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SEIZURE OF RUSSIAN CORPORATE ASSETS

*Prepared by the
Public International Law & Policy Group*

PROSECUTION OF RUSSIAN CORPORATIONS FOR WAR CRIMES IN UKRAINE AS A PRECURSOR TO SEIZURE OF FROZEN CORPORATE ASSETS IN FOREIGN JURISDICTIONS

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EXECUTIVE SUMMARY

As of December 2023, the war instigated by Russia’s illegal invasion of Ukraine is barreling toward its second anniversary. The cost of this conflict to Ukraine in civilian and military lives lost, infrastructure and civilian property damaged, and savagery of atrocities committed by Russian and Russian-backed forces is staggering. In September 2023, the *International Banker* reported:

The cost to rebuild Ukraine is upwards of \$411 billion According to Ursula von der Leyen, president of the EC, European leaders will work on a plan to allocate confiscated Russian assets toward such costs. “Russia and its oligarchs have to compensate Ukraine for the damage and cover the costs for rebuilding the country,” the EC president stated in November 2022. “And we have the means to make Russia pay. We have blocked €300 billion of the Russian Central Bank reserves, and we have frozen €19 billion of Russian oligarchs’ money.”¹

President von der Leyen’s sentiment to use the Russian frozen assets currently held in foreign jurisdictions to rebuild Ukraine is shared by many, including U.S. Treasury Secretary Janet Yellen and British Finance Minister Jeremy Hunt, who are embracing the EU’s plan to further seize the interest generated by Russia’s frozen assets as “windfall taxes” and then transfer upwards of \$3.27 billion to Ukraine annually for rebuilding purposes.² All of the jurisdictions which possess such frozen assets recognize the difference between sovereign assets, such as those that belong to the Russian Central Bank, and non-sovereign assets that belong to oligarchs and Russian corporations.

With a focus in U.S. courts, this White Paper develops a legal framework whereby foreign courts may satisfy financial awards by Ukrainian courts against Russian corporations when judgment is rendered against that corporation in either a criminal prosecution or a civil action alleging support of, complicity in, or aiding and abetting the commission of war crimes or other atrocities in Ukraine. As such, it serves as a legal process-focused companion piece to white papers developed by the Public International Law & Policy Group (PILPG) on [Russian Frozen Assets](#).³

Two thematic points underpin this White Paper: (1) Criminal prosecution is preferred to civil action, and (2) Proper legal process for securing assets is essential. The first point stems from Ukraine’s entire characterization of Russia’s aggression – namely that the February 2022 invasion was an act of aggression, which is a crime under conventional and customary international law. By extension, everything done pursuant to that act of aggression by Russian or associated forces in Ukraine, or by entities supporting those activities, are also criminal acts. Neither Ukraine nor the international community supporting Ukraine have wavered from this legal assertion.

To hold Russian corporations accountable for their support via civil instead of criminal cases in Ukrainian courts would undermine the internal logic of this proposition. Moreover, proceeding against the companies via civil law, with a plaintiff asserting wrongful death or tort, would only secure an award for that plaintiff, not the state; thus, Ukraine would derive little benefit from this path. “Many States, including member States of the European Union, the United States, and

¹ Nicholas Larsen, [Why Attempts to Divert Frozen Russian Assets Could Seriously Damage the West’s Credibility](#), INTERNATIONAL BANKER, Sep. 7, 2023.

² David Lawder & Andrea Shalal, [Yellen, Hunt, Signal Support for Windfall Tax on Frozen Russian Assets](#), REUTERS, Sep. 21, 2023.

³ Public International Law & Policy Group, [Policy Planning White Paper: Repurposing Frozen Russian Assets](#) (March 2023), [Hereinafter PILPG Frozen Assets White Paper].

Canada, have domestic legislation that allows that State to change the ownership of an asset linked to a crime or criminal activity by requiring the original owner to forfeit their ownership of that asset.”⁴

Although the second point bespeaks process, it is arguably more important than the first. The legal process of attaching frozen assets of Russian corporations in foreign jurisdictions to satisfy judgment awards by Ukrainian courts is preferred to diplomatic transfers of frozen assets or piecemeal taxation of profits generated by such assets. A consistent theme shared by Ukraine and the democracies which support it is that they are not only democracies, but also “rule of law” nations. Rule of law nations use legal means to seize and transfer foreign property. It is the practice of authoritarian states to do so without legal process. Transfer of assets to Ukraine absent such process would undermine Kyiv’s assertion of being a rule of law nation.

Nations supporting Ukraine in its fight against Russia met 2022 on the reconstruction of Ukraine. They adopted the “Lugano Principles” outlined in Figure 1.⁵ Signed by over 40 countries and nearly 20 international organizations, Principle 3 was a key focus. The main thrust of this White Paper—securing Russian frozen assets through a rule of law process—supports that point.



Figure 1: Lugano Principles on the Reconstruction of Ukraine

Below is the litigation matrix that may be followed to pursue this avenue of seizing the frozen assets of Russian corporations held abroad pursuant to a judgment/award by a Ukrainian court:

⁴ *Id.* at 18.

⁵ Swiss Department of Foreign Affairs, [Support for the Lugano Principles](#), July 2022.

Litigation Matrix:

- **Step 1: Identify Frozen Russian Corporate Assets:** Where are they and in what amounts?
 - Disaggregate Russian Central Bank assets from non-state-owned assets.
 - Determine asset amounts, noting that numbers may not be static per duty of frozen asset holders to invest and grow the corpus during the holding period.
- **Step 2: Match Assets to Corporations:** Begin financial forensics analysis.
- **Step 3: Match Corporations to War Crimes:** Russian corporation will have knowingly supported an entity which commits war crimes in Ukraine.
 - First, establish the war crime; second, establish who committed it; third, establish connection between perpetrator and Russian corporation.
 - Access to information or evidence collected by Ukraine, the EU, ICC, ICRC, and other international units.
- **Step 4: Bring Russian Corporation to Court in Ukraine:** Select between 2 litigation tracks.
 - **Step 4a [Criminal Track]:** Ukrainian prosecutor brings criminal case against company and secures guilty judgement which contains a financial penalty.
 - Ukrainian criminal code allows prosecution of foreign corporations.
 - Financial penalties go to the state of Ukraine; thus, this is the best method for the state to collect frozen assets for rebuilding.
 - **Step 4b [Civil Track]:** If a criminal prosecution is impracticable in a particular case.
 - Ukrainian civil code provides for suits by individuals.
 - Financial awards go to individuals; thus, another legal step within Ukraine will be required for the state to gain the frozen assets for rebuilding.
- **Step 5: Attach Assets to Judgment Award:** Bring the judgment award to a court in the jurisdiction where the frozen assets are located and request attachment in satisfaction.
 - Dual criminality is required; check domestic legislation for war crimes statute.
 - For criminal judgments, which are normally not enforceable by a foreign court, an executive agreement to judicially enforce may be required (conflicts of law rule).
 - In the U.S., *Dames & Moore v. Regan* is precedent for executive agreements “directing traffic” within the federal judiciary with respect to litigation against foreign entities.
- **Step 6: Transfer Assets to Ukraine:** Per order of the domestic court where the assets are frozen in satisfaction of the judgment/award.

BACKGROUND

Russia’s invasion of Ukraine on February 22, 2022, was not only illegal, it was criminal. Everything stemming from this invasion, therefore, is tainted with that illegality and criminality – from the atrocities committed against Ukrainian civilians and civilian infrastructure to the Russian financial transactions that underly those atrocities. Every Russian corporation that knowingly

participates in, or supports, such activities against Ukrainian non-combatants is complicit in the commission of war crimes.

Under Ukrainian law, such foreign corporations may be criminally prosecuted. In line with developing trends to hold corporations accountable for war crimes in both international and domestic courts,⁶ this White Paper charts the legal and policy frameworks for doing so in Ukraine and then transferring the resulting judgment to a foreign jurisdiction for execution via attachment of Russian assets.

In the aftermath of Russia's illegal invasion of Ukraine in February 2022, Ukraine wisely adopted a rule of law approach in its response. Kyiv launched a broad-based legal counteroffensive in multiple international judicial fora that has yielded consistently positive results.⁷ By March, in the International Court of Justice (ICJ), Ukraine had requested and received unprecedented provisional measures, challenging Russia's bogus assertion of a legal basis under the Genocide Convention for its invasion in order to prevent genocide. Within three weeks, near record deliberation time, the ICJ ruled that the Russian Federation must:

- (1) [I]mediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine; [and]
- (2) [S]hall ensure that any military or irregular armed units which may be directed or supported by it, as well as *any organizations and persons which may be subject to its control or direction*, take no steps in furtherance of the military operations referred to in point 1 above. . . .⁸

Importantly, point 2's reference to "organizations and persons" can be read to specifically include Russian corporations. Consequently, while such entities may be criminally indictable for complicity in atrocity crimes prior to March 16, 2022, after that date, any actions they undertook in continuing that complicity also puts them in direct violation of the ICJ's order to "take no steps in furtherance of the military operations" in Ukraine.

After similar admonitions from the European Court of Human Rights (ECHR),⁹ the International Criminal Court (ICC) moved to convert its preliminary examination stemming from Russia's illegal annexation of Crimea into a full-blown investigation of Russian atrocities committed in Ukraine, resulting in the empanelment of a 3-judge trial chamber which quickly

⁶ [The Proliferation of Corporate War-Crimes Cases](#), 29 STRATEGIC COMMENTS 1 (Nov. 2023); Julia Crawford, [Corporate Responsibility in War Crimes, A New Legal Battlefield](#), JUSTICEINFO.NET, Nov. 15, 2019; Joanna Kyriakakis, [Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law](#), in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY (Larry May & Zachary Hoskins, eds. 2009); MICHAEL J. KELLY, [PROSECUTING CORPORATIONS FOR GENOCIDE](#) (2016).

⁷ Michael J. Kelly, [The Role of International Law in the Russia-Ukraine War](#), 55 CASE WESTERN RES. J. INT'L L. 61 (2023).

⁸ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, [Order of 16 March 2022](#), I.C.J. Reports 2022, p. 211 at ¶86. Russia failed to appear, subsequently dismissing the ICJ's order by noting that it did not accept the jurisdiction of the Court. Sofia Stuart Leeson, [Russia Rejects International Court Ruling to Stop Invasion of Ukraine](#), EURACTIV, March 18, 2022. Nevertheless, the case continues in the ICJ. [emphasis added]

⁹ Press Release, [The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations in Ukrainian Territory](#), ECHR 068 (2022), March 1, 2022.

issued an arrest warrant for Vladimir Putin based on Russian abduction of Ukrainian children – an atrocity crime under the ICC’s Rome Statute.¹⁰

A warrant was also issued for Maria Lvova-Belova, head of the Kremlin’s Commission for Children’s Rights – the entity which orchestrated the mass abduction.¹¹ Any Russian corporate entities that partnered with this commission during the period of abduction, transfer, and resettlement of Ukrainian children (e.g. banks, ground or air transportation companies, housing concerns, catering or food services, companies tasked with the alleged re-education efforts, or document issuance services) would be prosecutable by Ukrainian courts under the criminal code as foreign corporations participating in the commission of a war crime in Ukraine. All of those contacts will likely be contained in the ICC’s evidentiary dossier for both arrest warrants.¹²

Building upon this international legal foundation with respect to the war, Ukraine can now pivot to utilizing its own domestic judicial system against Russian corporations which supported the Russian military or other entities that committed war crimes in Ukraine. Valid judgments against those companies with associated financial penalties are the most legitimate avenue for securing the financial assets of those companies to be used in rebuilding Ukraine.

The government in Kyiv will need every dollar of those frozen assets to rebuild the country. In March 2023, the World Bank issued its second Rapid Damage and Needs Assessment for Ukraine covering the first full year of the war from Feb. 2022 to Feb. 2023.¹³ It found that “The full year of war has resulted in more than US\$135 billion in direct damage to buildings and infrastructure. The most affected sectors have been housing (38 percent), transport (26 percent), energy (8 percent), commerce and industry (8 percent), and agriculture (6 percent).”¹⁴ The price tag for rebuilding is even higher:

Total estimated reconstruction and recovery needs exceed US\$411 billion . . . , which is 2.6 times the actual GDP of Ukraine in 2022. Costs — estimated for 10 years — consider inflation, market conditions, surge pricing in construction commonly seen in areas of mass construction, higher insurance premiums, and a shift toward lower energy intensity and more resilient, inclusive, and modern design. The highest estimated needs are in transport (22 percent), housing (17 percent), energy (11 percent), social protection and livelihoods (10 percent), explosive hazard management (9 percent), and agriculture (7 percent).¹⁵

Figure 2 breaks down this rebuilding assessment by sector, which includes “almost \$40 billion required for 'explosive hazard management'. As well as the countless so-called 'explosive remnants of war' (unexploded artillery shells, grenades, mortars, rockets, air-dropped bombs, and cluster munitions), landmines have been used extensively by both sides in the war.”¹⁶

¹⁰ Stephen P. Mulligan, [The Role of International Tribunals in the Response to the Invasion of Ukraine](#), *CRS Report*, LSB10704, at 2, March 22, 2023.

