Leading by Example

Canada's Approach to Seizing Frozen Assets and Holding Corrupt Leaders to Account

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WORKING PAPER

Canadian Task Force Against Global Corruption

June 2023

WORLD REFUGEE & MIGRATION COUNCIL

Cover Image

A Russian Antonov An124 Volga-Dnepr 4 engine heavy lift cargo jet sits on the tarmac at Toronto Pearson Airport. In April 2023, Canada announced plans to confiscate and transfer the aircraft to Ukraine as part of a new package of sanctions against Russia. (Photo: Sockagphoto/Shutterstock)

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Acknowledgments

The authors would like to thank Professor Christopher Penny, Professor Philip Zelikow and Mr. Lawrence L. Herman for their comments and suggestions on this paper. The authors are also most grateful for the research assistance and substantive input provided by Mr. Nickolas Eburne.

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The World Refugee & Migration Council is supported by a partnership with Cuso International.

Contents

1. Introduction

Bad governance often causes forced displacement and is almost always associated with corruption. Grand corruption, defined as "the abuse of high-level power that benefits the few at the expense of the many and causes serious and widespread harm to individuals and society",[1] weakens and distracts governments, making it less likely that they will meet their responsibility to protect their population.[2] Furthermore, corruption discourages donors, compounding the difficulty in funding efforts to assist refugees and the internally displaced.

The World Refugee & Migration Council addressed the scourge of grand corruption in its 2019 report, *A Call to Action: Transforming the Global Refugee System*, stressing accountability and proposing that when stolen funds are found offshore, they ought not only to be frozen but also confiscated and repurposed for the benefit of the displaced.

At the time, the Council believed that financial measures should be used to hold governments accountable for displacing people, specifically by repurposing frozen assets and working with international financial institutions to redirect those assets to help those who had been forcibly displaced. While these were seen primarily as measures to strengthen accountability, the Council also recognized that forfeited assets could ease financial shortfalls in host countries and affected communities, including those who have been forcibly displaced.

The idea of confiscating and repurposing forfeited assets to help those who have been forcibly displaced is not an entirely new concept. In one iteration, Guy S. Goodwin-Gill and Selim Can Sazak argued that "the State of origin could be held financially liable […] and subjected to sanctions" for generating refugees." Focusing on the case of Syrian refugees in Turkey, they proposed that frozen assets of refugee-generating countries should be used to provide humanitarian assistance (while noting that the idea dates back to 1939). They argued that "those countries that drive people from their homes should pay the costs of providing them with a humane life. An important step in this direction would be to allow refugee-receiving states or competent international institutions to draw on the assets of refugee source countries."[3]

In a series of working papers, the Council refined the concept and rationale for asset forfeiture and demonstrated, using the example of Canada, the kind of legislative framework that would be required at the domestic level to go beyond traditional

[1] "Grand Corruption", *Transparency International*, online: <https://www.transparency.org/en/corruptionary/grand-corruption>.

[2] For a good account of the related crime of "grand theft," see Lys Kulamadayil, "Grand theft in international law" (2022) 10: 3 *London Review of International Law* 427.

[3] Guy S. Goodwin-Gill and Selim Can Sazak, "Footing the Bill: Refugee-Creating States' Responsibility to Pay," (29 July 2015), *Foreign Affairs*, online: <https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill>.

sanctions legislation, which involves asset freezing, to actual asset forfeiture, in a manner that is consistent with existing constitutional, international treaty and legal, due process safeguards.[4]

Additionally, by addressing the issue of accountability, the Council drew a clear connection between forcible displacement and grand corruption. The Council argued that "Violent or oppressive regimes, or those that fail or refuse to protect their populations, are responsible for much of the forced migration in the world today. Those regimes are also often corrupt, stealing from their treasuries and placing the money and other assets offshore or for the rulers' and associates' unlawful benefit." In drawing this clear line, the Council argued that the ill-gotten gains of regimes responsible for forcible displacement should be legitimate targets of confiscatory action by those countries where the assets are held.

The Council also recognized that asset forfeiture, unlike asset freezing, is a form of punishment and that such action should be used sparingly and only in exceptional cases where states have violated the fundamental rights of their citizens and caused untold human suffering through state-sanctioned violence, which includes rendering citizens homeless and stateless. Traditionally, the imposition of sanctions against an offending state or its leadership has been viewed as a way to encourage behavioural change. Accordingly, sanctions will be lifted and assets "unfrozen" and returned to their owners when the offending party has changed its behavior or mended its ways. However, the Council recognized that there are clearly instances where this will not happen, and the only recourse may be punishment through asset forfeiture followed by restitution of the proceeds of crime to the victims, including those who have been forcibly displaced.

As for the target of confiscation, the Council framed its recommendation in terms of the privately held assets of a regime's leaders, family members, and its immediate supporters, specifically those who directly or indirectly have been involved in illicit or criminal activities and/or human rights abuses and have acquired their ill-gotten gains with the active support or collusion of their country's rulers. The Council did not call for or contemplate the seizure of state assets, including the holdings of central banks or state-owned companies held abroad.

