals and businesses to submit claims. However, it was also only established after the war, which ended with the defeat of Saddam Hussein's Iraq. Its activities have been cited as an example of success. The money for compensation payments came from the UN Compensation Fund, which received a percentage of the proceeds from the exports of Iraqi oil and petroleum products.

² 'Ірина Мудра: міжнародний Реєстр збитків. 500 днів повномасштабної війни', The Ministry of Justice of Ukraine, 8 July 2023, minjust.gov.ua.

³ In the context of a compensation mechanism, the terms 'compensation' and 'reparations' are used interchangeably. Historically, reparations were paid after the end of hostilities and took various forms: not only compensation, but also, for example, the confiscation of property or benefits in kind. Only states could claim them, but not individuals or legal entities. Today, the boundary between the two concepts has become blurred, hence even the statute of the Damage Register makes no distinction between them.

⁴ M.J. Matheson, 'Eritrea-Ethiopia Claims Commission: Damage Awards', *ASIL Insights*, vol. 13, issue 13, 4 September 2009, asil.org; A. Dybnis, 'Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict', *Loyola of Los Angeles International and Comparative Law Review*, vol. 33 (2), winter 2011, p. 257, after: digitalcommons.lmu.edu.

Obstacles to the possible transfer of Russian assets to Ukraine

Any seizure or use of Russian assets would require new legislation in the domestic laws of the countries that have decided to freeze them, and at present, most of the countries which are considering such a step do not have adequate mechanisms to do so.

Russian assets are covered by property rights, which are the cornerstone of a free-market economy for Western countries and can only be violated in exceptional situations. It is an accepted norm that no one may be expropriated without compensation. In this context, the mere fact that these funds have been frozen and can no longer be used already amounts to interference with property rights. Any confiscation of these assets with a view to reinvesting them and transferring the proceeds to Ukraine would be even more intrusive, as such steps would restrict the owner's right to use their property, dispose of it and derive benefits from it, such as interest; any seizure and transfer of these assets to Ukraine or a special fund would have a similar effect.

This problem relates in particular to the assets of private individuals, such as oligarchs, company owners and government-linked businessmen. No proof has been offered of their responsibility for the crime of aggression against Ukraine or other war crimes. Expropriating them without compensation, a legal basis or a court judgment would violate the fundamental principles of the law.

” Property rights are the cornerstone of a free-market economy, and can only be violated in exceptional situations.

The issue of seizing the assets that belong to the Russian state, primarily the CBR's assets, is somewhat easier to deal with. These are protected by immunities arising from state sovereignty and, in some cases, by bilateral investment treaties. The former can be circumvented in several ways. Immunities protect the state from the judicial jurisdiction of another state, but not from an executive action such as a decision by the government or a special office to freeze or confiscate assets. Some jurists⁵ have also cited the remedies that are identified in the draft UN Convention on the Responsibility of States for Internationally Wrongful Acts, which has not been ratified and is not in force. Without doubt, the aggression and use of force against Ukraine amount to a violation of the norms of international law, but arguments derived from the contents of this convention are not supported by any practice.⁶

With regard to the protection resulting from bilateral investment treaties, this generally does not apply to state assets. Most agreements of this kind state explicitly that investors are understood to be private entities.⁷ Many countries, including Poland, have terminated such agreements with Russia. Moreover, the Russian Federation has violated them itself by expropriating some Western companies or taking over their assets for symbolic amounts of money.⁸ Therefore, agreements of this nature do not pose any serious obstacles to the confiscation of Russian assets.

Economic and political obstacles

There are important political obstacles which accompany these legal problems. Countries that could introduce a mechanism to confiscate Russian assets are afraid of setting a dangerous precedent. Indeed, they often have investments in Russia, which could be frozen or seized.⁹ Indeed, Russia has

⁵ L.H. Tribe, R.P. Tolentino, K.M. Harris, J. Erpenbach, J. Lewin, *The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine*, Renew Democracy Institute, 17 September 2023, rdi.org, pp. 112–126.

⁶ *Ibidem*, pp. 124–125.

⁷ A. Moiseienko, 'Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets', Just Security, 17 August 2022, [justsecurity.org](https://www.justsecurity.org).

⁸ Russia has taken over the assets of companies such as Carlsberg, Danone, Fortum, Uniper and the Austrian oil company OMV. See 'Moscow takes control over assets of Western companies', Reuters, 20 December 2023, [reuters.com](https://www.reuters.com).