¹¹ Press Release, [Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova](#), ICC, March 17, 2023.

¹² Conflict & Resilience Research Institute of Canada, [Peacedays Webinars Series: War Crimes & Documentation in Ukraine](#), Sep. 19, 2023.

¹³ [Ukraine Rapid Damage and Needs Assessment February 2022 – February 2023](#), WORLD BANK REPORT (March 2023).

¹⁴ *Id.* at 11.

¹⁵ *Id.*

¹⁶ Martin Armstrong, [\\$411 to Rebuild Ukraine](#), STATISTA, April 4, 2023.

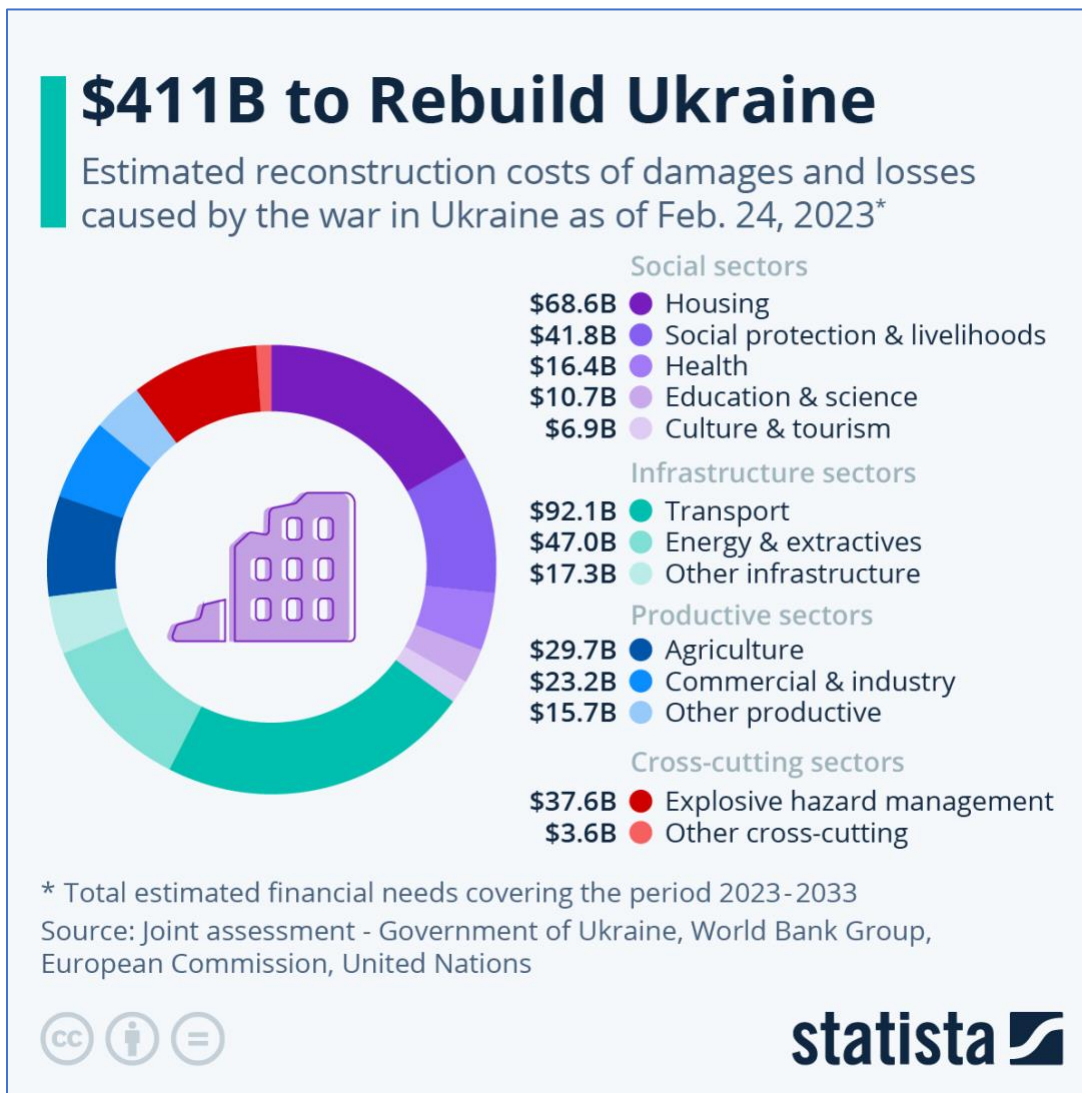


Figure 2: Sectoral Reconstruction Costs for Ukraine to Address Damage by Russian Military Operations

ANALYSIS

The six-step litigation strategy outlined in this White Paper is designed to secure critically needed assets for Ukraine to begin rebuilding. Simultaneously, our strategy emphasizes the symbolic and political importance of Ukraine doing so by proceeding against Russian corporations on a criminal enforcement footing within a rule of law framework to secure those assets. Politically driven transfer of funds, while more expedient, would seriously undermine the very rule of law values Ukraine is embracing under President Zelensky.¹⁷ Legal processes in rule of law societies take time and hard work, but those processes support the much-needed credibility that engenders societal trust in the rule of law. The flowchart outlined in Figure 3 reflects the six-step litigation strategy that is the core of this analysis:

¹⁷ Mykhailo Zhernakov, Stepan Berko, Halna Chyzhyk & Nestor Barchuk, [Ukraine's Rule-of-Law Battlefield](#), POLITICO, May 4, 2023.

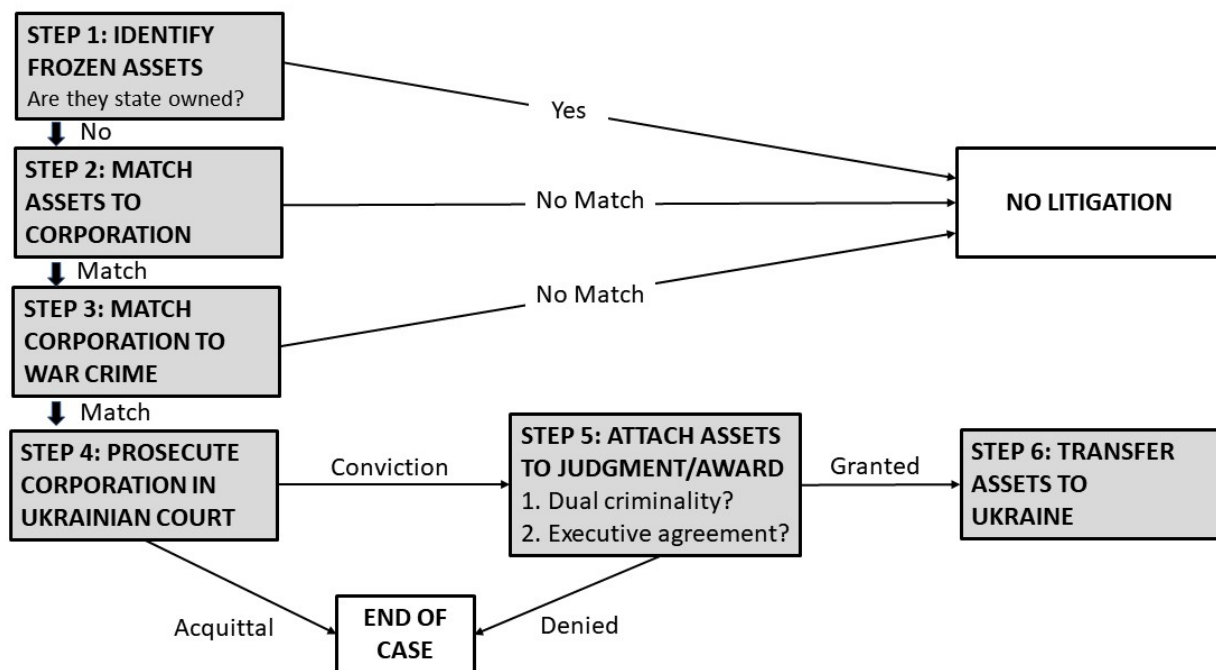


Figure 3: Litigation Flowchart to Secure Frozen Assets

Step 1: Identify Frozen Russian Corporate Assets

In line with standard criminal investigation procedure, which works backwards from the crime through investigation to determine who committed it, building up a line of evidence along the way, our analysis works backwards from first identifying where Russian corporate assets have been frozen, what type of assets they are, in what amounts, under what sanctions authority, and for what reason. From there, the trail will lead back to the corporation and then further to link any support that the corporation lent to a person or entity who committed a provable war crime in Ukraine. This begins with a 2-step inquiry:

- Disaggregate Russian Central Bank assets from non-state-owned assets.
- Determine remaining asset amounts, noting that numbers may not be static per the duty of frozen asset holders to invest and grow the corpus during the holding period.

Russian Central Bank Frozen Assets

At the outset, the total amount of frozen Russian assets must be disaggregated between state-owned versus non-state-owned because sovereign assets are generally not attachable in satisfaction of a foreign judgment,¹⁸ although investment earnings from the corpus might be. “[U]nder customary international law central bank accounts enjoy immunity from proceedings before a court.”¹⁹ That said, some have argued that Russia’s act of aggression against Ukraine, which is

¹⁸ Kimberly Donovan & Charles Lichfield, [The West Won’t Seize Russia’s Reserves Any Time Soon](#), THE ATLANTICIST (ATLANTIC COUNCIL), Sep. 21, 2023.

¹⁹ Menno T. Kamminga, [Confiscating Russia’s Frozen Central Bank Assets: A Permissible Third-Party Countermeasure](#), 70 NETH. INT’L L. REV. 1 (2023).

foundational to the subsequent commission of atrocity crimes under international law,²⁰ brings this traditional rule into doubt in the case of Ukraine and may create an exception.²¹

According to the Russian Elites, Proxies, and Oligarchs (REPO) Task Force, comprised of the E.U., Australia, and G-7's deputy treasury ministers, they have located \$280 billion of the \$310 billion claimed by the Russian Central Bank to be frozen abroad.²² The leading precedent for transferring sovereign assets to a victim state is the 1992 transfer of Iraqi frozen assets to Kuwait, but that was approved by the U.N. Security Council, thus legalizing the transaction.²³ Russia's Council veto will keep this option off the table for Ukraine.

Roughly half the total Russian Central Bank assets held abroad have been seized by the EU and other Western countries, largely from the G7, since the war began in February 2022.²⁴ €180 billion of those frozen reserves are with Belgium's Euroclear, a clearing house acting as a custodian for Russian reserves.²⁵ G7 holdings of Russian Central Bank assets include Austria (3%), Canada (2.8%), France (12.2%), Germany (9.5%), Japan (10%), the United Kingdom (4.5%), and the United States (6.6%).²⁶ Data on the distribution of funds across countries comes from June 2021, the last time the Bank of Russia published country-specific information. Between June 2021 and January, the assets held by the Central Bank of Russia increased from \$585 billion USD to \$630 billion USD (rounded to the nearest billion). The location of these additional funds is unknown and omitted.^{27, 28, 29}

Russian Central Bank Frozen Assets

Country/Location	Amount
France	\$71 billion USD in frozen assets.
Japan	\$58 billion USD in frozen assets.
Germany	\$55 billion USD in frozen assets.
United States	\$38 billion USD in frozen assets.
United Kingdom	\$26 billion USD in frozen assets.
Austria	\$17 billion USD in frozen assets.
Canada	\$16 billion USD in frozen assets.

²⁰ Astrid Reisinger Coracini & Pål Wrangé, [The Specificity of the Crime of Aggression](#) in THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kreß & Stefan Barriga, eds. 2017).

²¹ Kamminga, *supra* note 19.

²² Donovan & Lichfield, *supra* note 18.

²³ *Id.* "At the time, the international community was also keen to distinguish between income Iraq had earned since the beginning of the war and earlier earnings."

²⁴ Nicholas Larsen, [Why Attempts To Divert Frozen Russian Assets Could Seriously Damage The West's Credibility](#), INT'L BANKER (Sept. 7, 2023).

²⁵ Barbara Moens & Paola Tamma, [Seizing Russian Cash To Rebuild Ukraine Won't Be So Easy](#), POLITICO (Nov. 6, 2023).

²⁶ Kamminga, *supra* note 19; See CENTRAL BANK OF THE RUSSIAN FEDERATION, [Bank Of Russia Annual Report For 2021](#), at 37, 101-02 (Apr. 8, 2022).

²⁷ Statista Research Dep't, [Frozen Assets Of The Bank Of Russia Due To The War In Ukraine 2022. By Country](#) (Apr. 11, 2023).