The Council also recognized that asset forfeiture for these purposes would be setting a new precedent in international law because, as Yi Chao argues, "the liability

[4] "Repurposing Frozen Assets to Assist the Forcibly Displaced –Research Paper", (14 September 2020) *World Refugee & Migration Council*, online: <https://wrmcouncil.org/publications/research-paper/repurposing-frozen-assets-to-assist-the-forcibly-displaced/>. Also see, Michael J. Camilleri and Fen Osler Hampson, "No Strangers at the Gate: Collective Responsibility and a Region's Response to the Venezuelan Refugee and Migration Crisis", (31 October 2018), *Centre for International Governance Innovation*, online: <https://www.cigionline.org/publications/no-strangers-gate-collective-responsibility-and-regions-response-venezuelan-refugee/> and Michael J. Camilleri and Fen Osler Hampson, "Seize the money of Venezuelan kleptocrats to help the country and its people", (29 January 2019), *The Washington Post*, online: <https://www.washingtonpost.com/opinions/2019/01/29/seize-money-venezuelan-kleptocrats-help-country-its-people/>.

of RGEs (refugee-generating entitles) for refugee-generating still does not exist in treaties or customary international law…. international refugee law has been focusing almost exclusively on the responsibility of receiving States since its birth. No provision in the 1951 Convention relating to the Status of Refugees ("1951 Convention"), its 1967 Protocol, or the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Refugee Convention") addresses RGEs' liability. Due to the lack of widespread State practice and *opinio juris*, finding RGE's liable in customary international law is unconvincing. As Flavia Giustiniani noted in 2015, '[p]ractice shows that host States, rather than openly invoking the responsibility of source countries, have found it more practicable to limit their own [responsibility to protect refugees].'"[5]

As discussed below, the Parliament of Canada recently passed legislation that implemented the Council's proposal,[6] but in an even more expansive manner. This paper examines the precedent-setting nature of Canada's new legislation on foreign-owned asset forfeiture and some of the legal issues raised following the adoption of this new legislation. It also discusses some of the policy and legislative initiatives underway in other countries following upon Canada's ground-breaking legislation and how the current global context is shaping these initiatives, specifically Russia's invasion of Ukraine. As the paper argues, it is still an open question whether Canada's independent initiative will set a new framework and precedent for asset forfeiture that will change customary international law on this matter or whether formidable political and legal hurdles domestically and/or internationally will thwart its development and usage.

[5] Yi Chao, "The Need to Establish and Enforce the Liability of Refugee-Generating Entities: Addressing the Normative Lacuna in the Intersection between International Refugee Law and the Law of International Responsibility" (Montreal, Qc: SSRN, 2018).

[6] In 2022 the Council created the Canadian Task Force Against Global Corruption, a body dedicated to researching and promoting anti-corruption measures (and of which the current authors are members). See WRMC, "Canadian Task Force Against Global Corruption," online: https://wrmcouncil.org/canadian-task-force-against-global-corruption/.

2. Evolution and Application: Canadian Legislation on Asset Seizure

The assets seizure concept developed by the Council, including its applicability to Canadian laws and jurisdiction, initially served as the basis for a private member's bill in the Canadian Senate, which Council member Senator Ratna Omidvar, an Independent Senator from Ontario, introduced. The draft legislation in its final form went through two readings in Canada's upper chamber, where it enjoyed all-party support.[7] However, in spring 2022, mainly in response to Russia's invasion of Ukraine and the government's evident desire to strengthen its economic sanctions regime in response to the worsening situation, the government decided to introduce its new confiscatory measures, which were passed into law by the Canadian Parliament in June 2022 as part of Bill C-19 (the government's budget bill) as amendments to the existing *Special Economic Measures Act* (*SEMA*)[8] and the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.[9] The government's new legislation effectively pre-empted Senator Omidvar's proposed bill, which was subsequently withdrawn from consideration in the upper house. Notably, by placing the forfeiture principle in *SEMA*, the government's new legislation broadened its application to include penalties for situations involving grave breaches of international peace and security and the directing or facilitation of corruption, not just gross human rights violations.

Box: Amendments to SEMA: SC 1992, c. 17

The amendments to *SEMA* are as follows:

Purpose of Act

3.1 The purpose of this Act is to enable the Government of Canada to take economic measures against certain persons in circumstances where an international organization of states or association of states of which Canada is a member calls on its members to do so, a grave breach of international peace and security has occurred, gross and systematic human rights violations have been committed in a foreign state, or acts of significant corruption involving a national of a foreign state have been committed.

438 (1) Subsection 4(1) of the Act is replaced by the following:

Orders and regulations

4 (1) The Governor in Council may, if the Governor in Council is of the opinion that any of the circumstances described in subsection (1.1) has occurred,

[…]

[7] S-217, 44th Parliament, 1st session, November 22, 2021, An Act respecting the repurposing of certain seized, frozen or sequestrated assets.

[8] SC 1992, c 17, as amended.

[9] SC 2017, c 21, as amended. Here we focus on the forfeiture regime that was incorporated into the *SEMA*, but the same machinery was also inserted into the *Sergei Magnitsky Law*. It applies only to foreign nationals who are involved in gross human rights violations or directing/facilitating acts of corruption; see s. 4.

(b) by order, cause to be seized or restrained in the manner set out in the order any property situated in Canada that is owned — or that is held or controlled, directly or indirectly — by

(i) a foreign state,

(ii) any person in that foreign state, or

(iii) a national of that foreign state who does not ordinarily reside in Canada.

[…]

Forfeiture Orders

Definitions

5.3 The following definitions apply in sections 5.4 to 5.6.

Judge means a judge of a superior court of the province where property described in an order made under paragraph 4(1)(b) is situated. (juge)

Minister means the Minister responsible under section 6 for the administration of an order made under paragraph 4(1)(b). (ministre)

Forfeiture

5.4 (1) On application by the Minister, a judge shall order that the property that is the subject of the application be forfeited to Her Majesty in right of Canada if the judge determines, based on the evidence presented, that the property

(a) is described in an order made under paragraph 4(1)(b); and

(b) is owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person.

[…]

Payment out of Proceeds Account

5.6 After consulting with the Minister of Finance and the Minister of Foreign Affairs, the Minister may — at the times and in the manner, and on any terms and conditions, that the Minister considers appropriate — pay out of the Proceeds Account, as defined in section 2 of the Seized Property Management Act, amounts not exceeding the net proceeds from the disposition of property forfeited under section 5.4, but only for any of the following purposes:

(a) the reconstruction of a foreign state adversely affected by a grave breach of international peace and security;

(b) the restoration of international peace and security; and

(c) the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption.