⁹ *The Legal, Practical, and Moral Case...*, *op. cit.*, pp. 179–181.

explicitly threatened to do so in response to a proposal to create a European mechanism for providing Ukraine with funds obtained from the trading of Russian assets (the so-called windfall tax) which President of the European Commission Ursula von der Leyen announced in October 2023. However, we should bear in mind that the Kremlin had acquired tools which allow it to freeze and confiscate the property of Western businesses and countries even before that.¹⁰

Some countries are concerned that they could open a Pandora's box: after all, other countries could seek reparations from them for their past wrongs.¹¹ For example, Germany has been mentioned unofficially in this context as it may worry that the countries it ravaged during World War II could pursue claims against it. However, the Ukrainian justice ministry has made it clear that such a commission would only deal with Russia's invasion of Ukraine: this would be stated explicitly in the international treaty governing its operation, and consequently this precedent could not be resorted to with regard to other conflicts.

The US, for its part, is mostly concerned about the threat to the dollar's status as an international reserve currency and a potential

” The US is concerned that the dollar could lose its status as a reserve currency; the European Union has similar concerns with regard to the euro.

shift to the yuan by countries in Asia and the Middle East. The argument about the risk of eroding confidence in the safety of deposited assets has also been raised with respect to the euro.¹² These concerns do not seem justified: the decision to freeze the CBR's assets was in itself a far-reaching move that could have prompted China, India and the Gulf states to consider a change of their reserve currency or sparked capital flight from the G7 countries, but no such trend has arisen. The current position enjoyed by the dollar and the euro stems from a number of structural factors, such as the stability and reliability of the respective legal and financial systems, the global integration of the market, and the absence of viable alternative options.¹³

In the EU, another problem is a kind of trauma from the Eurozone crisis in 2010–18, which made European institutions very sensitive to any risks of undermining the stability of the single currency. A certain professional solidarity among the central bank heads, who are unwilling to ostracise the CBR, also plays a role here.

Efforts to create a compensation mechanism

The UN General Assembly endorsed the creation of a compensation instrument for Ukraine in a resolution¹⁴ which the Council of Europe invoked at its summit in Reykjavik on 17 May 2023, when it established the Damage Registry. This was an important first step that could lead to the establishment of such a mechanism. In fact, one of the ten points of Ukraine's peace formula was essentially fulfilled in this way. The Registry became operational in December 2023. According to its statute, its members (who come from different countries) collect and process evidence of damages and claims for compensation, categorise, arrange and evaluate them; they then determine whether they can be included in the register. However, they do not take decisions on whether to allocate funds to settle specific claims. The scope of their work covers the damage that has been caused since 24 February 2022.

¹⁰ Указ Президента Российской Федерации от 25.04.2023 № 302 «О временном управлении некоторым имуществом», *Официальное опубликование правовых актов*, publication.pravo.gov.ru.

¹¹ P. Polityuk, 'Ukraine says allies' concerns hamper talks on war compensation', *Reuters*, 16 March 2023, [reuters.com](https://www.reuters.com).

¹² N. Larsen, 'Why Attempts to Divert Frozen Russian Assets Could Seriously Damage the West's Credibility', *International Banker*, 7 September 2023, [internationalbanker.com](https://www.internationalbanker.com).

¹³ J. Brusuelas, 'Why the dollar remains the world's reserve currency, and will stay that way', *The Real Economy Blog*, 17 April 2023, [realeconomy.rsmus.com](https://www.realeconomy.rsmus.com).

¹⁴ Resolution L.6/2022 of 7 November 2022 'Furtherance of Remedy and Reparation for Aggression against Ukraine', *United Nations*, digitallibrary.un.org.

Forty-four European countries and the EU have expressed their willingness to join this institution. Members of its council include the former head of the aforementioned commission on Iraq, Norbert Wühler, and the former president of the European Court of Human Rights, Róbert Spanó, who has been appointed its chairman.

The EU has also taken cautious steps to transfer funds derived from Russian assets to Ukraine.