²⁸ Charles Lichfield, [Windfall: How Russia Managed Oil And Gas Income After Invading Ukraine, And How It Will Have To Make Do With Less](#), ATLANTIC COUNCIL (Nov. 30, 2022); Monica Hersher & Joe Murphy, [Russia Stored Large Amounts of Money With Many Countries. Hundreds of Billions of It Are Now Frozen](#), NBC NEWS (Mar. 17, 2022).

²⁹ *Bank of Russia Annual Report for 2021*, *supra* note 26.

Russian Central Bank Assets Partially Frozen or Unreported

Country/Location	Amount
International Institutions	\$29 billion USD in partially frozen or unreported assets.
Others	\$62 billion USD in partially frozen or unreported assets.

Russian Central Bank Assets Russia Can Still Access

Country/Location	Amount
Russian Central Bank – Gold	\$127 billion USD in assets Russia can still access.
China	\$81 billion USD in assets Russia can still access.

Russian Corporate/Oligarch Frozen Assets

With respect to the non-state-owned frozen assets of Russian corporations and oligarchs, these are spread across several states. As Figure 4 demonstrates, the trillion USD in this category dwarfs the Russian Central Bank assets, but very little is known about it or has been seized.³⁰

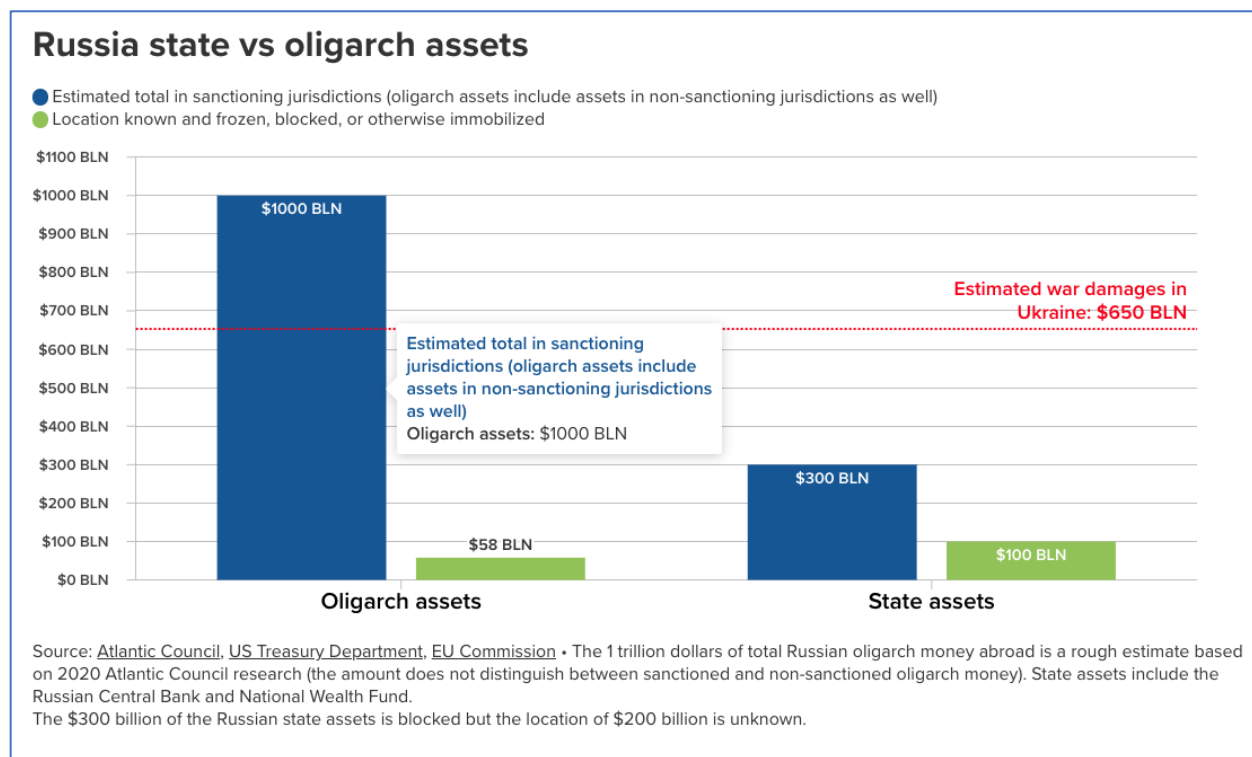


Figure 4: Russian State vs. Corporate Assets in Foreign Jurisdictions

Locating and measuring the frozen assets of Russian corporations and oligarchs is very much a work in progress. “In total, Western allies have sanctioned more than 1,200 Russian individuals [and oligarchs], more than 120 entities, and 19 banks since Russia invaded Ukraine. That equals assets of roughly 940 billion pounds (\$1.14 trillion).”³¹ The 1 trillion dollars of total Russian oligarch money abroad is a rough estimate based on 2020 Atlantic Council research (the amount does not distinguish between sanctioned and non-sanctioned oligarch money). State assets include

³⁰ Kimberly Donovan & Maia Nikoladze, [Global Sanctions Dashboard: What To Do With Sanctioned Russian Assets](#), ECONOGRAPHICS (ATLANTIC COUNCIL), March 24, 2023.

³¹ Elisabeth Braw, [Freeze – Don’t Seize – Russian Assets](#), FOREIGN POLICY (Jan. 13, 2023).

the Russian Central Bank and National Wealth Fund. The \$300 billion of the Russian state assets is blocked, but the location of \$200 billion is unknown.^{32, 33, 34, 35} Of the €300 billion in frozen assets, about \$30 billion owned by sanctioned Russian oligarchs are also "frozen" (as of August 31, 2023).³⁶ The Group of Seven (G7) nations target financial facilitators enabling Russia to evade multilateral sanctions. G7 consists of seven states holding Russian frozen assets, including Austria, Canada, France, Germany, Japan, the United Kingdom, and the United States.³⁷

On March 9, 2023, G7 allies issued an advisory to financial institutions describing types of Russian sanctions evasion, which include, but are not limited to: Using “family members and close associates to ensure continued access and control” of property and assets; Using “real estate to hold value;” Using complex ownership structures and shell companies or other legal entities and arrangements to avoid detection and disguise connection to assets and property; Using financial facilitators and enablers to avoid direct involvement in sanctions evasion activity and continue to access funds; and Transferring assets and funds to countries that have not sanctioned Russia, including the United Arab Emirates, Turkey, China, Brazil, and India, among others.³⁸

Reported Assets Frozen Related to Sanctioned Russian Oligarchs & Officials³⁹

Country/Location	Amount
United Kingdom	£18.39 billion (\$22 billion USD /€20.7) reported in frozen Russian oligarch and official’s assets (It is not clear whether this includes Central Bank of Russian assets or is made up of Russian oligarchs and official’s assets.)
European Union	€21.5 billion (\$23 billion USD) reported in frozen Russian oligarch and official’s assets. (It is believed this doesn’t include Central Bank of Russian assets. From publicly available information €17 billion can be mapped to EU countries with just 8 countries reporting at least €1 billion in assets frozen; EU includes € 3.5 billion as frozen for Belgium and € 2.5 billion as frozen for Luxembourg.)
Switzerland	CH 7.5 billion (\$7.94 billion USD) reported in frozen Russian oligarch and official’s assets (It is believed that these assets relate to assets of sanctioned Russian oligarchs and or officials).
Canada	C\$122 million (\$90 million USD) reported in blocked Russian oligarch and official’s assets.
Australia	\$45 million USD reported in frozen Russian oligarch and official’s assets.
Japan	No details provided.
United States	No details provided.
Cayman Islands	\$8 billion USD reported in frozen Russian oligarch and official’s assets.

³² *Id.*

³³ Anders Åslund & Julia Friedlander, [Defending The United States Against Russian Dark Money](#), ATLANTIC COUNCIL (Nov. 17, 2020).

³⁴ U.S. Dep’t Treasury, [Joint Statement From The REPO Task Force](#), (Mar. 9, 2023).

³⁵ European Commission, [Statement By President Von Der Leyen On Russian Accountability And The Use Of Russian Frozen Assets](#), (Nov. 30, 2022).

³⁶ European Pravda, [What Hinders Confiscation of Russian Assets By The West](#), (Aug. 31, 2023).

³⁷ Kamminga, *supra* note 19; *Bank of Russia Annual Report for 2021*, *supra* note 26.

³⁸ Donovan & Nikoladze, *supra* note 30.

³⁹ John Cusack, [Where Are The Sanctioned Russian Assets Frozen In The West And How Much Is Actually Frozen?](#), FIN. CRIMES ENF’T NETWORK (FinCEN) (Feb. 23, 2023).

Channel Island of Jersey	\$7 billion USD in oligarch and official's Russian assets (assets may be included at least partially indirectly in other reporting countries; a significant portion of the Jersey amounts relate to an oligarch's former holding in Chelsea Football Club through Jersey Companies, but assets were in UK).
Belgium	€50.5 billion independently reported in frozen Russian oligarch and official's assets (EU reports only included €3.5 billion from Belgium).
Luxembourg	€5.5 billion independently reported in frozen Russian oligarch and official's assets (EU reports only included €2.5 billion from Luxembourg).

Non-Financial Frozen Assets

Some assets are literally more physically movable than others, such as yachts. “More than a dozen yachts, worth approximately \$2.5 billion, [and multimillion-dollar properties] belonging to Russian oligarchs have been seized [or frozen] in several countries worldwide since the armed conflict started, and more are expected to be seized.”^{40, 41}

⁴⁰ Tal Yellin, [From Yachts To Lavish Estates, Tracking Russian Assets Seized So Far](#), CNN (Apr. 27, 2022); Zachary Basu & Jacob Knutson, [How Many Russian Oligarchs' Yachts Have Been Seized So Far](#), AXIOS (Apr. 12, 2022).

⁴¹ Jacob Knutson, [White House Proposes Plan To Sell Russian Yachts For Ukraine Aid](#), AXIOS (Apr. 28, 2022); Ivana Saric, [U.S. Unveils New Sanctions Against Russian Elites Asset Managers](#), AXIOS (Jun. 2, 2022).


Seized Russian yachts 			
As of April 12, 2022			
Owner	Ship	Status	Estimated value
Alexander Mikheev	The Lady Anastasia	Seized in Spain	Unknown
Alexey Kuzmichev	The Little Bear I	Seized in France	\$22m
	The Little Bear II	Seized in France	\$76m
Alexey Mordashov	The Lady M	Seized in Italy	\$55m
	The Lena	Seized in Italy	\$71m
Alisher Usmanov	The Dilbar	Blocked from leaving German port	\$600m
Andrey Melnichenko	The SY A	Seized in Italy	\$578m
Dmitry Kamenshchik	The Flying Fox	Seized in the Dominican Republic	\$400m
Dmitry Pumpyansky	The Axioma	Seized in the United Kingdom	\$75m
Igor Sechin	The Crescent	Seized in Spain	\$600m
	The Amore Vero	Seized in France	\$120m
Roman Abramovich	Halo	Identified for seizure in Antigua and Barbuda	\$20m
	Garçon	Identified for seizure in Antigua and Barbuda	\$38m
Sergei Chemezov	The Valerie	Seized in Spain	\$140m
Unnamed Russian businessman	The Phi	Seized in the United Kingdom	\$49m
Viktor Medvedchuk	The Royal Romance	Blocked from leaving port in Croatia	\$200m
Viktor Vekselberg	The Tango	Seized in Spain	\$90m

Figure 5: Russian Yachts Seized as of April 2022

Entities Subject to Asset Freezes and Prohibition of Making Funds Available to Them

On June 23, 2023, the EU added 87 entities connected to Russia's military and industrial complex and subject to tighter export restrictions concerning dual-use goods and technologies and advanced technology items under Annex IV in Council Regulation (EU) No 833/2014, including banks and financial institutions, companies in the military and defense sectors, companies in the aviation, ship and machine building sectors, armed forces and paramilitary groups, political parties, the movement 'All-Russia People's Front,' media organizations responsible for propaganda and disinformation, the Wagner Group (a Russia-based private military entity), and RIA FAN (a Russian media organization).⁴²

⁴² Council of The European Union, [EU Sanctions Against Russia Explained](#), (last visited Nov. 29, 2023); [Council Regulation \(EU\) 2023/1214](#) of 23 June 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, 2023 O.J. (L 159 I) 1.