Among the questions raised in public discussion about these amendments is whether the framework brings about an unlawful seizure under Canadian law and/or whether the amendments violate Canada's international treaty commitments or customary international law obligations. In the next section, we consider each of these arguments in turn. While the issues might differ for any given country — particularly those involving domestic law — the hope is that a view of Canada's situation could be helpful or instructive regarding the kinds of issues that may be encountered.

3. Potential Legal/Constitutional Challenges to the Act in Canada

3.1. Threshold Challenge: "Human rights violations" or "Acts of significant corruption"

Below we consider a couple of potential constitutional challenges that might be brought regarding the procedural machinery used in the new regime.[10] However, in the foreground is that the entire forfeiture scheme rests on a finding under section 4 of SEMA by the "Governor in Council" (i.e., the federal Cabinet, acting in its capacity as the ultimate setter of government law and policy) that either "gross and systemic human rights violations" or "acts of significant corruption"[11] have taken place that involve the "national of a foreign state" which is being targeted by the measures. It is not difficult to imagine that a foreign national whom the Cabinet views as being implicated in grand corruption might wish to challenge this finding to escape the freezing, seizing and forfeiture process.

We think such a challenge would be available insofar as Cabinet's determination is an administrative decision made by a government body and would therefore be subject to judicial review.[12] However, when Cabinet makes a decision involving its exercise of the Crown prerogative over foreign affairs and related matters, the decision attracts a highly deferential standard of review.[13] To be overturned, it would have to demonstrate a complete lack of evidence base and a failure of rationality. To our minds, Cabinet will likely be able to avoid such errors. In any event, a successful challenge would simply result in rescinding the sanctions and related measures in particular cases—not the striking down of the legislation itself.

Beyond straight judicial review, it is not difficult to imagine an alleged oligarch or similar person challenging a finding that they were involved in the crime of "acts of significant corruption" or in "gross and systemic human rights violations" (which would amount to crimes in most states) by arguing that they have not been convicted of such a crime, in Canada or elsewhere. Therefore, they might say,

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[10] Such challenges are anticipated: see "Canada's move to seize assets from Russian oligarch could test charter law: trade lawyer", (22 December 2022), *CBC News*, online: <https://www.cbc.ca/news/politics/canada-seize-assets-russian-oligarch-charter-1.6695583>.

[11] Per s. 3.1 and 4(1.1). The legislation continues to apply to situations where an international organization to which Canada belongs has requested sanctions, or where a "grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis" (*SEMA* s. 4(1.1)(a) and (b)). In our view neither of these findings would see a successful challenge.

[12] One such proceeding was brought just as this paper was being finalized; see Darryl Greer, "Russian billionaire couple claims Canadian sanctions are unjustified and unreasonable", (16 April 2023), *CTV News*, online: <https://www.ctvnews.ca/canada/russian-billionaire-couple-claims-canadian-sanctions-are-unjustified-and-unreasonable-1.6357722>.

[13] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65; Lake v. Canada (Minister of Justice), 2008 SCC 23.

Cabinet cannot validly say that they have perpetrated such acts and the confiscation is legally invalid and violates their human rights.

The phrases "acts of significant corruption" and "gross and systematic human rights violations" suggest that criminal conduct is at play. However, in Canada, as in many democracies, the state is free to impose penalties upon an individual if it can be legally established that they engaged in criminal activities without needing a criminal conviction based on the "beyond a reasonable doubt" standard of proof. For example, under Canada's *Immigration and Refugee Protection Act*,[14] permanent residents, foreign nationals and refugee claimants can all be held "inadmissible" to Canada (and thus deported) for "criminality" or "serious criminality" committed outside Canada. To prove inadmissibility, the government need not show that the person has been convicted or even tried; instead, they must establish "reasonable grounds to believe" that the individual engaged in the criminal conduct.[15] Similarly, the determination by the Governor-in-Council that an individual was engaged in "acts of significant corruption" or "gross and systematic human rights violations" does not require establishing that an offence was committed.

In this setting, the most relevant law is the regime for civil forfeiture of the proceeds of crime, which in Canada is administered under provincial legislation. Civil forfeiture is a decades-old American innovation in the fight against organized crime. It has been made part of the various international treaties designed to combat transnational crime and corruption, such as the Vienna Narcotics Convention, the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption.[16] The essence of civil forfeiture is that the government is entitled to freeze, seize and dispose of assets of all sorts (including real property and vehicles in addition to money and financial instruments) if it can demonstrate, on a balance of probabilities, that the assets are derived from criminal activities. No criminal conviction is required,[17] and the illegal activities from which the proceeds are derived need not have taken place in Canada.[18] The Supreme Court of Canada upheld the constitutionality of this mechanism in 2009,[19] and its main features have not been the subject of significant legal challenges in the years since. In fact, a recent commission of

[14] SC 2001, c 27.

[15] See Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3d ed (Toronto: Irwin, 2020) at 234-317.

[16] For background see Michelle Gallant, "Transnational Crime, Tainted Property and Civil Forfeiture" In Robert J. Currie, ed, *Transnational and Cross-Border Criminal Law: Canadian Perspectives* (Toronto: Irwin, forthcoming 2023).

[17] This is distinct from situations where forfeiture of proceeds of crime is imposed as part of a sentence following a criminal conviction, which is dealt with under federal criminal legislation.

[18] See, e.g., Ontario's Civil Remedies Act, 2001, SO 2001, c 28, s 1.1, "unlawful activity."

[19] Chatterjee v. Ontario (Attorney General), 2009 SCC 19,

inquiry on money laundering and financial crime in Canada has recommended the much more aggressive use of civil forfeiture by Canadian authorities.[20]

The forfeiture regime in the *SEMA* amendments is somewhat analogous to civil forfeiture: the impugned acts will usually have taken place outside Canada; notice to the affected parties is required; the onus of proof is on the government; and the entire process is supervised by the courts, not to mention that the assets are liquidated and put to governmental purposes. This further suggests that the regime is constitutionally and legally sound.