” **The EU has been seeking to seize the windfall profits (interest) generated by the frozen Russian assets.**

In March 2022, the Freeze and Seize task force was set up within Eurojust¹⁵ to monitor the proper enforcement of the sanctions against Belarus and Russia as well as to freeze and, where possible, confiscate the assets that belong to these countries. After that, the EU’s efforts were stalled for a long time due to the resistance of some members, notably Belgium, France and Germany,¹⁶ who tried to hide their reluctance to seize these funds by arguing that it was necessary to hold further discussions on the legal and economic consequences of such moves. It was not until October 2023 that von der Leyen announced the creation of the aforementioned mechanism involving the taxation of ‘windfall profits’, that is, those generated by the frozen Russian assets. This stemmed from the rules governing the operation of clearing houses (that is, institutions set up to organise and execute the settlement of transactions in financial instruments) in the EU member states, according to which upon maturing the blocked funds are automatically reinvested by intermediaries in order to protect the client’s interests. However, as the Russian assets remain frozen, any interest they generate cannot be returned.¹⁷

On 12 December, the European Commission announced an even more far-reaching proposal, under which windfall profits would be seized in full rather than just taxed. The details of this solution are yet to be disclosed, but on 23 January the foreign ministers of the EU’s member states gave their approval to the draft proposal. On 1 February, the European Council endorsed this concept and indicated that funds obtained from the seizure of profits generated by Russian assets could provide an additional source of funding for the Ukraine Facility, the EU’s new assistance tool for 2024–27. This mechanism based on the transfer of interest would allow the EU to provide €15–17 billion to Ukraine by 2027. However, this form of aid has also raised legal issues: the Belgium-based Euroclear clearing house has claimed that it owns the sums generated in this way. This argument cannot be verified without access to classified agreements between Russia and the clearing houses.¹⁸ Therefore, there is a risk that the transfer of windfall profits to Ukraine would also violate property rights. As a result of this, the Commission has to devote considerable attention to providing adequate justification for the legal admissibility of this mechanism.

Without waiting for the EU to complete its lengthy legislative procedure, some countries have been working to create the possibility of transferring some funds to Ukraine on their own. **Estonia** wants to seize Russian assets under a law on combating money laundering and hopes to obtain around €20 million this way. The relevant draft legislation was expected by the end of January 2024, but has not so far been presented.¹⁹

¹⁵ The EU Agency for Criminal Justice Cooperation. It fosters cooperation between national authorities in the field of combating terrorism and serious organised crime affecting more than one member state.

¹⁶ H. Foy, ‘Why EU efforts to use Russia’s frozen assets are progressing at a snail’s pace’, *Financial Times*, 10 January 2024, [ft.com](https://www.ft.com).

¹⁷ G. Sorgi, ‘EU takes first step to raise money for Ukraine from Russian frozen assets’, *Politico*, 12 December 2023, [politico.eu](https://www.politico.eu).

¹⁸ A. Ripenko, ‘Funding Ukraine’s Aid: New Challenges’, *EJIL: Talk!*, 7 December 2023, [ejiltalk.org](https://www.ejiltalk.org).

¹⁹ O. Tammik, ‘Estonia to Move Ahead of EU With Plans to Seize Russian Assets’, *Bloomberg*, 9 January 2023, [bloomberg.com](https://www.bloomberg.com).

Belgium, where the most Russian assets in Europe are located (Euroclear manages €125 billion of Russian reserves), has led the way in creating more cautious solutions.²⁰ Although it has been wary of confiscating these assets and all the capital gains they generate, in October 2023 it provided Ukraine with a portion of these funds: specifically, its income from the taxation of interest on the frozen reserves. This is expected to generate €1.7 billion a year for Ukraine. There is a reason for this apparent ambiguity in Belgium's stance. Purely fiscal solutions are a rather convenient option for Western countries: they do not interfere with property rights as the state can collect taxes and then decide independently on how to allocate the revenues it obtains in this way, including transferring them to Ukraine (the interest itself would not be transferred). However, the downside of this mechanism is that it is less efficient as it allows the state to seize only a fraction of the profit generated, which constitutes a tiny percentage of the overall value of the assets.

It is worth mentioning that some countries have approached the issue of confiscating Russian property with less caution than the

” **The issue of how to use the frozen Russian assets will be discussed at the G7 meeting scheduled for 24 February.**

European countries (apart from Estonia). **Canada** has drafted amendments to the Special Economic Measures Act which allow it to freeze and even seize assets that belong to Russia or any person under sanctions and transfer them to another country. The success of such an operation requires due process: at the request of the relevant minister, the highest court of the province concerned may agree to seize such assets if the existing holder has violated human rights or peace, or if an international organisation to which Canada is a member has made, suggested or communicated a decision to impose sanctions on them. Since April 2023, efforts have been underway to hand over to Ukraine an AN-124 transport aircraft that Ottawa had seized, but a lawsuit from the plane's Russian owner has stalled this procedure.