On 28 July 2023, the EU adopted Council Implementing Regulation (EU) 2023/1563, adding 5 entities to the list in Annex I to Regulation (EU) No 269/2014 whose funds and economic resources will be frozen within the EU, including Social Design Agency, Structura National Technologies, ANO Dialog, Inforos OOO IA, and the Institute of Russian Diaspora.⁴³ EU restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine now apply to over 1,800 natural or legal persons, entities, and bodies altogether, including 1,584 individuals and 249 entities in total.⁴⁴

All of this information gleaned from Step 1 in the litigation matrix begins to lay the groundwork for the exercise in Step 2—firmly matching the assets to the corporation so that the company can positively be identified as the proper defendant in a legal case before a Ukrainian court. Financial transactions in and of themselves can be the evidence of “knowledge” sufficient to fulfill the *mens rea* requirement for a complicity charge. No business can reasonably deny knowing about its financial transactions. Of the Russian corporate and oligarch assets which are actually locatable and frozen, most appear to be held in the EU and UK, as seen in Figure 6:

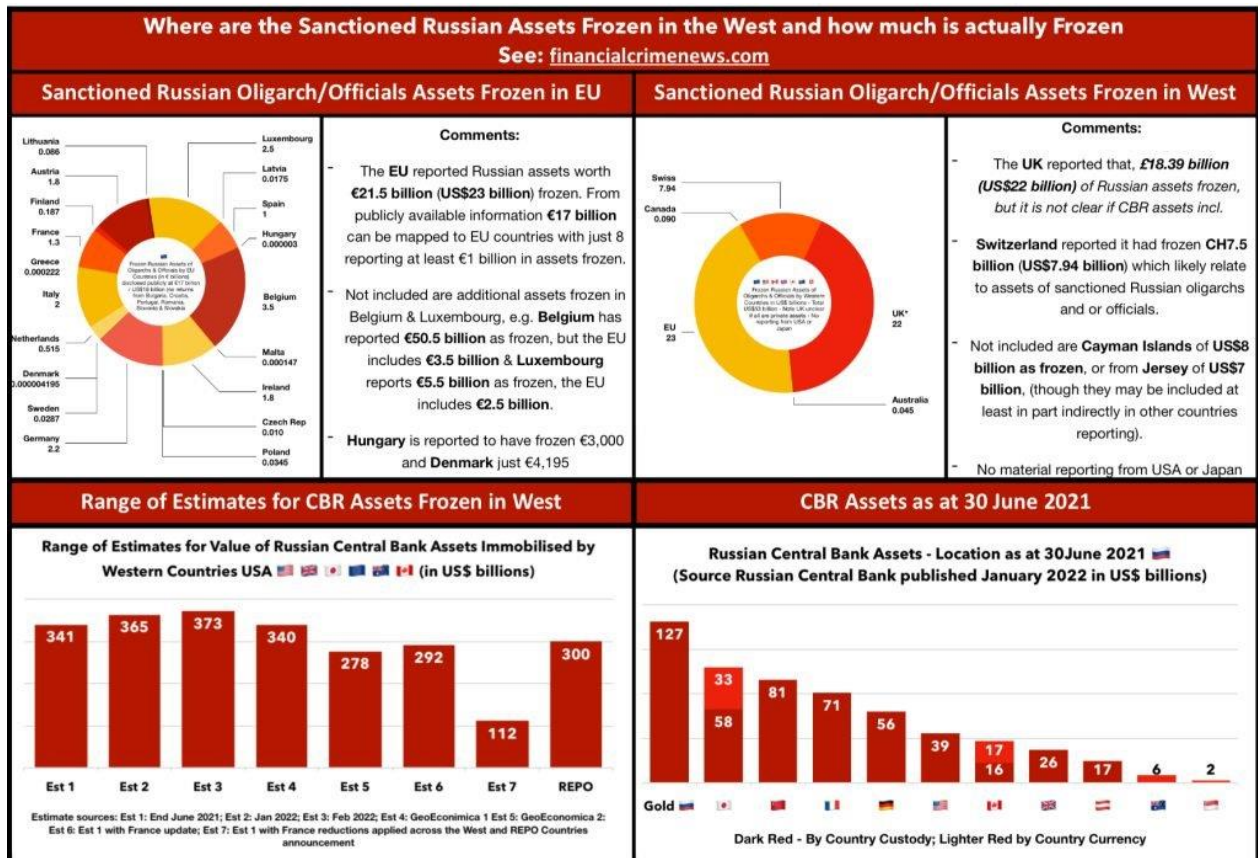


Figure 6: Location of Sanctioned Corporate/Oligarch Assets

⁴³ [Council Implementing Regulation \(EU\) 2023/1563](#) of 28 July 2023 implementing Regulation (EU) No 269/2014 of July 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, 2023 O.J. (L 190 I) 1.

⁴⁴ *EU Sanctions Against Russia Explained*, supra note 42; [Consolidated Version of the Council Regulation \(EU\) No 269/2014](#) of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

Step 2: Match Assets to Corporations

Once identified, the frozen assets must be matched with their Russian corporations. This requires financial forensic expertise. Foreign-located corporate assets are typically deposited by subsidiaries or shell corporations operating through several financial institutions and “oligarchs are known to mask their ownership by titling assets in the names of family members, associates, and offshore companies.”⁴⁵ Moreover, asset tracing reveals that some Russian corporations and oligarchs have managed to escape sanctions that would have frozen their assets, repositioning them primarily in the UAE, Turkey, and Cyprus.⁴⁶

The World Bank’s Stolen Asset Recovery Initiative notes that in corruption and money laundering cases, the process can become quite complex and requires resources and expertise to unwind in order to match these assets to their corporations:

Corruption cases and most complex money laundering cases generally require asset recovery efforts beyond domestic borders. Some offences or parts of an offense may be committed in another jurisdiction: a company paying bribes for a contract may be headquartered or incorporated in a jurisdiction outside the jurisdiction in which the bribes are paid, and the officials receiving the bribes may launder their ill-gotten gains in still another jurisdiction. . . .

Corrupt officials use complicated financial schemes often involving offshore centers, shell companies, and corporate vehicles to launder the proceeds of corruption- very easy and quick to set up. In addition, money can be moved quickly — often instantly with the click of a keyboard key or a cell phone button, with the help of such tools as wire transfers, letters of credit, credit and debit cards, automated teller machines, cryptocurrencies and mobile devices.

In contrast to the short time it takes to move money and establish opaque structures, asset tracing and recovery by law enforcement officials and prosecutors may take months or years because the principle of sovereignty restricts authorities’ ability to take investigative, legal, and enforcement actions in foreign jurisdictions. Successful tracing and recovery efforts often depend on assistance from foreign jurisdictions In this context, international cooperation, in its widest sense, is essential for the successful recovery of assets that have been stashed or hidden abroad.⁴⁷

Step 3: Match Corporations to War Crimes

Legal linkage requires matching a Russian corporation with an entity that has committed war crimes in Ukraine, for example supporting the Wagner Group – a known perpetrator. With over 78,000 reported war crimes in Ukraine since the Russian invasion, the Prosecutor General’s office

⁴⁵ Franklin Monsour & Kristina Arianina, [How Does the U.S. Take Ownership of Russian Oligarchs’ Assets?](#), BLOOMBERG NEWS, March 18, 2022.

⁴⁶ Daria Plakhova Freshville, Jenna Burton, Abby Stanglin, Richard Bowles, Nicholas Peck & Warren Feldman, [Moscow Rules: Asset Tracing Investigations During Wartime in Ukraine](#), GLOBAL INVESTIGATIONS REV., May 26, 2023.

⁴⁷ JEAN-PIERRE BRUN, ANASTASIA SOTIROPOULOU, LARISSA GRAY, CLIVE SCOTT & KEVIN M. STEPHENSON, [ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS](#) 215 (2nd ed., 2021). [Hereinafter BRUN, ET AL, ASSET RECOVERY HANDBOOK]

has partnered with U.S. data analytics provider Palantir Technologies to sort through all the evidence with a view toward building cases.⁴⁸

Building one of these cases against a Russian corporation will initially require a three-step process: (1) establish that a war crime was committed, (2) establish who committed it, and (3) establish a connection between the Russian perpetrator and the Russian corporation. Assuming criminal and financial evidence is available, here is what that prosecutorial inquiry might look like, for example, with respect to connecting the massacre in Bucha to the perpetrators and then back to the corporation:

- (1) **Establish the War Crime:** The March 2022 massacre at Bucha, Kyiv Oblast, which included summary executions of at least 73 civilians of the over 450 killed is a horrendous war crime that also entailed the use of torture chambers, mutilation and burning of bodies, and rape of young girls. Photographic, video, testimonial, and documentary evidence have been collected, along with phone tracing evidence and intercepted conversations.⁴⁹
- (2) **Establish the Perpetrator:** Several Russian units were involved in the Bucha massacre, including the 234th Guards Air Assault Regiment.⁵⁰ The Wagner Group was among them and is implicated in the massacre.⁵¹
- (3) **Establish the Corporate Connection:** There may be several corporations to consider prosecuting. U.S. Treasury identified the Limited Liability Corporation DM (OOO DM), which was involved in an illicit gold selling scheme to support Wagner financially.⁵² The U.K. House of Commons Foreign Affairs Committee identified Charter Green Light Moscow, which provided charter aircraft services for Wagner personnel and equipment, and Joint Stock Company Research and Production Concern BARL (AO BARL), which supports Wagner's military activities in Ukraine with high-resolution satellite imagery.⁵³

In addition to accessing war crimes evidence collected by Ukraine, the Prosecutor General's office will need access to war crimes evidence collected by the EU, ICC, and other foreign and international units. If not already in place, such evidence sharing may require mutual legal assistance agreements if for no other reason than to ensure a streamlined and reliable chain of custody. It is highly probable that the linkage between the Russian perpetrator and the Russian corporation will be financial, although material support is not out of the question.

⁴⁸ Jeffrey Dastin, [Data Company Palantir to Help Ukraine Prosecute Alleged Russian War Crimes](#), REUTERS, April 22, 2023.

⁴⁹ Office of the High Commissioner for Human Rights, [Killings of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation's Armed Attack Against Ukraine](#), United Nations OHCHR Thematic Report, Dec. 2022.

⁵⁰ Yousur Al-Hlou, Masha Froliak, Dmitriy Khavin, Christopher Koettl, Haley Willis, Alexander Cardia, Natalie Reneau & Malacy Browne, [Caught on Camera, Traced by Phone: The Russian Military Unit That Killed Dozens in Bucha](#), N.Y. TIMES, Dec. 23, 2022. This unit is part of/associated with the 76th Guards Air Assault Division, whose war crimes in Bucha have been extensively documented. Erika Kinetz, Oleksandr Stashevskiy & Vasilisa Stepanenko, [How Russian Soldiers Ran a 'Cleansing' Operation in Bucha](#), AP NEWS, Nov. 3, 2022.

⁵¹ Sean McFate, [The Mercenaries Behind the Bucha Massacre](#), Wall St. J., April 12, 2022.

⁵² Press Release, [Treaty Sanctions Illicit Gold Companies Funding Wagner Forces and Wagner Group Facilitator](#), U.S. Treasury Dep't., June 23, 2023.

⁵³ House of Commons Foreign Affairs Committee, [Guns for Gold: The Wagner Network Exposed](#), Seventh Report of Session 2022-23, July 26, 2023.

In this case, financial tracing will become a key component to proving a complicity charge and that would be married to contemporaneous knowledge of war crimes being committed. For example, in France, the LaFarge Cement Corporation was prosecuted for the actions of its subsidiary in Syria, which provided funds to ISIS so that LaFarge could continue operating its cement plant at the same time that ISIS was engaged in “abductions, torture, and summary public executions.”⁵⁴ In the Bucha/Wagner scenario outlined above, it would need to be shown that the corporation selected for prosecution knew of Wagner’s pattern of war crimes and continued its support it anyway.

The scale of atrocities in Ukraine is now reaching vast proportions. According to the Congressional Research Service: “As of September 29, 2023, Ukrainian authorities in the Office of the Prosecutor General of Ukraine state they have recorded 108,904 potential war crimes committed by Russian forces. . . . As of September 24, 2023, the Office of the U.N. High Commissioner for Human Rights (OHCHR) recorded 27,449 civilian casualties (killed and injured), but asserts that the true total is likely far higher.⁵⁵ In March 2023, U.S. Attorney General Merrick Garland stated, ‘Just over twelve months ago, invading Russian forces began committing atrocities at the largest scale in any armed conflict since the second World War.’”⁵⁵

Step 4: Bring the Russian Corporation to Court

There are two ways to bring a case against a Russian company in Ukraine: criminal and civil. The former is preferred for all the reasons set forth in the Executive Summary, above. Similar to the three elements of matching the perpetrator of the war crime to the corporation in Step 3, above, to secure a conviction against a company in court, the prosecutor must generally prove that the war crimes occurred, the company supported it in some way, and intended to do so.⁵⁶

Ukrainian Criminal Code

Through a series of interlocking provisions that cross-reference one another, the Ukrainian Criminal Code allows for the prosecution of corporations, and the language also provides flexibility to assert jurisdiction over foreign corporations as well. The provisions excerpted below demonstrated that the corporate entities described in Article 96 can be criminally prosecuted for violations of Articles 109 and 110 (Crimes Against Ukraine’s National Security) and Article 438 (War Crimes).