3.2. Constitutional Challenge to Search and Seizure

This section considers legal arguments if a constitutional challenge is brought against this legislation based on section 8 of the *Canadian Charter of Rights and Freedoms* on the ground that it constitutes unreasonable search and seizure. The body of case law concerning the test applicable to search and seizure is considerable, going from *Hunter v Southam Inc.* in 1984 to the most recent, *R. v. McGregor*, in 2023.

The current case law out of the Supreme Court supports the assessment that a valid search or seizure must contain the following elements:

1. Prior authorization, where feasible, is a pre-condition for a valid search and seizure. It follows that warrantless searches are prima facie unreasonable under s. 8.
2. For the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. For example, he must not be charged with investigative or prosecutorial functions under the relevant statutory scheme.
3. Reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search constitutes the minimum standard consistent with s. 8 of the Charter for authorizing searches and seizures.[21]

On the issue of reasonableness, which is central to the s. 8 analysis, the Supreme Court of Canada has recently confirmed that “A search is reasonable within the meaning of s. 8 “if it is authorized by law, if the law itself is reasonable and if the

[20] “Commission of Inquiry into Money Laundering in British Columbia: Executive Summary”, (2022), *Cullen Commission*, online: <https://cullencommission.ca/files/reports/CullenCommission-FinalReport-ExecutiveSummary.pdf>.

[21] James A. Fontana and David Keeshan, *The Law of Search and Seizure*, 12th ed (Toronto: Lexis Nexis, 2021) at pp 4-5 where the authors cite Dickson J. in Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 160-68.

manner in which the search was carried out is reasonable."[22] The criteria to establish whether a search and seizure occurred is minimal and centers around the individual's reasonable expectation of privacy; if it has been engaged, the courts will conclude that it was a search or seizure.[23] There is admittedly a high expectation of privacy associated with personal funds, and thus a seizure would be easy to show.

The repurposing of frozen assets framework serves to grant the option of forfeiture of seized assets upon judicial verification that ownership by the concerned individual is proven. A constitutional challenge on the grounds of unlawful seizure and s. 8 of the Charter would have to show that the seizure and forfeiture were unreasonable.[24] The Supreme Court in 2015 recognized that the state's interest in pursuing the public interest and enforcing its laws allows for an intrusion in the private sphere (in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)* [*Goodwin*]):

"The protection s. 8 provides for an individual's personal, territorial and informational privacy is essential not only to human dignity but also to the functioning of our democratic society. At the same time, s. 8 permits reasonable searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere. The tension articulated in Hunter between the competing individual and state interests and the adequacy of the safeguards provided remain foundational to this analysis."[25]

The state's 'legitimate interest' in the repurposing of frozen assets framework is invoked in its amendments to *SEMA*'s "Purpose" provision, now reading:

"[…] enable the Government of Canada to take economic measures against certain persons in circumstances where […], a grave breach of international peace and security has occurred, gross and systematic human rights violations have been committed in a foreign state or acts of significant corruption involving a national of a foreign state have been committed."[26]

The *Goodwin* decision called for a 'flexible approach' to determining whether a seizure was reasonable in light of its context,[27] pondering the same considerations that were previously listed in *Del Zotto v. Canada* (C.A.) [*Del Zotto*]:

[22] R v. McGregor 2023 SCC 4 at para 26 citing R v. Collins, [1987] 1 S.C.R. 265, at p 278 and R v. Caslake, [1998] 1 S.C.R. 51, at para 10 among other cases.

[23] *Supra* note 10 p 5, where the authors cite *Collins v. The Queen* [1987] 1 S.C.R. 265.

[24] *Ibid* at pp p 4-5.

[25] Goodwin v. British Columbia (Superintendent of Motor Vehicles), [2015] 3 S.C.R. 250 at para 55.

[26] SEMA *supra* note 7 at art 3.1.

[27] Goodwin supra note 14 at para 57.

"It appears from the jurisprudence that the "context" in which these matters must be judged involves several factors: the nature and the purpose of the legislative scheme whose administration or enforcement is in question; the mechanism for discovery or mandatory production employed and the degree of its potential intrusiveness; and the availability of judicial supervision. All of these factors must be considered in determining whether a seizure, actual or potential, would be unreasonable within the meaning of section 8."[28]

A judge tasked with determining whether a seizure of frozen assets was reasonable, either from the individual whose assets were frozen or from the bank institution which held these funds, would need to consider "all of these factors": the nature and purpose of the legislation, the mechanism and its intrusiveness, and the availability of judicial supervision.

In our opinion, the nature and purpose of the legislation would argue in favour of the reasonability of the seizure. The Supreme Court previously stated in *Goodwin* that a legislative scheme aimed at removing impaired drivers from the roads was compelling and "[the] compelling purpose of preventing death and serious injuries on public highways weighs heavily in favour of the reasonableness of the breath seizure."[29] It reached that conclusion through an objective analysis of the deaths caused by impaired drivers in the past. It could be argued, analogously, that the scheme's purpose for repurposing frozen assets is compelling enough to show its reasonableness. It is aimed at imposing financial consequences where "a grave breach of international peace and security has occurred; gross and systematic human rights violations have been committed in a foreign state or acts of significant corruption involving a national of a foreign state have been committed." The funds would then be used for the reconstruction of a foreign state adversely affected by a grave breach of international peace and security, the restoration of international peace and security, and the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption. There is no question as to the reasonableness of this purpose. In addition, the Supreme Court has recognized that a regulatory seizure will be held to a lower standard than a seizure made under criminal law provisions.[30]

In examining the reasonable nature of the seizure mechanism, the Court will most likely examine its overall reliability. Indeed, the Supreme Court's *Chehil* decision mentions that "[a] method of searching that captures an inordinate number of innocent individuals cannot be reasonable". In addition, "a high degree of accuracy has been crucial to endorsing sniffer-dog searches on a lower standard of

[28] Del Zotto v. Canada (C.A.), 1997 CanLII 6349 (FCA), [1997] 3 FC 40 per Strayer J.A., in dissenting reasons adopted by the Supreme Court in 1999 CanLII 701 (SCC), [1999] 1 S.C.R. 3.

