

# DUMPING DEBT AND SEIZING ASSETS: UKRAINIAN COUNTERMEASURES FOR RUSSIAN AGGRESSION

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## INTRODUCTION

Russia's war on Ukraine is an unlawful use of force that has imposed needless suffering on Ukraine and its people. Through (1) its unjustified occupation and annexation of Ukraine's Crimea region and (2) its support for antigovernment insurgencies in Ukraine's eastern provinces of Donetsk and Lugansk, Russia is largely responsible for an unprovoked war that has killed more than 3700 people and forced several hundred thousand to flee their homes.<sup>1</sup> Russia's actions in Ukraine are an ongoing violation of international law. As Kiev considers its next move, it should be aware of all its legal options, which include freezing Russian government assets and suspending payments on debt owed to Moscow and its state-owned companies.

Under customary international law, states are entitled to impose countermeasures in response to another state's illegal acts. Countermeasures, defined as responsive state actions that otherwise would be illegal but for the first state's breach, are a key horizontal enforcement mechanism in international law.<sup>2</sup> There is no legal reason Ukraine cannot take countermeasures to compel Russia to withdraw its troops from the country—and the ability to target Russian financial interests gives Ukraine a powerful bargaining chip.

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1. Courtney Weaver, *Café Encounter Exposes Reality of Russian Soldiers in Ukraine*, FIN. TIMES, <http://www.ft.com/cms/s/2/76bac354-59c2-11e4-9787-00144feab7de.html> (last updated Oct. 22, 2014, 8:53 PM); UN: *Number of Internally Displaced Persons in Ukraine Tops 370,000*, INTERFAX-UKR. (Oct. 8, 2014, 2:18 PM), <http://en.interfax.com.ua/news/general/227553.html>.

2. See Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 220 (Sept. 25) (Vereshchetin, J., dissenting) ("Entitlement to respond by way of proportionate countermeasures stems from a prior wrongful act of the State which is the target of the countermeasures in question."); Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 22, 49, U.N. Doc. A/RES/56/83 (Jan. 28, 2002); Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 199-201 (2006).

To be legal, countermeasures must satisfy five conditions relevant here: (1) they may be imposed only by an injured state;<sup>3</sup> (2) they may be directed only at a breaching state; (3) their purpose must be to compel compliance with international law; (4) they must be proportional to the initial violation; and (5) they must take an appropriate form, excluding threat or use of force and violations of fundamental human rights, peremptory norms, diplomatic immunity, or humanitarian law.<sup>4</sup> Freezing Russian assets and suspending Ukraine's sovereign debt payments to Russia satisfy all necessary criteria.

## I. PERPETRATORS AND VICTIMS

Before a state can consider imposing countermeasures, it must have the right to take them. The first two conditions speak to the relationship between states: only an injured state can impose countermeasures, and only a breaching state can be subject to countermeasures. Thus, for countermeasures to be legal, there first must be a violation of international law. Moscow's illegal use of force and intervention in Crimea and Eastern Ukraine establishes the necessary relationship that entitles Kiev to impose countermeasures on Russia.

During the lead-up to the current crisis, Russian officials warned Ukraine against developing closer economic ties with the European Union.<sup>5</sup> Despite Russian opposition, protest movements in Ukraine in early 2014 brought to power a new government committed to reaching a trade deal with the European Union. Russia responded by seizing Crimea.<sup>6</sup> On February 27, 2014, commandos began taking over government buildings in Crimea.<sup>7</sup> At first, the Russian government denied that its forces had taken part, but Russian President Vladimir Putin later admitted that Russia's military was involved in seizing Crimea.<sup>8</sup> On March 1, 2014, Russia's parliament approved the use of military force in

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3. Some violations of international law—those where the breach is of an obligation “owed to . . . the international community as a whole” and “[i]s of such a character as radically to change the position of all the other States to which the obligation is owed”—give all states the right to take countermeasures. G.A. Res. 56/83, *supra* note 2, Annex, arts. 42, 54. Annexing another state's territory may well rise to that level, which would entitle any state to take countermeasures to induce Russia's compliance with international law. Other states' options are beyond the scope of this Essay, which focuses on Ukraine's unilateral options.

4. *Id.* Annex, arts. 49-52.