With respect to applying criminal law to corporations, Article 96 requires a showing that the corporate activity was for the benefit of the corporation; thus, the prosecutor will need to make this showing as part of their case against the company when applying Articles 109, 110, or 438. Article 96 of the Ukrainian Criminal Code⁵⁷ reads in relevant part with emphasis added:

Section XIV-1 CRIMINAL LAW MEASURES APPLIED TO LEGAL ENTITIES

Article 96-3. Grounds for applying criminal law measures to legal entities:

1. The grounds for applying criminal and law measures to a legal entity shall be as follows:

. . . .

⁵⁴ Center for Justice & Accountability, [Corporate Complicity in ISIL Crimes Against Humanity](#).

⁵⁵ Andrew S. Bowen & Matthew C. Weed, [War Crimes in Ukraine](#), CRS Rep. R47762, Oct. 16, 2023, at 15.

⁵⁶ *Proliferation of Corporate War Crimes*, *supra* note 6, at 2.

⁵⁷ [Criminal Code of Ukraine](#), Art. 96 et seq., as amended (2021).

4) the commission by its authorised person on behalf of and for the benefit of a legal entity of any of the criminal offences provided for by Articles [109](#), [110](#), . . . [438](#), . . . hereof;

....

2. Criminal offences provided for by [Articles 109, 110, . . . 438](#), . . . hereof, shall be deemed committed for the benefit of a legal entity, if they resulted in obtaining its improper advantage or created the conditions for such advantage or were aimed at evading liability under the law.

....

Article 96-4. Legal entities that are subject to criminal law measures

1. Criminal law measures, in the cases provided for by clauses 1 and 2, part 1, Article 96-3 hereof, may be applied by a court to an enterprise, institution or organisation, except for government authorities, authorities of the Autonomous Republic of Crimea, local governments, organisations established by them in the prescribed manner, fully supported by the state or local budgets, foundations of compulsory state social insurance, the Deposit Guarantee Fund and international organisations.

....

3. In the event of reorganisation of legal entities specified in parts 1 and 2 of this Article, criminal law measures may be applied to their successors to whom the property, rights and obligations related to the commission of criminal offences stipulated in clauses 1–6, Part 1 of Article 96-3 hereof have been transferred.

....

Article 96-6. Types of criminal law measures applicable to legal entities

1. The following criminal law measures may be applied to legal entities by court:

- 1) fine;
- 2) forfeiture of property;
- 3) liquidation.

2. A fine and liquidation may be applied to legal entities only as the primary criminal law measures, and forfeiture of property shall only be applied as an additional measure. When applying criminal law measures, a legal entity shall reimburse the damages and losses in full, as well as the amount of improper advantage obtained, which was obtained or could have been obtained by the legal entity.

Article 96-7. Fine

1. A fine shall mean the amount of money paid by a legal entity under a court decision.

The court shall impose a fine based on twice the amount of illegally obtained improper advantage.

2. In the event the improper advantage has not been received, or its amount cannot be calculated, the court, depending on the gravity of the criminal offence committed by the authorised person of the legal entity, shall apply a fine in the following amounts: from five to ten thousand tax-free minimum incomes for a criminal offence; from ten to twenty thousand tax-free minimum incomes for a minor crime; from twenty to

seventy-five thousand tax-free minimum incomes for a grave crime; from seventy-five to one hundred thousand tax-free minimum incomes for a special grave crime.

3. Having regard to the property status of a legal entity, the court may apply a fine with instalment payment in certain parts for up to three years.

....

Article 96-8. Forfeiture of property

1. Forfeiture of property consists in compulsory confiscation of property of a legal entity without compensation and shall be applied by the court in case of liquidation of a legal entity in accordance with this Code.

....

Article 96-10. General procedure for the application of criminal law measures to legal entities

1. When applying criminal law measures to a legal entity, the court shall take a due account of the gravity of the criminal offence committed by its authorised person, the degree of criminal intent, the amount of damage, the nature and amount of illegal gain received or that could be received by the legal entity, measures taken by a legal entity to prevent criminal offences.

Articles 109 and 110 state the criminal elements for violations of Ukraine's national security that a company described under Article 96 provisions can be prosecuted for.⁵⁸ Forfeiture of property would entail the seizure of frozen assets. While the provisions of Article 109 may not be considered war crimes for purposes of dual criminality analysis with the U.S. War Crimes Act, the provisions of Article 110 are more likely to be so, and the provisions of Article 438 specifically satisfy this requirement. Moreover, while forfeiture appears to not to be the preferred route for punishment, it is a permitted route for rectifying crimes committed by corporations.

SPECIAL PART

Section I CRIMES AGAINST NATIONAL SECURITY OF UKRAINE

Article 109. Actions aimed at forceful change or overthrow of the constitutional order or take-over of government

1. Actions aimed at forceful change or overthrow of the constitutional order or take-over of government, and also a conspiracy to commit any such actions shall be punishable by imprisonment for a term of five to ten years with or without forfeiture of property.

2. Public appeals to violent change or overthrow of the constitutional order of take-over of government, and also distribution of materials with any appeals to commit any such actions shall be punishable by restriction of liberty for a term of up to three years, or imprisonment for the same term with or without forfeiture of property.

....

Article 110. Trespass against territorial integrity and inviolability of Ukraine

1. Willful actions committed to change the territorial boundaries or national borders of Ukraine in violation of the order provided for by the Constitution of Ukraine, and also public calls or distribution of materials with calls to commit any such

⁵⁸ [Criminal Code of Ukraine](#), Art. 109-110, as amended (2021).

actions **shall be punishable by** imprisonment for a term of three to five years with or without **forfeiture of property**.

2. The same actions, if committed by an official of government authorities, or repeated, or committed by an organised group, or accompanied with exciting national or religious enmity shall be punishable by imprisonment for a term of five to ten years with or without **forfeiture of property**.

3. Any such actions, as provided for by parts 1 and 2 of this Article, if they caused the death of people or resulted in any other grave consequences shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment with or without **forfeiture of property**.

Article 110-2. Financing of actions committed for the purpose of forcible change or overthrow of the constitutional order or take-over of government, change of boundaries of the territory or state border of Ukraine

1. Financing of actions committed to change the boundaries of the territory or state border of Ukraine in violation of the procedure established by the Constitution of Ukraine **shall be punishable by** imprisonment for a term of three to five years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to two years, with **forfeiture of property**.

2. Financing of actions committed for the purpose of forcible change or overthrow of the constitutional order or take-over of government shall be punishable by imprisonment for a term of five to seven years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to two years, with **forfeiture of property**.

3. Any such actions as provided for by parts 1 or 2 of this Article, committed repeatedly or for mercenary reasons, or by a group of persons upon their prior conspiracy, or on a large scale, or where they have caused considerable property damage shall be punishable by imprisonment for a term of six to eight years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years and **forfeiture of property**.

4. Any such actions as provided for by parts 1 or 2 of this Article, committed by an organised group or on a particularly large scale, or where they have resulted in other grave consequences shall be punishable by imprisonment for a term of eight to ten years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years with **forfeiture of property**.

....

Note. 1. The financing of actions provided for by this Article shall be deemed actions committed for the purpose of their financial or material support.

2. Financing of actions committed for the purpose of forcible change or overthrow of the constitutional order or take-over of government, change of the boundaries of the territory or state border of Ukraine shall be deemed committed on a large scale where the amount of financial or material support exceeds six thousand tax-free minimum incomes.

3. Financing of actions committed for the purpose of forcible change or overthrow of the constitutional order or take-over of government, change of boundaries of the territory or state border of Ukraine shall be deemed

committed on a particularly large scale if the amount of its financial or material support exceeds eighteen thousand tax-free minimum incomes.

War crimes are more specifically described in Article 438 and this article incorporates by reference the definitions outlined in the Geneva Conventions.⁵⁹

Article 438. Violation of rules of the warfare

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years.

In Absentia Prosecution

Ukraine's Prosecutor General office has detailed approximately 200 prosecutors to handle the thousands of alleged war crimes committed since the beginning of the war. A small fraction of cases have been brought and, under Ukrainian law, a portion of these have proceeded *in absentia* (in the absence of the accused). "Several commentators have discussed the difficulty of conducting war crimes trials against enemy soldiers while a conflict is ongoing. However, these commentators have remarked that such trials are not contrary to international humanitarian law and that Ukraine's legal system has so far exhibited the ability to operate for the most part effectively and transparently during these trials."⁶⁰

The *in absentia* process in Ukraine for war crimes prosecutions is described by the Institute for War & Peace Reporting:

Although nearly half of the war crimes convictions so far secured by Ukrainian prosecutors against Russian soldiers have been in absentia, experts argue that such trials still form an important part of the architecture of justice in Ukraine. Out of the 26 cases so far completed, 12 have involved persons not in Ukrainian custody. . . . According to the European Court of Human Rights, a person's awareness of a criminal case against him or her is a prerequisite for the consideration of a case in absentia. "It is important to observe all formalities during the investigation of such cases, as the convicted may later appeal the decisions of the Ukrainian courts to the European Court of Human Rights," said Vadym Kovalenko, a prosecutor at the prosecutor general's office. . . .

In the year since the beginning of Russia's full-scale invasion of Ukraine, prosecutors have announced suspicions to 277 people of committing war crimes. Out of these, 255 have been to persons not in Ukrainian custody. Amendments to the Ukrainian criminal legislation, which provide for a pre-trial investigation and trial without the participation of the suspect, were adopted by parliament in October 2014. . . . After the full-scale invasion of February 24, 2022, absentee investigations and trials were . . . applied to Russian soldiers accused of war crimes.

⁵⁹ [Criminal Code of Ukraine](#), Art. 438, as amended (2021).

⁶⁰ Bowen & Weed, *supra* note 55, at 15.

The decision to start an investigation in absentia is prompted if a potential suspect fails to appear at his or her summons. If the prosecutor's office does not know the person's whereabouts, it publishes relevant notices in the parliamentary Voice of Ukraine newspaper as well as on the website of the prosecutor general's office. "Prosecutors also receive operational information about the person's crossing of borders based on telephone traffic, there's data from social networks that confirm they are in the temporarily occupied territory of Ukraine or in the Russian Federation," said Kovalenko. "With these materials, the prosecutor or investigator applies to the investigating judge to obtain permission to conduct a special pre-trial investigation in absentia."

The judge checks whether the prosecutor has used all possible means to notify the person of the criminal case against him or her. The court also publishes notices of its summons on the Judicial Authority of Ukraine's website and the Government Courier newspaper. Stanislav Kravchenko, a judge with the criminal court of cassation within the Supreme Court, said that the summons was also spread through social networks, e-mail or phone, if such information was available to investigators. . . .

"If the judge gives permission, the absentee investigation begins," Kovalenko continued. "First of all, the prosecutor must hand over the suspicion - he publishes it again on the website of the prosecutor general's office and in the Voice of Ukraine [newspaper]. Other aspects of the case, from conducting examinations to questioning witnesses, do not differ from normal proceedings, Kovalenko said. When the investigation is completed, the materials are sent to the court, but before the case is considered the prosecutor has to request permission for a special trial without the participation of the accused.

At this stage, a state-appointed lawyer familiarises themselves with the case materials so as to actively defend the accused in court. Krapyvin said that the right to appeal underpinned the process. He noted the case of the first war crimes trial in May 2022, in which Russian tank commander Vadim Shishimarin, 21, was jailed for life for shooting a 62-year-old civilian just after the war began. On appeal from his court-appointed defence lawyer, the sentence was reduced to 15 years. "A person convicted in absentia has the right to review his case if he does not agree with the verdict," Krapyvin concluded. "In this way, the right to a fair trial is ensured, and this is key."⁶¹

Ukrainian Civil Code

If a criminal prosecution in Ukraine against a Russian corporation is unfeasible, it may be possible for an individual plaintiff or a group of plaintiffs to bring a lawsuit for damages against such company based on provisions of the Ukrainian Civil Code. Because financial awards would go to the individual plaintiffs, the attorneys in those cases, not the state of Ukraine, would have to petition foreign courts to attach frozen assets in satisfaction of the judgment. Moreover, Ukraine would have to adopt new internal legislation or adjust its tax code so that the majority of those assets, minus whatever amount should appropriately go to the plaintiff to cover actual damages and legal costs, would revert to the state of Ukraine for rebuilding purposes.

The relevant Civil Code provisions below demonstrate the process that could be litigated before a Ukrainian court:

⁶¹ Victoria Matola, [Ukraine: Justice in Absentia](#), INST. FOR WAR & PEACE REPORTING, April 11, 2023.

Ukrainian Civil Code, Book One, Section 1, Chapter 3, Article 16 Protection of Civil Rights and Interests by the Court

1. Each person shall be entitled to apply to the court for the protection of his/her/its private non-property or property rights and interests.
2. Civil rights and interests remedies may include:
 - 1) right recognition;
 - 2) recognition of a legal action as invalid;
 - 3) termination of the action violating the right;
 - 4) restoration of pre-violation position;
 - 5) enforcement of in kind fulfillment of obligation;
 - 6) modification of legal relationship;
 - 7) termination of legal relationship;
 - 8) indemnification for losses and other means of property damage indemnification;
 - 9) indemnification for moral (non-material) damages;
 - 10) recognition of decisions, actions or inactivity of the state power authority, the power authority of the Autonomous Republic of Crimea or the local self government body as well as of their officials and employees to be unlawful.