[29] Goodwin *supra* note 14 at para 59.

[30] *Ibid* at para 60: "Where an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards".

reasonable suspicion."[31] The mechanism put in place by the repurposing frozen assets legislation ensures that a judge will be able to verify whether "the property […] is described in an order made under paragraph 4(1)(b); and (b) is owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person." This imposes a mechanism aimed at the precise funds listed and where ownership is judicially proven; in addition, a notice is served to the individual concerned. Given existing jurisprudence on this topic, the mechanism's reasonableness is generally sound.

In addition, it imposes an obligation to obtain a judicial order, fulfilling the last consideration mentioned in *Del Zotto*, confirmed in *Goodwin*, and just recently referred to in *McGregor*. This is significant; in the typical criminal or regulatory context in which s. 8 applies, the judge, in authorizing a search warrant, determines whether the police have reasonable and probable grounds to believe that an offence has been committed and that evidence of the offence will be found at the named location. As noted, the judge must determine that the named person owns the property forfeited.

Considering all these elements, a court would have to rule in favour of the reasonableness of the legislation putting the repurposing frozen assets mechanism in place and, indeed, find such a seizure reasonable in light of the applicable jurisprudence from the Supreme Court. The bottom line, however, is that it is quite likely that a constitutional challenge based on section 8 of the Charter would fail.[32]

3.3. Potential International Law Challenges

It is foreseeable that challenges to the Canadian regime could be made under international law principles. In this section, we assess a few of them.

3.3.1. Are Sanctions Unlawful?

It is important to recall that, at the most basic level, sanctions are not illegal under international law. That is to say, there is no customary international law prohibition on the use of sanctions by states against other states. As is well known, for a prohibition on conduct to emerge as a rule of customary international law, it has to be supported by both widespread and consistent state practice and a demonstrable view on the part of states that the conduct in question is prohibited (*opinio juris*). State practice around sanctions reveals the opposite—a plurality of states often uses them to accomplish foreign policy objectives, including

[31] *Ibid* at para 67.

[32] Moreover, while it is beyond the present scope, section 1 of the Charter contains a saving clause that allows the state to justify breaches where the rights are limited in a way that "can be demonstrably justified in a free and democratic society." The complex test for assessing the application of this provision gives weight to the reasonableness of the government's objectives, as well as their proportionality; we venture that a s. 8 breach here would, to use the normal legal language, be "saved by section 1."

compelling other states to refrain from a particular behaviour. For its part, even the UN General Assembly appears to be ambivalent about the legality of unilateral sanctions, sometimes condemning them while at other times urging states to apply them.[33]

To be sure, particular kinds of sanctions, applied in specific ways, might very well amount to conduct that breached international law. State practice is replete with states objecting to the legality of specific sanctions regimes. For example, sanctions that were "forcible or dictatorial" might be found to be coercive and thus breach the principle of non-intervention.[34] Therefore it is worth asking questions about the nature and impact of the asset seizure and repurposing regime as a matter of international law and practice.[35]

Notably, Article 41 of the *Articles on the Responsibility of States for Internationally Wrongful Acts*[36] provides that states are obliged to "cooperate to bring to an end through lawful means" illegal acts that breach peremptory norms. So, given that we are asking questions about international law breaches, it is essential to focus on the direct violation of international law that gives rise to all of this: Russia's invasion of Ukraine. There is controversy around what acts constitute "the most serious violations of international law," but state-on-state armed attacks top the list. Refraining from aggressive war is a core rule of international law, often called a "peremptory norm," which means there is no way to make a breach of the norm legal. Notably, the General Assembly has resolved that Russia has violated the *jus cogens* prohibition on making aggressive war.[37] Genocide, which has been credibly (if somewhat controversially) alleged against Russia,[38] has the same status and is the basis for a case brought against Russia by Ukraine at the International Court of Justice.

Given this, article 41 indeed suggests that Canada and other like-minded states are not only permitted to act against Russian aggression but also obliged to. As noted in our introduction, Canada's asset forfeiture and repurposing regime is not

[33] Rebecca Barker, "An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions" (2021) 70 Int'l Comp. L.Q. 343.

[34] See Maziar Jamnejad & Michael Wood, "The Principle of Non-Intervention" (2009) 22 Leiden J Int'l L 345 at 348. Various concerns have been raised around the kind of sanctions-based confiscation measures proposed by Canada and some other states; see Andrew Dornbierer, "Working Paper 42: From sanctions to confiscation while upholding the rule of law", (February 2023), *Basel Institute on Governance*, online: <https://baselgovernance.org/sites/default/files/2023-03/230309%20Working%20Paper%2042.pdf>.

[35] Parts of the following originally appeared in Robert J. Currie, "Seizing Russian Assets: Canada Has the Spirit of International Law on Its Side", (27 June 2022), *Policy Magazine*, online: <https://www.policymagazine.ca/seizing-russian-assets-canada-has-the-spirit-of-international-law-on-its-side/>.

[36] Adopted by the United Nations General Assembly by, and annexed to, UNGA Res 56/83 (12 December 2001).

[37] UNGA Res ES-11/5, 14 November 2022.

[38] "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)", *International Court of Justice*, online: <https://www.icj-cij.org/en/case/182/>.

conceptually new but novel in its application and execution. Can it truly be considered the subject of an international law prohibition?

3.3.2. International Trade and Investment Treaties

Another set of issues concerns whether Canada could be held liable for unlawfully expropriating the assets of a foreign national(s) under Canada's bilateral foreign investment promotion and protection agreements (FIPA) with another country or for being in breach of specific rules under the World Trade Organization regime.