5. Shaun Walker, *Ukraine's EU Trade Deal Will Be Catastrophic, Says Russia*, GUARDIAN (Sept. 22, 2013, 9:23 AM EDT), <http://www.theguardian.com/world/2013/sep/22/ukraine-european-union-trade-russia>.

6. *See Ukraine Crisis: Russia Vows Troops Will Stay*, BBC (Mar. 3, 2014, 8:53 AM ET), <http://www.bbc.com/news/world-europe-26414600>.

7. Andrew Higgins & Steven Erlanger, *Gunmen Seize Government Buildings in Crimea*, N.Y. TIMES (Feb. 27, 2014), <http://www.nytimes.com/2014/02/28/world/europe/crimea-ukraine.html>.

8. *See Kathy Lally, Putin's Remarks Raise Fears of Future Moves Against Ukraine*, WASH. POST (Apr. 17, 2014), <http://wapo.st/1r21l45>.

Crimea.<sup>9</sup> The new authorities in Crimea rapidly organized an independence referendum and declared independence from Ukraine on March 17, 2014.<sup>10</sup> On March 21, 2014, Russia formally annexed Crimea.<sup>11</sup>

Russia's actions in Crimea directly violate international law. One of the most foundational principles in international law is the prohibition on the use of force absent narrow exceptions. Article 2, paragraph 4 of the U.N. Charter declares that all member states "shall refrain" from "the threat or use of force against the territorial integrity or political independence of any state."<sup>12</sup> Russian military involvement in Crimea and its subsequent annexation, designed to undermine Ukraine's territorial integrity, constitute unlawful use of force under Article 2, paragraph 4. Annexing neighboring territory is a quintessential example of illegal use of force, as illustrated by the similar annexation of Kuwait by Iraq in 1990 that was swiftly condemned as illegal.<sup>13</sup> Accordingly, the U.N. General Assembly decisively renounced the validity of Crimea's referendum on independence, calling on all states to refrain from recognizing any change in Crimea's status.<sup>14</sup>

While Russia's use of force in Crimea would alone justify Ukraine's use of countermeasures, Russia's subsequent intervention in Eastern Ukraine provides a second and independent ground. After seizing Crimea, Russia began supporting an insurgency in the border provinces of Donetsk and Lugansk. These insurgencies could not have been sustained without active support from the Russian government.<sup>15</sup> Journalists have repeatedly sighted Russian military forces in the area,<sup>16</sup> and many Russian soldiers have been killed or captured while

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9. Kathy Lally et al., *Russian Parliament Approves Use of Troops in Ukraine*, WASH. POST (Mar. 1, 2014), <http://wapo.st/1eLgMqD>.

10. David M. Herszenhorn & Alan Cowell, *Lawmakers in Crimea Move Swiftly to Split from Ukraine*, N.Y. TIMES (Mar. 17, 2014), <http://www.nytimes.com/2014/03/18/world/europe/european-union-ukraine.html>.

11. *Crimea, Sevastopol Officially Join Russia as Putin Signs Final Decree*, RT (Mar. 21, 2014, 9:10 AM), <http://rt.com/news/russia-parliament-crimea-ratification-293>.

12. U.N. Charter art. 2, para. 4; cf. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27) (confirming "the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations").

13. See S.C. Res. 662, ¶ 1, U.N. Doc. S/RES/662 (Aug. 9, 1990) ("[A]nnexation of Kuwait by Iraq under any form and whatever pretext has no legal validity . . .").

14. *Territorial Integrity of Ukraine*, G.A. Res. 68/262, ¶¶ 2, 5-6, U.N. Doc. A/RES/68/262 (Mar. 27, 2014).

15. See Weaver, *supra* note 1.

16. *Id.*

fighting in Ukraine.<sup>17</sup> Despite the cease-fire signed in September, Russian forces still openly operate in Eastern Ukraine.<sup>18</sup>

Admittedly, Russia denies any military involvement in Eastern Ukraine, and that factual question creates a shakier foundation for concluding that its actions there constitute illegal force.<sup>19</sup> But even assuming the Russian military is not actively fighting in Eastern Ukraine, Moscow's support for insurgents in the region constitutes an illegal intervention that itself justifies countermeasures. The United Nations has recognized that intervention by any state "directly or indirectly" into the "internal or external affairs of any other State" is a violation of customary international law.<sup>20</sup> The International Court of Justice has similarly recognized that core principle, affirming "the right of every sovereign State to conduct its affairs without outside interference" and recognizing that simply funding rebels in another state constitutes intervention.<sup>21</sup> Russia's support for insurgents in Eastern Ukraine is likely significant enough to constitute illegal force,<sup>22</sup> but at the very least, its actions are an illegal indirect intervention in Ukraine's internal affairs.