.....

Ukrainian Civil Code, Book One, Section 1, Chapter 3, Article 22. Indemnification for the Losses and Other Ways of Property Damage Indemnification

1. The person who incurred losses as a result of destruction or damaging thing shall have a right to the indemnification therefor.
2. The damages include:
 - 1) losses incurred by a person as a result of destroying or damaging thing as well as expenses, which a person has incurred or must incur in order to restore its violated rights (real losses);
 - 2) incomes that a person could receive under ordinary circumstances if his/her/its right would have not been violated (the lost profit);
3. Damages shall be indemnified in full unless any other extent of indemnification is provided by the agreement or the law. If a violating person receives incomes with this connection, the amount of the lost profit to be indemnified to a person whose right was violated may not be less than incomes received by a violating person.
4. Upon the request of a person who incurred the loss and in accordance of the circumstances of the case, the property damage may be indemnified in other way, in particular, in kind (by transferring the thing of the same type and quality, repairing the damaged thing, etc.).

Ukrainian Civil Code, Book One, Section 1, Chapter 3, Article 23. Indemnification for Moral Damage

1. A person shall have a right to the indemnification for the moral damage resulted from the violation of his/her/its right.
2. Moral damage consists in:
 - 1) physical pain and misery suffered by a natural person in connection with his/her disability or other health impairment;

- 2) soul sufferings incurred by a natural person in connection with the illegal conduct of his/her family or close relatives;
 - 3) soul sufferings incurred by a natural person in connection with the destruction or damaging his/hers property;
 - 4) abasement of honor and dignity of an individual as well as business standing of an individual or a legal entity.
3. Moral damage shall be indemnified by cash, other property or otherwise. The amount of moral damage indemnification shall be specified by the court in dependence of the infringement nature, physical and moral suffering extent, degradation of a sufferer's capabilities or depriving him/her of the possibility to realize them, degree of guilt of the person inflicting moral damage if this guilt is a ground for the indemnification as well as having regard to other circumstances of material significance.
4. Moral damage shall be indemnified regardless of the property damage, which is subject to the indemnification, and is not connected with the amount of this indemnification.
5. Moral damage shall be indemnified on a nonrecurring basis unless otherwise established by the agreement or the law.

Ukrainian Civil Code, Book Two, Chapter 2, Article 281 The Right to Life

1. Each person shall have the inalienable right to life.
2. A natural person cannot be deprived of life. A natural person shall have the right to protect his/her life and health, as well as the life and health of another natural person, from illegal encroachment with any means not prohibited by the law.

Ukrainian Civil Code, Book Three, Section 1, Chapter 29, Article 390 Settlements under Claim of Property from the Other's Illegal Possession

1. The property owner shall have the right to claim from a person that knew or could know about his/her illegal possession of the property (unfair beneficiary) transfer of all profits from the property that he/she received or could receive for the whole time of possession.
2. The property owner shall have the right to claim from a bona fide beneficiary all transfer of all profits from the property that he/she received or could receive since the moment he learned about illegality of his/her possession or since the moment he/she received a subpoena to the court for the action brought by the owner on claiming the property.
3. A bona fide or unfair beneficiary (holder) shall have the right to claim from the property owner to reimburse the expenses necessary for maintenance and preservation of the property since the moment the owner acquired the right to return the property or transfer the profit.
4. A bona fide beneficiary (holder) shall have the right to leave for himself the property improvements if they can be separated from the property without damaging it. If the improvements cannot be separated from the property, a bona fide beneficiary shall have the right for reimbursement of the expenses for the amount by which the value of the property increased.

At present, there is a deficiency in Ukraine's civil and commercial legal processes when it comes to seeking redress against foreign corporations that have been involved in or supported war crimes in the country. Nonetheless, in recent years, a judicial practice established a limitation on Russian state sovereign immunity that paved the way for private individuals and entities to file lawsuits against Russia for war-related damages without requiring the Russian embassy's consent.^{62,63} This has led to a significant surge in the number of lawsuits against Russia in Ukrainian courts.^{64,65} Despite these positive developments, petitioners are yet to receive compensatory damages.

There is a growing movement among the Ukrainian legal community to adopt an alternative and potentially more constructive approach of suing corporations closely related to the Russian government and piercing the corporate veil.⁶⁶ While there have been some successful cases, it must be noted that proving a corporation is only an alter ego and piercing the corporate veil is a high bar that requires a substantial level of proof.⁶⁷ This approach has limitations in its application and may yield inconsistent outcomes. However, as previously mentioned, although criminal proceedings remain preferable to civil litigation, this approach can serve as a valuable complementary option.

An example of an international civil suit of private citizens against a private company implicated in war crimes would be the *Ukrainian People vs. Wagner Group* launched in the United Kingdom in the Fall of 2022.⁶⁸ This case is somewhat straightforward, where Putin expressly admitted to financing the group, and the group had already admitted to being a terroristic organization as defined by the UK.^{69 70}

⁶² Про основні засади примусового вилучення в Україні об'єктів права власності Російської Федерації та її резидентів [On the main principles of forced seizure in Ukraine of objects of property rights of the Russian Federation and its residents] (*Golos Ukrainy*, 2022, No. 47).

⁶³ Касаційний Цивільний Суд в складі Верховного Суду України [Civil Cassation Court within the Supreme Court] Apr. 14, 2022, No. 308/9708/19.

⁶⁴ «Найдорожчі» Судові Позови до Росії: що Вимагають Українські Компанії [*The "Most Expensive" Lawsuits Against Russia: What Ukrainian Companies Demand*], VKURSI PRO, June 13, 2023.

⁶⁵ Олександрійський міськрайонний суд Кіровоградської області [Court of Oleksandriysk City District Court of Kirovohrad Oblast] Jan. 10, 2023, No. 398/3995/22 (claiming emotional distress and mental anguish resulting from the occupation, a citizen of Luhansk seeks damages); Господарський суд Запорізької області [Commercial court of Zaporizhzhia region] Mar. 28, 2023, No. 908/1100/22 (filing a successful claim by farm against the Russian Ministry of Justice for property damage caused by Russian aggression); Господарський суд Харківської області [Commercial court of Kharkiv region] Mar. 30, 2023, No. 922/323/23 (suing for damages resulted from temporary occupation and looting of the goods).

⁶⁶ Vitaly Nestor, «Корпоративна Вуаль» Держави та Можливість Відповідальності Державних Підприємств і Компаній, що Належать Державі, за Збитки, Завдані Війною [*The "Corporate Veil" of the State and the Possibility of Liability of State-Owned Enterprises and State-Owned Companies for Losses Caused by War*], PRAVO.UA, Nov. 6, 2023.

⁶⁷ Касаційний Господарський Суд в складі Верховного Суду України [Commercial Court of Cassation within the Supreme Court] July 20, 2022, No. 910/4210/20.

⁶⁸ Press Release, McCue Jury & Partners, *The Ukrainian People versus Wagner Group* (Nov. 1, 2023), <https://www.mccue-law.com/ukrainian-people-versus-wagner-group/>.

⁶⁹ OPEN SOCIETY JUSTICE INITIATIVE, ACCOUNTABILITY FOR CRIMES OF PERSONNEL OF THE WAGNER GROUP IN UKRAINE 51 (Nov. 2023).

⁷⁰ Home Office, *Russian Wagner Group declared terrorists* (Sep. 6, 2023), <https://www.gov.uk/government/news/russian-wagner-group-declared-terrorists>.

Apart from private claims, Ukraine also has the institution of “civil confiscation,” which is the recognition of unfounded assets and their collection into state income. Assets can be collected into state income through civil confiscation if it is proven that ownership rights to those assets were acquired illegally.⁷¹ According to the Ukrainian Constitution’s Article 41 of Chapter II on the “Rights, Freedoms and Obligations of a Man and a Citizen,” property confiscation can occur only by a court decision.⁷² The High Anti-Corruption Court is already successfully practicing civil confiscation mechanisms within the country.⁷³ In civil forfeiture, the court can potentially collect “funds (cash, funds held in bank accounts or in custody in banks or other financial institutions), other property, property rights, intangible assets, cryptocurrencies, the amount of reduction of financial obligations, as well as works performed or services provided.”⁷⁴ However, a lawsuit can be brought only by the prosecutor of the Specialized Anti-Corruption Prosecutor's Office, and the assets go to the public sector agencies such as the Asset Recovery and Management Agency (ARMA), the State Property Fund, military administrations, and others.⁷⁵ Another limitation is that the law applies only to assets acquired after November 28, 2019.⁷⁶

Step 5: Attach Assets to Judgment Award

Once the Russian corporation is convicted on the criminal prosecution track or found guilty on the civil litigation track, the judgment/award is brought to the jurisdiction where the assets are located, and a request is filed with the local court to recognize the judgment/award and attach those assets in satisfaction of it. The legal analysis presented here focuses on U.S. courts. Although this model may generally be transposed to other jurisdictions, further jurisdiction-specific legal analysis would be required to successfully do so. Notably, the seizure and attachment processes differ dramatically depending upon the criminal or civil nature of the Ukrainian judicial process. For the criminal process to succeed, two hurdles must be cleared: (1) dual criminality, and (2) an executive agreement to allow enforcement of a penal judgment.

Dual Criminality

The dual criminality element is straightforward. It is a common requirement for seizure of assets stemming from money laundering or corruption prosecutions in another jurisdiction.⁷⁷ In this case, both jurisdictions criminalize war crimes to the extent that the definitions in both jurisdictions match with respect to the charge for which the defendant was found guilty and that a company can be a defendant – and therefore prosecuted for committing the crime. This analytical

⁷¹ *Mechanisms for Confiscation of Russian Assets: What Does the Legislation Say?* Transparency International (Aug. 29, 2022).

⁷² UKR. CONST., June 28, 1996, art. 41.

⁷³ Press Release, High Anti-Corruption Court, Антикорууд застосував санкцію до російських компаній [Anticorruption court imposed sanctions on Russian companies] (Aug. 29, 2023), <https://hcac.court.gov.ua/hcac/press-centr/news/1469411/>.

⁷⁴ Про внесення змін до деяких законодавчих актів України щодо конфіскації незаконних активів осіб, уповноважених на виконання функцій держави або місцевого самоврядування, і покарання за набуття таких активів [On amendments to some legislative acts of Ukraine regarding the confiscation of illegal assets of persons authorized to perform the functions of the state or local self-government, and punishment for acquiring such assets] (*Vidomosti Verkhovnoi Rady Ukrainy*, 2019, No. 2, p. 5) art. 290.8(1).

⁷⁵ *Id.* at art. 290.1.

⁷⁶ *Id.*

⁷⁷ BRUN, ET AL, ASSET RECOVERY HANDBOOK at 47.

exercise must be undertaken for each country holding significant frozen assets. In the case of the U.S., it appears both elements would be met for dual criminality.

On the first question, the U.S. Congress updated America's War Crimes Statute in late 2022 and it was promulgated in early 2023.⁷⁸ The language now better tracks both that in the Geneva Conventions and, therefore, that in the Ukrainian Criminal Code – which is modeled on the Geneva Conventions. On the second question, it appears that the new statutory language would allow for prosecution of foreign corporations, just as the Ukrainian code does – although this would be a case of first impression in the U.S. Helpfully, the U.S. code definition section 1 USC §1 states: “In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁷⁹ Thus, according to an analysis by the Corporate Accountability Lab just prior to promulgation:

Just as the Justice for Victims Act would expand the US Government's power to prosecute natural persons “present in the United States,” so too the bill would expand its prosecutorial power over corporations. The proposed bill retains the [War Crimes Act]'s use of the words “whoever” and “person,” terms that generally refer to both legal and natural persons. Assuming the bill . . . would give Attorneys General authority to prosecute corporations, the question arises: what does it mean for a *foreign* corporation to be “present in” the United States? In other words, what kinds of connections must exist between the corporation and the United States before the corporation is considered *present*?

In 2009, a federal district court observed that the case law on this issue is “surprisingly sparse and poorly developed.” That same court went on to identify four instances where a court may have jurisdiction over a foreign corporation under [the] US criminal code:

1. A corporation has established certain “minimum contacts” with the United States;
2. Conduct abroad causes an injury within the United States;
3. An agent of the foreign corporation has done enough business in the United States to justify jurisdiction; or
4. At least one overt act occurred in the United States.

For example, pillaging is a war crime covered by the WCA. If a foreign corporation pillages natural resources during an armed conflict in a foreign jurisdiction, and then sells those resources in the United States, this might trigger criminal liability under the WCA.⁸⁰

Moreover, the U.S. statutory language now contains a political triggering mechanism such that prosecutions for war crimes may not be undertaken unless the Attorney General certifies that doing so would be “in the public interest and necessary to secure substantial justice.”⁸¹ That the

⁷⁸ [Justice for Victims of War Crimes Act](#), 136 Stat. 6265, 117th Cong., Jan. 5, 2023 [hereinafter U.S. War Crimes Act].