In the case of Russia, for example, the 1989 Canada-USSR bilateral investment treaty remains in force between the two countries. Even if Canada were to notify Russia of its intention to withdraw, the arbitration provisions in the agreement would continue for another 20 years. Furthermore, the FIPA has no national security exemption clause — as in the newer FIPPA template — reinforcing the legal conclusion regarding the absence of that kind of provision in the 1989 treaty.

Monies owned by sanctioned oligarchs held in Canadian financial institutions would qualify as "investments" — like almost any form of financial or physical asset. However, a yacht or vacation property seized by Canada would not be categorized as an "investment" and, therefore, could be seized without being in contravention of Canada's FIPA agreement with Russia.

Regarding asset forfeiture, Article IX allows Russian investors to invoke arbitration under UNCITRAL Arbitration Rules. If Canada refuses to participate, the Rules allow the investors to seek panel appointments through the President of the Permanent Court of Arbitration in the Hague. This would make it difficult for Canada to entirely ignore/sidestep the arbitration process if it were invoked. Canada could cite Russia's deplorable actions in Ukraine to have the PCA refuse jurisdiction. There could also be norms of public international law that could be used at the PCA — but that would require further analysis and investigation. In any case, it would be defensive in the face of a Russian oligarch actively seeking recourse under Article IX.

Forfeiture is not a GATT/WTO issue. There is no basis for relying on GATT Article XXI because the WTO Agreement does not apply. Whether Canada could successfully invoke the police power concept under customary international law is doubtful. In any case, that could only be done after an arbitration panel is convened. Although there is nothing in the Vienna Convention on the Law of Treaties that says that a treaty or part of a treaty ceases to be operational when the other side has committed acts of aggression contrary to international law, the bilateral investment agreement in its entirety — bearing in mind its object and purpose — may have been vitiated as a result of Russia's aggressive actions in Ukraine. In any event, any breach by Canada may also be neutralized by operation of the defence of countermeasures, which we consider in section 3.3.5 below.

3.3.3. Confiscating Private versus State Funds

As noted earlier, the Canadian scheme under *SEMA* includes within its ambit the seizure, restraint and forfeiture of property or assets that are "held or controlled, directly or indirectly" by a foreign entity — including, in subparagraph 4(b)(i), "a foreign state." The idea of seizing and repurposing state property has lately given rise to a robust debate around whether the law of sovereign immunity might bar such a measure in the case of Russia, particularly (though not exclusively) as regards assets owned by the Russian Central Bank, which are thought of as being primarily "sovereign" in nature. There is little doubt that state assets held in foreign states are indeed protected *ab initio* from execution under the customary international law of sovereign immunity, as primarily encapsulated in the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Properties.[39] This applies with particular force to foreign central banks' currency reserves and other assets.[40]

However, a closer look at the relevant norms produces a more nuanced account. A credible argument has been made that sovereign immunity only applies where state assets would be constrained "in connection with proceedings before a court."[41] Professor Moiseienko has recently put forward an interesting argument, based on detailed consideration of state practice, that immunity of state assets is limited to exercising judicial powers. Thus, freezing and confiscation are not unlawful if done by the executive.[42] The idea is that sovereign immunity is essentially designed to keep states from adjudicating upon each other but does not preclude other forms of (particularly executive-based) action.

At first glance, Canada's State Immunity Act,[43] which implements Canada's customary international law obligations around immunity,[44] appears to present obstacles to the forfeiture and repurposing of Russian state assets that are held in Canada. Section 3 provides that, "Except as provided by this Act, a foreign state is

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[39] United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, GA Res. 59/38. At the time of writing it is two ratifications shy of being in force; however, it is generally viewed as a solid restatement of the relevant customary international law norms.

[40] Ingrid (Wuerth) Brunk, "Sovereign Immunity of Foreign Central Bank Assets" (23 February 2018), *Lawfare*, online: <https://www.lawfareblog.com/sovereign-immunity-foreign-central-bank-assets.>

[41] See Tom Ruys, "Non-UN Financial Sanctions Against Central Banks and Heads of State: in breach of international immunity law?" (12 May 2017), *EJIL Talk*, online: <https://www.ejiltalk.org/non-un-financial-sanctions-against-central-banks-and-heads-of-state-in-breach-of-international-immunity-law/>; Ingrid (Wuerth) Brunk, "Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?" Lawfare (7 March 2022), *Lawfare*, online: <https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks>; Daniel Franchini, "Ukraine Symposium – Seizure of Russian State Assets: State Immunity and Countermeasures" (8 March 2023), *Articles of War*, online: <https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasures/>.

[42] Anton Moiseienko, "Sovereign Immunities, Sanctions and Confiscation: The Case of Central Bank Assets", (Canberra, Aus: SSRN, 2023).

[43] RSC 1985, c S-18 [*SIA*].

[44] Phillip M Saunders & Robert J Currie, eds, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond, 2019) at 386.

immune from the jurisdiction of any court in Canada"[45] and requires courts to give effect to this immunity "in any proceedings before a court." Section 11(1) provides that even where a foreign state is involved in court proceedings, no relief (including "the recovery of land or other property") may be granted against it without its consent.[46] Section 12(1) provides generally that foreign state property in Canada is "immune from attachment and execution…, arrest, detention, seizure and forfeiture,"[47] while Section 12(4) immunizes central bank property from "attachment and execution."[48] Given these provisions of the SIA, if the Canadian government were to commence proceedings to forfeit Russian state assets, Russia would likely claim its immunity to the proceeding, which it may do without attorning to the jurisdiction of the Canadian court.[49]

Such a claim on Russia's part could even be successful. It might be possible to argue that the initiation of the entire process is essentially by way of executive *fiat* — *i.e.*, the federal Cabinet order that the assets are subject to seizure or restraint — and that the forfeiture proceedings are simply meant to provide for court *supervision* of the subsequent forfeiture process, so as to ensure maximum fairness. However, this is a fairly thin argument, given that the forfeiture provisions envision actual adjudication by the judge presiding over the forfeiture hearing, and that immunity from adjudicative jurisdiction is the central pillar of the customary international law of state immunity, which informs the interpretation of the SIA. Nor would it seem viable for Canada to argue that, by imposing forfeiture upon state property, Parliament has simply chosen not to respect an otherwise applicable immunity. While the Canadian legislature has the capacity in domestic law to violate international law, statutes are interpreted via the "presumption of conformity," which requires that such an exercise of Parliamentary must use fairly explicit language.[50] However, the SEMA amendments lack such explicit language. Accordingly, it appears that while using the courts to forfeit non-state actors' assets may very well be successful, under the law as it currently stands Canada may be blocked from using the courts as a means of forfeiting *state* assets, including central bank funds.