## II. ENDS AND MEANS

Russia's illegal use of force and intervention in Crimea and Eastern Ukraine give Kiev the right to impose countermeasures to induce Moscow's compliance with international law. The question becomes whether suspending its sovereign debt and freezing Russian assets are valid options. The remaining legal requirements for countermeasures speak to ends and means. The purpose of countermeasures must be to induce compliance with international law, while the steps taken must be proportional to the violation at hand. Both proposed actions satisfy those standards.

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17. See, e.g., Corey Flintoff, *Russia Reports Troop Deaths in Ukraine, but Calls Them 'Volunteers,'* NPR (Sept. 8, 2014, 5:03 AM ET), <http://www.npr.org/blogs/parallels/2014/09/08/346735504/some-in-russia-admit-their-troops-volunteer-in-ukraine>; Shaun Walker, *Russia Admits Its Soldiers Have Been Caught in Ukraine*, GUARDIAN (Aug. 26, 2014, 5:44 AM EDT), <http://www.theguardian.com/world/2014/aug/26/russia-admits-soldiers-in-ukraine>.

18. Weaver, *supra* note 1.

19. Lizzie Davies, *Putin Under Pressure to Commit to Fragile Peace Plan for Eastern Ukraine*, GUARDIAN (Oct. 17, 2014, 7:13 AM EDT), <http://www.theguardian.com/world/2014/oct/17/putin-ukraine-eu-leaders-poroshenko-peace-plan>.

20. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, at 123, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

21. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 202, 228, 246 (June 27).

22. See *id.* ¶¶ 227-228; see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 76 (3d ed. 2008) (discussing *Nicaragua* and other cases).

Countermeasures are a coercive tool to change another state's behavior. They are not a punishment mechanism.<sup>23</sup> Rather, their purpose must be to induce compliance with international legal obligations—and they must cease when that purpose is accomplished.<sup>24</sup> That requirement is easily satisfied here. Suspending debt obligations or freezing assets, used as leverage in negotiations between Kiev and Moscow, are temporary measures that could be wielded *for the purpose* of getting Russia out of Ukraine. Those steps can “be taken in such a way as to permit the resumption of performance of the obligations in question.”<sup>25</sup> The moment Russia ceases its destabilizing actions in Crimea and Eastern Ukraine, Kiev can resume debt payments and unfreeze assets.

Proportionality presents a more difficult question. Specifically, “[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”<sup>26</sup> A strictly reciprocal response to Russia's use of force is off the table, because countermeasures cannot take the form of a threat or use of force. What, then, is a proportional response to the violation of Ukraine's sovereignty and annexation of its territory? Looking to the demands that Kiev can make on Moscow, Ukraine is entitled to cessation of Russia's illegal actions and reparations for Moscow's involvement in Crimea and Eastern Ukraine.<sup>27</sup> Those reparations can take the form of restitution “to re-establish the situation which existed before the wrongful act was committed,” compensation, and satisfaction.<sup>28</sup>

The annexation of Crimea and the war in Donetsk and Lugansk have imposed enormous costs on Ukraine. The territories Russia invaded have significant economic value. Crimea's annual GDP is \$4.3 billion, while Donetsk's is \$21 billion, at least twelve percent of Ukraine's total GDP.<sup>29</sup> Russia's invasion also disrupted interprovincial trade within Ukraine and complicated tax collection efforts. It created a climate of fear that reduced business investment, causing predictions that Ukraine's GDP would shrink by eight percent in 2014 and its budget deficit would spike.<sup>30</sup> Ukraine's government will need to rebuild in-

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23. N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT'L L. 1393, 1420 (2009).

24. G.A. Res. 56/83, *supra* note 2, Annex, arts. 49, 52-53.

25. *Id.* Annex, art. 49, ¶ 3.

26. *Id.* Annex, art. 51.

27. *See id.* Annex, art. 43.