⁷⁹ Words Denoting Number, Gender, and So Forth, 1 USC § 1.

⁸⁰ Justin Bertsche, [To Fulfill U.S. Obligations & Hold Corporations Accountable for Aiding and Abetting War Crimes, Congress Must Amend the War Crimes Act](#), CORP. ACCOUNTABILITY LAB, Aug. 12, 2022.

⁸¹ U.S. War Crimes Statute at §2(f)(A).

war in Ukraine drove the redrafting and promulgation of this act is no secret;⁸² indeed, the U.S. Attorney General tied the two together in a pre-Christmas statement just after President Zelensky's visit to Washington:

During a meeting yesterday afternoon at the White House, President Zelenskyy gave us further reports of horrific atrocities resulting from Russia's unjust and unprovoked war in Ukraine. The Justice Department and our partners stand with the people of Ukraine and will pursue every avenue of accountability to bring to justice those responsible, wherever they are located. The Justice for Victims of War Crimes Act will strengthen those efforts by enabling the Department to prosecute alleged war criminals who are found in the United States. In the United States of America, there must be no hiding place for war criminals and no safe haven for those who commit such atrocities. This bill will help the Justice Department fulfill that important mandate.⁸³

Consequently, a U.S. federal court faced with converting a Ukrainian criminal judgment against a Russian corporation for war crimes into a U.S. order for attachment of assets in satisfaction of the judgment/award would be fulfilling both legislative and executive intent in adopting the statute in the first place. This is likely enough to overcome an argument based on the presumption against extraterritorial application of U.S. law. It is also likely enough to overcome an argument based upon the presumption against retroactive application absent express statutory language – just as the Supreme Court did in *Republic of Austria v. Altmann*⁸⁴ with respect to retroactively applying the Foreign Sovereign Immunities Act⁸⁵ against Austria so that a World War II era artwork restitution case could move forward in the federal courts.

Executive Agreement/Order

The transition from freezing foreign assets, which is a political decision undertaken by the executive branch, is different from seizing those assets, which is a legal decision undertaken by the judicial branch. Seizure is a form of enforcement. When seizure is done with respect to the assets of a foreign entity in satisfaction of a foreign judgment/award, it is analyzed from a conflicts of law perspective, and that foreign judgment must be converted into a local judgment for the judicial power of the local court to flow into it.

“[A] judgment rendered in another jurisdiction – whether in a sister-state or a foreign country – will be regarded as a foreign judgment by the jurisdiction where its enforcement is sought. The judgment thus has no direct or automatic effect in the second jurisdiction. The judgment creditor must depend on the assistance of the local courts for the recognition and enforcement of the judgment.”⁸⁶ To the extent foreign judgments are satisfied by US courts, it is a matter of comity based upon reciprocity;⁸⁷ however, bilateral agreements may be executed to induce recognition.⁸⁸

⁸² Grace Lin, [Expanding U.S. Prosecutorial Power Over International War Crimes](#), COLUMBIA J. TRANSNAT'L L. BULL., Feb. 14, 2023.

⁸³ Press Release, [Attorney General Merrick B. Garland Statement on the Passage of the Justice for Victims of War Crimes Act](#), U.S. Dep't. of Justice, Dec. 22, 2022.

⁸⁴ *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

⁸⁵ Foreign Sovereign Immunities Act of 1976, 28 USC §§1330, 1332, 1391, 1441, 1602-1611 (1976).

⁸⁶ PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICTS OF LAW 1446 (5th ed. 2010).

⁸⁷ *Id.* at 1446-47.

⁸⁸ *Id.* at 1448.

Nevertheless, courts will look to both finality and due process in the rendering jurisdiction before recognizing a foreign judgment/award.⁸⁹

That said, under traditional conflicts of law theory, due to public policy and sovereignty concerns, criminal judgments are normally not enforceable by a foreign court. Chief Justice John Marshall stated the rule in 1825 in *The Antelope*: “The courts of no country execute the penal laws of another. . . .”⁹⁰ However, the modern trend is toward allowing recognition.⁹¹ An executive agreement between the U.S. and Ukraine would accomplish this task and open the federal courthouse door to Ukraine, bringing a penal judgment, rendered in its courts against a Russian corporation, to the U.S. for enforcement through seizure and attachment of frozen corporate assets. The U.S. Supreme Court points the way via its decision in *Dames & Moore v. Regan*.⁹²

Dames & Moore is precedent for executive agreements “directing traffic” within the federal judiciary with respect to foreign litigation. In that case, plaintiffs sued to recover damages from the illegal confiscation of their assets (debt incurred by the Shah’s regime) by Iran during the 1979 revolution that brought a successor government to power. The president concluded the Algiers Accords with Iran – an executive agreement which coordinated the release of U.S. hostages with the settlement of financial matters, including the removal of all claims in U.S. federal courts to an arbitration tribunal in The Hague.⁹³

The Supreme Court upheld the president’s ability to do this via executive agreement, deriving authority not only from his constitutional foreign affairs and national security duties, but also from the International Emergency Economic Powers Act (IEEPA), which authorizes the president to recognize an “unusual and extraordinary threat. . . . to the national security, foreign policy, or economy of the United States [that originates] in whole or substantial part outside the United States” and empowers the president to freeze assets or block transactions to deal with that threat.⁹⁴ The Court said, “the legislative history of the IEEPA further reveals that Congress has accepted the authority of the President to enter into settlement agreements.”⁹⁵

Notably, the operative language in IEEPA §1702(a)(1)(B) would allow not only the blocking and freezing of assets, but also the regulating and directing of transfers and withdrawals, which would imply the unfreezing of assets, thereby making them available for attachment:

(B) investigate, block during the pendency of an investigation, *regulate, direct* and *compel*, nullify, void, prevent or prohibit, any acquisition, holding, withholding, *use, transfer, withdrawal*, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, *any property in which any foreign country or a national thereof has any interest by any person*, or with respect to any property, subject to the jurisdiction of the United States;⁹⁶

Justice Rehnquist went on to opine in *Dames & Moore* that “In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President has some measure of power to enter into executive agreements

⁸⁹ *Id.* at 1451-59.

⁹⁰ *Id.* at 1470 (quoting *The Antelope*, 23 U.S. 66, 123 (1825)).

⁹¹ *Id.* at 173-174, 1477.

⁹² *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁹³ *Id.*

⁹⁴ *Id.* (citing IEEPA, 50 USC §1701-1709 (1977)).

⁹⁵ *Id.* at 680-82.

⁹⁶ IEEPA at §1702.

without obtaining the advice and consent of the Senate.”⁹⁷ In making this point, he cited with approval Judge Learned Hand, “The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.”⁹⁸

In that sense, at least, Ukraine bringing a claim against frozen assets in New York to seize them in satisfaction of a foreign judgment could constructively be considered claims settlement for purposes of U.S. statutory and case law – thereby empowering the president to enter into an executive agreement to effectuate this process. Consequently, the internal logic of the IEEPA, together with the president’s constitutional powers in foreign relations under Article II, and the Supreme Court’s application of all of this in *Dames & Moore*, augers well for the president engaging with Ukraine to allow for penal claims to be enforced by U.S. federal courts against Russian frozen assets in the United States.

If the Supreme Court allows the president to *close* the federal courthouse door, pursuant to an executive agreement, to litigants seeking to secure an award and attach foreign assets, then the reverse must also logically be true: the president can *open* the federal courthouse door, pursuant to an executive agreement, allowing the court to accept a penal award that would normally not be accepted for purposes of attaching foreign assets. Mutual legal assistance (MLA) treaties sometimes accomplish this task with respect to financial and corruption cases where asset recovery is sought.⁹⁹

The United States and Ukraine concluded a bilateral MLA treaty for criminal matters in 1998 that entered into force in 2001.¹⁰⁰ Article 1(1)-(2)(g) of the treaty establishes cooperation in the seizure and forfeiture of foreign assets: “The Contracting States shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters. Assistance shall include . . . assisting in proceedings related to immobilization and forfeiture of assets, restitution, and collection of fines. . . .”¹⁰¹ Article 17, which provides the legal basis for the transaction envisioned by Step 5, states:

Article 17. Assistance in Forfeiture Proceedings

1. If the Central Authority of one Contracting State becomes aware of proceeds of instrumentalities of offenses that are located in the other State and may be forfeitable or otherwise subject to seizure under the laws of that State, it may so inform the Central Authority of the other State. If the State receiving such information has jurisdiction in this regard, it may present this information to its authorities for a determination whether any action is appropriate. These authorities shall issue their decision in accordance with the laws of their country. The Central Authority of the State that received the information shall inform the Central Authority of the State that provided the information of the action taken.

⁹⁷ *Dames & Moore*, 682-683.

⁹⁸ *Id.* at 683 (quoting *Ozanic v. United States*, 188 F.2d 228, 231 (CA2 1951)).

⁹⁹ BRUN, ET AL, ASSET RECOVERY HANDBOOK, *supra* note 77, at 243-270.

¹⁰⁰ [Treaty Between the United States and Ukraine on Mutual Legal Assistance in Criminal Matters](#), U.S.-Ukraine, entered into force Feb. 27, 2001, S. TREATY DOC. 106-16.

¹⁰¹ *Id.* at Art. 1.

2. The Contracting States shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offences, restitution, to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings.

3. The Contracting State that has custody over proceeds or instrumentalities of offenses shall dispose of them in accordance with its laws. Either Contracting State may transfer all or part of such assets, or the proceeds of their sale, to the other State, to the extent permitted by the transferring State's laws and upon such terms as it deems appropriate.¹⁰²

The transactional foundation established in Article 17 is then followed by language in Article 18 which envisions further agreements, such as a new executive agreement, specifically providing U.S. federal courts the “jurisdiction in this regard” referred to in 17(1).

Article 18. Compatibility with other Treaties

Assistance and procedures set forth in this Treaty shall not prevent either Contracting State from granting assistance to the other Contracting State through the provisions of other applicable international agreements, or through the provisions of its national laws. The Contracting States may also provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable.¹⁰³

The 2023 version of U.S. Department of Justice Asset Forfeiture Policy Manual describes the roles of the federal court and the Attorney General in this process:

XI. Enforcement of Judgments

....

B. Enforcement of Foreign Judgments and Restraining Orders

Pursuant to 28 U.S.C. § 2467, the United States can restrain and forfeit assets in connection with foreign forfeiture matters. Requests for this type of this assistances come as MLA (or other legal assistance) requests and are generally referred by OIA to MLARS for execution. The most common mechanism under § 2467 for restraining or seizing assets is through the enforcement of a foreign court-issued restraining order. Before a federal court may enforce a foreign restraining order or a “foreign forfeiture or confiscation judgment” under § 2467, the “Attorney General or the designee of the Attorney General” must certify that enforcing the order is “in the interest of justice.” See 28 U.S.C. § 2467(b)(2) & (d)(3)(B)(ii).¹⁰⁴

In the U.S., executive agreements are international agreements entered into by the president outside the formal treaty-making process established in Article II of the Constitution. Their legal force is derived from the legal authority upon which they rest—in this case, it would likely be a combination of the president's constitutional authority under Article II combined with the statutory authority cited above and the U.S.-Ukraine MLA Treaty. Again, from the perspective of U.S. law,

¹⁰² *Id.* at Art. 17.

¹⁰³ *Id.* at Art. 18.

¹⁰⁴ [U.S. DEP'T. OF JUSTICE CRIMINAL DIVISION, ASSET FORFEITURE POLICY MANUAL](#) §IX(B) (2023).

there are three types of executive agreement: (1) Congressional-Executive Agreements that are agreed by both houses of Congress, (2) executive agreements pursuant to an Article II treaty, and (3) sole presidential executive agreements.¹⁰⁵ The Algiers Accords were the third type, but were used by the Court in conjunction with a federal statute. The process envisioned in Step 5 entails a new executive agreement (and executive order) of the second type.