On 29 November 2023, a bipartisan group of lawmakers in **the US** tabled a draft measure that would allow for Russian assets to be handed over to Ukraine.²¹ It gained the support of the White House,²² and on 23 January 2024 it was approved by the Senate Foreign Relations Committee.²³ Current US law only allows the government to seize the assets of people who have broken sanctions laws. It also requires court approval for any confiscation of funds worth more than \$500,000. The new bill would address these problems by enabling the Department of Justice to expropriate individuals and the Russian Federation and transfer their assets to Ukraine through executive action, without the need to navigate a legally cumbersome court process.

This proposal is related to the plans to present a joint mechanism for the confiscation of Russian assets at the G7 meeting on 24 February. In particular, Japan, Canada, the United States and the United Kingdom are reportedly in favour of creating such an instrument,²⁴ although France, Germany and Italy are said to be more sceptical. The US hopes that the G7 will act in unison, likely out of concern that any unilateral steps would put it at a disadvantage compared to the other Western countries.

²⁰ G. Baczyńska, J. Payne, 'EU hopes to advance talks on using Russian assets for Ukraine', *Reuters*, 13 October 2023, [reuters.com](https://www.reuters.com).

²¹ A Bill to authorize the seizure and forfeiture of assets of Russian kleptocrats, and for other purposes, *US Congress*, [whitehouse.senate.gov](https://www.whitehouse.gov).

²² D. Flatley, 'White House Throws Support Behind Seizing Frozen Russian Assets', *Bloomberg*, 10 January 2024, [bloomberg.com](https://www.bloomberg.com).

²³ P. Zengerle, 'US Senate panel backs 'big hammer' plan to seize Russian assets to help Ukraine', *Reuters*, 24 January 2024, [reuters.com](https://www.reuters.com).

²⁴ P. Tamma, J. Politi, 'Washington puts forward G7 plan to confiscate \$300bn in Russian assets', *Financial Times*, 28 December 2023, [ft.com](https://www.ft.com).

On 2 January, Ukrainian foreign minister Dmytro Kuleba said that the success of the efforts to confiscate Russian assets depends on whether the members of the G7 and the EU take coordinated action.²⁵

Uncertain prospects

Despite the creation of the Damage Registry, no bold steps to set up an international compensation commission and a fund from which compensation would be paid have so far been taken. The issue of providing Ukraine with funds obtained from the frozen assets is primarily political; legal and economic factors play a secondary role here.

So far, the EU has shown little willingness to provide Ukraine with anything more than the windfall profits generated by Russian property or the revenues from taxing it. This mechanism is unlikely to satisfy Ukraine as it will fail to utilise the full financial potential of the frozen funds while also providing a convenient excuse for the EU not to take further action. Indeed, the countries which are more lukewarm towards Ukraine will be able to argue that the issue of the mechanism has been resolved, which will scupper the chances of transferring the confiscated assets. In that case, the EU members that have been pushing harder for the implementation of this proposal (such as Estonia) could adopt their own solutions, which would be independent of decisions taken at the European level. However, such steps could potentially be deemed contrary to EU law.

More willingness to take action can be seen on the other side of the Atlantic. However, the problems surrounding the Canadian mechanism have revealed the legal complexities of the entire process. Despite appearing to downplay this issue, Russia has been preparing its own instruments that would allow it to overturn any confiscation.²⁶ Meanwhile, Washington's efforts to secure the G7's support have shown that concerns over any unilateral confiscation of Russian assets remain strong, and that the chances of transferring them to Ukraine are slim unless coordinated action is undertaken by the members of the G7 and the EU. This will derail the plans to create an international compensation commission based on the seized assets, at least until the end of the war.

Ukraine's best hope is that some countries will act independently to provide it with Russian reserves on their own behalf, but such steps are unlikely to have a satisfactory financial impact or carry political weight. Moreover, much depends on internal developments within Ukraine, in particular how effectively it will fight against corruption and whether it will reform its dysfunctional power apparatus. The West will be unwilling to bear the economic and political risks of any confiscation of assets if much of the aid it provides is squandered or stolen.

²⁵ 'Кудеба очікує на схвалення у 2024 році правової рамки щодо конфіскації заморожених активів РФ', Укрінформ, 3 January 2024, ukrinform.ua.

²⁶ 'Russia Prepares Legal Battle to Stall Seizure of Frozen Reserves', [Bloomberg](https://www.bloomberg.com), 12 January 2024, [bloomberg.com](https://www.bloomberg.com).