28. *Id.* Annex, arts. 34-37.

29. *See Crimea's Economy in Numbers and Pictures*, RT (Mar. 15, 2014, 2:51 PM), <http://rt.com/business/crimea-economy-referendum-results-102>; Vladislav Inozemtsev, Op-Ed., *Russian Expansion into Eastern Ukraine Could Cost Putin Dearly*, WASH. POST (Mar. 13, 2014), <http://wapo.st/1hh00Cl>; Sarah A. Topol, *Ukraine's East Is Poor, Fed Up, and Desperate for Change*, BLOOMBERG BUSINESSWEEK (Mar. 10, 2014), <http://www.businessweek.com/articles/2014-03-10/ukraines-eastern-industrial-heartland-is-fed-up-wants-change>.

30. *See* INT'L MONETARY FUND, COUNTRY REPORT NO. 14/263, UKRAINE: FIRST REVIEW UNDER THE STAND-BY ARRANGEMENT, REQUESTS FOR WAIVERS OF NONOBSERVANCE AND APPLICABILITY OF PERFORMANCE CRITERIA, AND A REQUEST FOR REPHASING OF THE

frastructure and provide health care for the injured. Meeting these needs will require billions of dollars.<sup>31</sup>

In addition, Russia's invasion and seizure of Ukrainian territory has violated Ukraine's territorial integrity and imposed devastating costs on Ukraine's already fragile body politic.<sup>32</sup> Sovereignty and territorial integrity are fundamental rights inherent in statehood. In judging proportionality, the International Court of Justice has required "some degree of equivalence," but it has included the importance of the principle at stake in that calculation.<sup>33</sup> The principle here is the ongoing integrity of Ukraine's borders.

Given the economic and dignitary costs of Russia's actions, suspending Ukraine's sovereign debt and freezing Russian assets would be a proportional response, implicating billions in Russian property interests. Public estimates put Ukraine's debt to Russia and its state-owned companies at less than \$10 billion. This includes \$3 billion that Russia lent Ukraine in late 2013 as part of its package to bolster former Ukrainian President Viktor Yanukovich.<sup>34</sup> Russia also claims Ukraine owes several billion dollars to Gazprom, Russia's state-owned gas company, as payment for previously delivered gas. Russia has claimed that Ukraine's debts reach \$5.3 billion,<sup>35</sup> though the two sides recently agreed to a \$3.1 billion settlement.<sup>36</sup> As a state-owned enterprise, Gazprom is an extension of the state, and debts owed to it are fair game.<sup>37</sup> Were Kiev to freeze Russian assets in Ukraine, it could reach billions in additional property.

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ARRANGEMENT 16 (2014), available at <http://www.imf.org/external/pubs/ft/scr/2014/cr14263.pdf>; *World Bank: Ukraine GDP to Shrink 8% This Year*, BBC (Oct. 2, 2014, 7:07 AM ET), <http://www.bbc.com/news/business-29454965>.

31. See Anders Aslund, Op-Ed., *Marshall's Postwar Logic Holds True in Ukraine Today*, FIN. TIMES (Oct. 22, 2014, 5:01 PM), <http://www.ft.com/intl/cms/s/0/f7889a8e-594e-11e4-9546-00144feab7de.html>.

32. See Balazs Jarabik, *Hot Water in Ukraine*, FOREIGN AFF. (Sept. 23, 2014), <http://www.foreignaffairs.com/features/letters-from/hot-water-in-ukraine>.

33. Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417, 443 (Int'l Arb. Trib. 1978) ("[I]t will also be necessary to take into account the importance of the positions of principle . . .").

34. ANNA GELPERN, DEBT SANCTIONS CAN HELP UKRAINE AND FILL A GAP IN THE INTERNATIONAL FINANCIAL SYSTEM 1 (Peterson Inst. for Int'l Econ., Policy Brief 14-20, 2014), available at <http://www.iie.com/publications/pb/pb14-20.pdf>.

35. Sergei Kozlov, *Ukrainian Naftogaz Debt to Gazprom at \$5.3 Billion*, TASS (Sept. 16, 2014, 2:01 PM), <http://en.itar-tass.com/economy/749744>.