Below is draft language for a self-executing executive order which can mirror a sole presidential executive agreement issued pursuant to the U.S.-Ukraine MLA treaty that could be implemented to accomplish the purpose of specifically allowing U.S. federal courts to recognize Ukrainian penal judgments against Russian corporations and seize Russian corporate assets to satisfy those judgments:

Draft Executive Order [x]—Recognition of Ukrainian Penal Judgments Against Russian Corporations and the Seizure of Russian Assets to Satisfy Such Judgments

By the authority vested in me as President by the Constitution and statutes of the United States, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), Section 301 of Title 3 of the United States Code, the National Emergencies Act (50 U.S.C. 1601 et seq.), and Section 2467 of Title 28 of the United States Code (28 U.S.C. 2467(b)(2) and (d)(3)(B)(II)),

I, JOSEPH R. BIDEN JR., President of the United States of America, in view of the Russian Federation’s continued use of its military industrial base to aid its effort to undermine security in countries and regions important to United States national security, and in order to take additional steps with respect to the national emergency declared in Executive Order 14024 of April 15, 2021, expanded by Executive Order 14066 of March 8, 2022 and by Executive Order 14114 of December 22, 2023, and relied on for additional steps taken in Executive Order 14039 of August 20, 2021, and expanded by Executive Order 14066 of March 8, 2022, Executive Order 14068 of March 11, 2022, and Executive Order 14071 of April 6, 2022, and in furtherance of the Treaty Between the United States and Ukraine on Mutual Legal Assistance in Criminal Matters, U.S.-Ukraine (entered into force Feb. 27, 2001, S. TREATY DOC. 106-16.), hereby order:

Section 1. If the Central Authority of Ukraine becomes aware of proceeds of instrumentalities of offenses that are located in the United States and may be forfeitable or otherwise subject to seizure under the laws of Ukraine, and if the Central Authority of Ukraine so informs the United States, the United States shall assume jurisdiction in this regard, and shall inform Ukraine that it has assumed jurisdiction.

Section 2. The United States shall assist Ukraine in proceedings relating to the forfeiture of the proceeds and instrumentalities of offences, restitution, to the victims of crime, and

¹⁰⁵ Stephen P. Mulligan, *International Law and Agreements: Their Effect Upon U.S. Law*, CRS Report RL32528, July 13, 2023. (“Self-executing treaties are the law of the land equal to federal law and superior to U.S. state law. Self-executing executive agreements can also prevail against inconsistent state laws, but executive agreements do not always have equal status to federal law. . . . A sole executive agreement has the potential to prevail over existing federal law if the agreement concerns an enumerated or inherent executive power under the Constitution or if Congress has historically acquiesced to the President entering into agreements in the relevant area.”)

the collection of fines imposed as sentences in criminal prosecutions. This may include action to immobilize the proceeds or instrumentalities located in the United States.

Section 3. If the United States has custody over proceeds or instrumentalities of offenses, the United States may transfer all or part of such assets, or the proceeds of their sale, to Ukraine, to the extent permitted by Ukrainian laws.

Sec. 4. The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Homeland Security, in consultation with the Secretary of State, are hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Homeland Security may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury, the Department of Commerce, and the Department of Homeland Security, respectively. All executive departments and agencies of the United States shall take all appropriate measures within their authority to implement this order.

Civil Litigation

If the criminal litigation track is not open, then the civil litigation track may be used to secure a wrongful death or other tort claim against the Russian corporation before a Ukrainian court. Damages awards secured by plaintiffs in foreign jurisdictions are regularly enforced in the U.S. if assets are present, the judgment is final, due process concerns are met, and the case is *res judicata*.¹⁰⁶ Of course, the chief downside of this litigation path is that the seized assets would be remitted to the plaintiff, not the state of Ukraine. Thus, an adjustment to internal Ukrainian law would need to be made such that while a portion of the award might remain with the individual litigant, the bulk of the award would inure to the state, perhaps via an adjustment in the Ukrainian tax code, for purposes of rebuilding.

Step 6: Transfer Assets to Ukraine

The transfer of seized Russian corporate assets to Ukraine, per order of the domestic court where the assets were frozen in satisfaction of a Ukrainian judicial penalty or award, must be handled carefully. On the foreign jurisdiction's side, a policy decision will need to be made with respect to the amount transferred and from which account it is drawn: the original corpus that was frozen, the investment proceeds which are also being held, or partially from both. If from the original corpus, then a determination must be made as to what happens to the proceeds.

On the Ukrainian side, a policy decision must also be made with respect to where the transferred assets land – e.g. in the Justice Ministry, the Treasury, or a specially designated rebuilding fund. Moreover, internal policy discussions must yield agreement on asset usage in determining fund structure. For example, at the ICC, the Trust Fund for Victims (TFV) would receive assets of guilty defendants in particular situations and then distribute resources in a variety of ways including rebuilding infrastructure in addition to or in place of individual reparations.¹⁰⁷

¹⁰⁶ Molly S. Van Houweling, [Enforcement of Foreign Judgments, The First Amendment, and Internt Speech: Notes for the Next Yahoo! v. Licra](#), 24 MICH. J. INT'L L. 697, 698-99 (2003).

¹⁰⁷ Trust Fund for Victims, [TFV Management Brief Q1 & Q2/2022](#) (1 Jan. – 30 June 2022).

According to the ICC model of asset recovery, states parties to the Rome Statute receive an order from the court to freeze assets at the appropriate juncture of a prosecution. Once the criminal proceedings and appeals have concluded, the court may then issue an order seizing those assets for use by the TFV. A state party to the Rome Statute is obligated by the multilateral treaty to implement a system in place to facilitate this process.¹⁰⁸

Similarly, the draft executive agreement outlined in Step 5, above, would provide the legal basis for seizure and transfer of Russian corporate assets to Ukraine, and although this one in particular is designed to operate bilaterally between Ukraine and the United States, the model can easily be adapted for use with Japan, France, Germany, the United Kingdom, or anywhere else Russian assets have been frozen.

CONCLUSION

Attachment of assets by local courts in foreign jurisdictions in satisfaction of international arbitration awards or judgments on financial crimes involving money laundering or corruption are commonplace, albeit done normally under an agreed treaty regime. Seizing the frozen assets of Russian corporations that are implicated in the commission of war crimes is no less an important matter as a rule of law than satisfying arbitration claims or combatting corruption—laudable as those goals are.

This White Paper proposes a criminal litigation pathway within a broader rule of law context for legally securing those assets, which Ukraine can then utilize to begin the rebuilding process without having to wait through more years of depredation and harsh winters. Doing so through a legal process such as that outlined in this White Paper is going to be key to Ukraine's future as a democracy, as a candidate to join the European Union, as a candidate to join NATO, and as a rule of law society that is trusted and safe enough to attract substantial foreign direct investment.

Freezing foreign assets pursuant to sanctions is a political matter, but seizing them is a legal matter, and one that Western governments should also want to adhere to lest other countries attempt to seize their own assets if the bar is lowered. “Seizing the Russians’ assets without linking them to a crime might be possible through new legislation—but it would create enormous risks for Western companies operating in other countries. That makes wholesale seizure plans different from the seizures of assets that Italy and others have carried out—because those assets had been used in criminal ways. Indeed, seizing Russian assets without demonstrating criminality would rob Western companies and individuals abroad of the legal protection that Western governments have over the past three decades so painstakingly been prodding other governments to introduce.”¹⁰⁹

By example, Ukraine has admirably demonstrated its embrace of not only democratic values and principles, but also rule of law processes. It must continue on this path for that is the path of Ukraine's future in a much brighter post-conflict world. Kyiv has resisted committing revenge-motivated war crimes against Russian forces and has shown that it is the better and more sophisticated state in the context of *jus in bello*. To throw that progress away for anything short of a fully legal seizure of Russian corporate assets would amount to a crude money grab – even if it is ill-advisedly enabled by Ukraine's international allies. Thus, Ukraine should stay the course and continue embracing the mature and sober approach it has taken to this conflict that was so aggressively thrust upon it by Russia.

¹⁰⁸ ICC, [Financial Investigations and Recovery of Assets](#) (Nov. 2017).

¹⁰⁹ Braw, *supra* note 31.

APPENDIX:

PRINCIPAL AUTHORS



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Professor Kelly holds the Senator Allen Sekt Endowed Chair in Law and directs the Law School's international criminal law program "[Nuremberg to The Hague](#)" based at Friedrich Alexander Universität – Erlangen/Nürnberg and Uniwersytet Jagielloński w Krakowie. He is a member of the Board of Directors of *l'Association Internationale de Droit Pénal* (AIDP) based in Paris and of the [International Scientific & Professional Advisory Council](#) (ISPAC) of the UN Crime Prevention & Criminal Justice Programme based in Milan. The author/editor of over 50 articles and 8 books, Professor Kelly presented his most recent research on the digitization of human rights at the 2023 United Nations Internet Governance

Forum in Kyoto based on a paper published with David Satola of the World Bank: "[Internet Human Rights](#)" in Vol. 26 *University of Pennsylvania Journal of Law & Social Change*. He also co-chairs the American Bar Association's Task Force on Internet Governance and is Corresponding Editor of the American Society of International Law's *International Legal Materials*. His books at Oxford University Press include [Prosecuting Corporations for Genocide](#) (2016) and [The Cuba-U.S. Bilateral Relationship](#) (2019) and at Cambridge, [The International Law of Disaster Relief](#) (2014).

Federica D'Alessandra, Oxford University.

Dr. D'Alessandra is Deputy Director of the [Institute for Ethics, Law, and Armed Conflict \(ELAC\)](#), and Director of the [Oxford Programme on International Peace and Security](#) at the Blavatnik School of Government. She is also a member of the Steering Committee of the School's [Alfred Landecker Programme](#), an Academic Affiliate of the [Oxford Bonavero Institute](#) of Human Rights, and on the Steering Committee of the [Oxford Network of Peace Studies](#). Prior to joining Oxford, Dr. D'Alessandra held several appointments at Harvard University including at the [Harvard John F. Kennedy School of Government](#), and at the [Harvard Law School](#), where she concentrated on research concerning mass atrocity response and prevention, transitional justice, national security, and human rights. Her current research focuses on international aggression, judicial accountability for mass atrocities, new institutional developments in international justice, States' legal duties in mass atrocities situations, the role of new actors and technologies in atrocity crimes documentation, and the UN accountability turn. Her contributions have supported the aggression and starvation amendments to the Rome Statute, the UN Draft Articles on Crimes Against Humanity, the ICC's Guidelines for Civil Society Documentation, and the Berkeley Protocol on Open-Source Investigations, among others.





Dmytro Koval, National University of Kyiv-Mohyla Academy - Ukraine.

Associate Professor Koval is currently a visiting scholar at Stanford University's [Center for Russian, East European, and Eurasian Studies](#). His research focuses on the international criminal courts' influence on post-conflict societies' collective memory. During 2012-2013 he was engaged in the research project "Restitution of Cultural Property: International Law Regulation and National Experience" at Jagiellonian University, Krakow. In 2015-2017 he served as a member of the Ministry of Justice Expert Committee on International Humanitarian Law Implementation. He also contributed to the monitoring reports of the Ukrainian Helsinki Human Rights Union, CrimeasSOS and other NGOs on compliance of parties in armed conflict in

Ukraine with IHL provisions. His work for [Truth Hounds](#) was recognized in 2023 by the [Clooney Foundation for Justice](#) with an Albie Award for the NGO. Associate Professor Koval has consulted Ukraine's Ministry of Foreign Affairs and Ministry of Culture, and the Crimean Prosecutor's Office on cultural property protection in the event of armed conflict.

Milena Sterio, Cleveland-State University.

Professor Sterio holds the Charles R. Emrick Jr. - Calfee Halter & Griswold Professor of Law at Cleveland-Marshall College of Law and is Managing Director of the [Public International Law & Policy Group](#) (PILPG), where she also leads the organizations influential "Thought Leadership Initiative." She is a leading expert on international law, international criminal law and human rights. In spring 2013, Professor Sterio was selected as a Fulbright Scholar, spending the semester in Baku, Azerbaijan, at Baku State University where she taught and conducted research on secession issues under international law related to the province of Azerbaijan, Nagorno-Karabakh. Serving as a maritime piracy law expert, she participated in meetings of the United Nations Contact Group on Piracy off the Coast of Somalia as well as in the work of the United Nations Global Counterterrorism Forum and assisted in piracy prosecutions in Mauritius, Kenya and the Seychelles Islands. She has published seven books and numerous law review articles. Her latest book, [The Syrian Conflict's Impact on International Law](#), was published by Cambridge University Press in 2020. Professor Sterio is a graduate of Cornell Law School and the University of Paris I, and was an associate in the New York City firm of Cleary, Gottlieb, Steen & Hamilton before joining the ranks of academia full time.





Lydia Korostelova, Harvard University.

A native of Ukraine, Ms. Korostelova joined Harvard Law School as a Visiting Researcher upon graduation with her J.D. from Catholic University of America, Columbus School of Law and joining the Washington D.C. bar. At Harvard, she focuses on transitional justice in a variety of contexts but with a special concentration on the formation of a truth commission for post-war Ukraine. She co-authored *The Ukraine War Law Handbook* with Professor Michael Bazylar of Chapman University, Professor Michael Bryant of Bryant University, Dr. Noëlle Quéniwet of the University of the West of England, and Mr. Ashot Agaian of Chemonics International—to be published in late 2023 Carolina Academic Press. This is the first legal text on the Ukraine War and this e-book is divided into 5 parts: Part I: Ukrainian History,

Law, and Politics; Part II: Assisting the Victims; Part III: Violations of International Law; Part IV: Rebuilding A Postwar Ukraine and the Law; and Part V: Back to the USSR: Russian Law After the 2022 Invasion and other relevant legislation.