There are a couple of potential solutions here. First, the international law immunity of state property already has certain exceptions, even though these are fairly limited.[51] Should Canada and like-minded allies decide that the egregiousness of Russia's actions justify a limited incursion on the rules that grant these particular

[45] *SIA* s 3.

[46] *Id.*, s 11(1).

[47] *Id.*, s 12(1).

[48] *Id.*, s 12(4).

[49] *SIA* s. 4(3)(a).

[50] *R v Hape*, 2007 SCC 26 at para 53.

[51] See, e.g., the United Nations Convention on the Jurisdictional Immunities of States and Their Properties, UN Doc A/59/508 (2 December 2004), article 19.

immunities, this may result in a "Grotian moment"[52] shift of the sovereign immunity landscape and the creation of a new exception. To wit, Canada could simply amend the SIA so as to exempt the forfeiture regime and do as it wishes with the state property. However, this course of action is unlikely, in part because it has the potential to provoke a reciprocal response from Russia and possibly other states.

Second, on the more technical (and realistic) side, the forfeiture provisions might be applied *only* to private assets, while the forfeiture of state assets can be carried out by executive action. The SIA is explicitly aimed at creating sovereign immunity from the jurisdiction of courts—therefore, the SIA arguably does not restrain the executive action, i.e., the Cabinet order under s. 4. As such, it follows that state assets are immune only from the adjudicative process of courts, and not from executive action. This may fit within the line of state practice around sovereign immunity noted above, to the effect that immunity only attaches to adjudication and not to executive action.[53] Therefore, in order to effect liquidation and repurposing, the Cabinet's power to execute "seizure or restraint in the manner set out in the order"[54] could be interpreted to include some form of disposal of the assets, or SEMA could be amended to this specific effect.

That said, supposing that there is a breach of some international norm (relating to sovereign immunity or otherwise) that would be created by confiscation of state assets under Canada's process, this would lead to consideration of another topic currently seeing some energy: the availability of countermeasures. We consider this below after a review of concurrent state practice.

3.3.4. Other Initiatives: UK, EU and US

Although Canada is an international leader in asset forfeiture through these measures, it increasingly finds itself in good company as legislators and officials in other Western jurisdictions consider similar courses of action. Two pieces of legislation have been introduced in the British House of Commons and the House of Lords to provide for the seizure of Russian assets held in the United Kingdom and repurpose them to help the Ukrainian people.

A private member's Bill introduced by Labour MP Sir Chris Bryant entitled "A Bill to require the Secretary of State to lay before Parliament proposals for the seizure of Russian state assets to provide support for Ukraine; and for connected purposes".

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[52] A "Grotian moment" is a term that denotes a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. *See, e.g.*, Michael P. Scharf, "The 'Grotian Moment' Concept" (2010-2011) 19 ILSA QUART. 16.

[53] *See* Anton Moiseienko, "Sovereign Immunities, Sanctions and Confiscation: The Case of Central Bank Assets," above.

[54] *SEMA* s 4(1)(b).

BOX: Bill 255-2-22-23

Bill 245-2022-23 provides that "Within 60 days of the coming into force of this Act, the Secretary of State must lay before Parliament proposals for a Bill to provide for the seizure of Russian state assets for the purpose of offering support to Ukraine and the Ukrainian people."[55] Confiscation is directed at assets, reserves or property of the Russian Federation. The list of potential assets to be seized is quite exhaustive and covers the following:

1. (a) the Central Bank of the Russian Federation:
2. (b) the National Wealth Fund of the Russian Federation;
3. (c) the Ministry of Finance of the Russian Federation; *20*
4. (d) a person owned or controlled directly or indirectly (within the meaning of regulation 7 of The Russia (Sanctions) EU Exit Regulations 2019) by a person mentioned in paragraphs (a) to (c); or
5. (e) a person acting on behalf of or at the direction of a person mentioned in paragraphs (a) to (c). *25*

Those "assets or reserves" are as follows:

(a) money market instruments (including cheques, bills and certificates of deposit);
(b) foreign exchange and currency;
(c) derivative products (including futures and options);
(d) exchange rate and interest rate instruments (including products such as swaps and forward rate agreements);
(e) transferable securities (including shares and bonds);
(f) other negotiable instruments and financial assets (including bullion);
(g) special drawing rights.

The second reading of the Bill before it is referred to committee is scheduled in late November 2023.

On April 27, 2023, Lord Alton of Liverpool, a Crossbench member of the U.K. House of Lords, tabled an amendment to the government's Economic Crime and Corporate Transparency Bill to give the government further authority to forfeit assets under the Proceeds of Crime Act, specifically in those cases where there has been deliberate concealment of assets.[56] The amendment "would allow the seizure of assets when deliberate attempts had been made to escape the enforcement of sanctions." As Lord Alton points out, Russian "oligarchs have

[55] Bill 245, Seizure of Russian State Assets and Support for Ukraine Bill, 2022-2023 sess, 2023, 1(1).