36. *Ukraine's Naftogaz Repays \$1.45 Billion Tranche of Gazprom Debt*, REUTERS (Nov. 4, 2014, 2:52 PM EST), <http://www.reuters.com/article/2014/11/04/us-ukraine-crisis-gas-idUSKBN0IO21X20141104>; see also INT'L MONETARY FUND, *supra* note 30, at 22.

37. In other contexts, countries treat state-owned enterprises as extensions of the state. See, e.g., Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603 (2013) (defining "foreign state" as encompassing any "agency or instrumentality of a foreign state," which includes an entity "a majority of whose shares or other ownership interest is owned by a foreign state").

For example, several state-owned Russian banks, including Sberbank, VTB, and VEB, have assets in Ukraine worth over \$10 billion together.<sup>38</sup>

If Ukraine wishes to impose these countermeasures, it can look to the historical analogue of asset seizures by the United States. The United States regularly freezes assets without distinguishing between governments and state-owned companies in response to violations of international law.<sup>39</sup> When the U.S. Supreme Court approved asset seizures following the Iranian hostage crisis, it recognized the value of using frozen assets as a bargaining chip in negotiations with hostile countries.<sup>40</sup> There is little conceptual difference between freezing assets and suspending debt payments; in both cases, the state takes countermeasures to temporarily deprive another state of its property interests to induce compliance with international law.

### CONCLUSION

As Ukraine seeks to reach a negotiated solution to the current crisis, it should be aware of all its legal options, including asset seizures and a debt moratorium. The best strategy may be to threaten countermeasures but not impose them immediately. Such a strategy would give Kiev the negotiating leverage it needs, without exposing itself to retaliatory measures from Moscow. As Ukraine builds greater economic ties to Europe, its threats to impose countermeasures on Russia will become increasingly credible.

To be sure, Ukraine faces practical impediments to implementing immediate unilateral countermeasures. If Ukraine stops payment on the \$3 billion it owes Russia, all of Ukraine's other public debt instruments would go into default, which could put significant pressure on Ukraine's financial system.<sup>41</sup> Luckily for Kiev, Britain and the International Monetary Fund could help Ukraine avoid that consequence,<sup>42</sup> and Kiev can still access other Russian property interests. If Ukraine takes any countermeasures, however, it will also

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38. See Sid Verma, *Banks to Brave Russia-Ukraine Storm, Say Analysts*, EUROMONEY (Mar. 5, 2014), <http://www.euromoney.com/Article/3315943/Banks-to-brave-Russia-Ukraine-storm-say-analysts.html>; see also Peter Hobson, *VEB Seeks Central Bank Refinancing as Ukraine Losses Loom*, MOSCOW TIMES (Apr. 22, 2014, 8:18 PM), <http://www.themoscowtimes.com/business/article/veb-seeks-central-bank-refinancing-as-ukraine-losses-loom/498735.html>.

39. See, e.g., Press Release, U.S. Dep't of the Treasury, Treasury Designates Burmese State-Owned Enterprises (July 29, 2008), available at <http://www.treasury.gov/press-center/press-releases/Pages/hp1105.aspx>; Press Release, U.S. Dep't of the Treasury, Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism (Oct. 25, 2007), available at <http://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx>.

40. *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981).

41. Sujata Rao, *As Ukraine's Debt Tangle Unwinds, Russia Holds Key Thread*, REUTERS (Sept. 24, 2014, 12:50 PM EDT), <http://www.reuters.com/article/2014/09/24/us-ukraine-crisis-eurobonds-analysis-idUSKCN0HJ1E120140924>.

42. See GELPERN, *supra* note 34, at 6.

be vulnerable to retaliatory trade restrictions. Most dangerously, Russia could cut off gas shipments to Ukraine this winter. Once spring comes, however, if Kiev succeeds in executing plans to diversify its energy supply, its threats to seize Russia's assets will be far more credible—and far more intimidating—to the Kremlin.

As Kiev pushes back against Moscow's aggression, it should be aware of the full range of legal options it has, and it should seek to build leverage wherever possible to force Russia to change course. Especially as Ukraine reduces its economic dependence on Russia and strengthens its links to Europe, threats to impose countermeasures will become increasingly credible—and increasingly worrying to Russia's government, as its state-owned firms hold significant assets in Ukraine. As time passes, the Kremlin will find that the threat to its property interests provides an increasing incentive to end the conflict with Ukraine.