[56] "Economic Crime and Corporate Transparency: Volume 829, debated on Thursday 27 April 2023" (27 April 2023), *UK Parliament*, online: < https://hansard.parliament.uk/lords/2023-04-27/debates/EB1B0703-6CF6-4BBC-9399-D62E1C2D17B4/EconomicCrimeAndCorporateTransparency>.

found increasingly sophisticated ways to weaken our sanctions response: moving assets just before sanctions hit; exploiting loopholes to put assets out of reach; and concealing assets to hinder the enforcement of sanctions." He notes, for example, that "Oligarchs such as Abramovich, for example, were able to bypass the sanctions by handing over their wealth and companies to family members just a few weeks before the sanctions hit. Just before the war began, Abramovich restructured at least $4 billion of his personal wealth and transferred it to his children, who are now the owners of trusts, luxury yachts, private jets and mansions — all out of reach of UK sanctions. Had Amendment 85 been in place, these funds, which by contrast amount to more than the UK's present commitment in military aid to Ukraine, would not have escaped freezing orders and could potentially have been seized." There is a grace period in Lord Alton's amendment "to require all designated individuals to declare any assets they control in the UK to OFSI [Office of the Superintendent of Financial Institutions]." Accordingly, sanctioned individuals "would…be required to provide a list of assets held in the six months prior to designation. Failure to disclose these assets within a specified timeframe would be criminalized as a form of sanctions evasion. As a result, undisclosed assets would be made susceptible to seizure using existing procedures under the Proceeds of Crime Act. These procedures already have safeguards in place for courts to ensure that a person is not arbitrarily deprived of their private property."[57] The amendment has yet to be put to a vote and will be re-introduced at a later stage in the discussion of the bill.

The European Union is also considering punitive measures "to mobilize…less conventional sources of funding" to assist with the reconstruction of Ukraine.[58] In March 2022, the European Commission set up the so-called "freeze-and-seize" task force to identify and freeze the assets of Russian oligarch holdings in EU Member States. This was followed by a European Parliamentary resolution that called on Russia to provide war reparations to Ukraine and which argued that frozen Russian assets should be "legally confiscated in accordance with international law."[59]

In November 2022, the Commission identified several options available to its Member States to hold Russia accountable for its "atrocities and crimes" in Ukraine. It proposed "a new structure to manage frozen and immobilized public Russian assets, invest them, and the use the proceeds for Ukraine." In the long term, if and when sanctions were to be lifted, the EU would return Russia's Central

[57] Ibid.

[58] It is worth noting that in addition to freezing Russian assets, France and Italy under executive authority have also seized the physical assets (yachts) of Russian oligarchs. See, for example, Rachel Treisman, "France seizes its first yacht as the West pledges to crack down on Russian oligarchs,"(3 March 2022) *NPR,* online: < > and Elisabeth Braw, "Italy Is Leading the World in Seizing Oligarchs' Assets (17 August, 2022) *Foreign Policy*, online: < https://www.npr.org/2022/03/03/1084195089/russian-oligarch-yacht-seized-france>.

[59] EC, European Parliament resolution of 7 April 2022 on the conclusions of the European Council meeting of 24-25 March 2022, including the latest developments of the war against Ukraine and the EU sanctions against Russia and their implementation, 2022/2560(RSP).

Bank assets, although the return of such assets, the Commission notes, "could be linked to a peace agreement, which compensates Ukraine for the damages it has suffered" and that such assets could also be "offset against this war reparation." As Commission President Ursula von der Leyen tweeted, "Russia must pay for its horrific crimes. We will work with the ICC and help set up a specialized court to try Russia's crimes. With our partners, we will make sure that Russia pays for the devastation it caused, with the frozen funds of oligarchs and assets of its central bank pic.twitter.com/RL4Z0dfVE9." Two kinds of assets are in the Commission's sight-lines: Some 19 billion euros of sanctioned oligarchs' money and an estimated 165 billion euros of frozen Russian reserves held by eurozone central banks.[60]

In the United States, Russia's invasion of Ukraine and mounting violence and atrocities have been met with growing calls to confiscate frozen Russian assets to compensate Ukraine for the damage and destruction it has caused. Although at one time the US government had the authority to lawfully seize and confiscate the property of an enemy state with which it was at war (The Trading with the Enemy Act of 1917), powers which were extended in subsequent legislation, those powers were reined in by the International Emergency Economic Powers Act (IEEPA) in 1977 because of growing congressional fears about the unbridled powers of the "imperial presidency" in the aftermath of the Vietnam war. Nonetheless, amendments to IEEPA following the 9/11 terrorist attacks on the United States did allow for asset seizure in situations where the US found itself in armed conflict with another party(ies). But when the US is not directly at war with another party, any asset seizure would require special "judicial notice." In December 2022, however, Congress passed amendments to the legislation allowing for the "sale and proceeds of assets — including seized mega-yachts, private jets, mansions and expensive art — from sanctioned Russian oligarchs and entities supporting Putin to be used to the benefit of the Ukrainian people."[61] The 2023 Consolidated Appropriations Act further authorized this approach. However, this authority only extends to assets that have been confiscated where there is a criminal offence involving the violation of existing sanctions under a specific presidential directive. It does not include the holdings of sanctioned Russian oligarchs where no such offence exists. However, in April 2023, the Justice Department asked Congress "to expand the range of forfeited assets it can transfer to Ukraine for rebuilding." As Deputy Attorney General Lisa Monaco testified before the Senate Judiciary Committee: " We're leaving money on the table if we don't expand our ability to use the forfeited assets that we gain from the enforcement of our export control violations and expanding the sanctions regime that that transfer authority is

[60] Pierre Briancon, "EU's frozen Russian assets plan is best put on ice" (12 January 2023), *Reuters*, online: <https://www.reuters.com/breakingviews/eus-frozen-russian-assets-plan-is-best-put-ice-2023-01-12/>.

[61] "Graham, Whitehouse Russian Oligarch Asset Seizure Amendment Unanimously Passes Senate" 22 December 2022), *Lindsey Graham Senate*, online: <https://www.lgraham.senate.gov/public/index.cfm/2022/12/graham-whitehouse-russian-oligarch-asset-seizure-amendment-unanimously-passes-senate#:~:text=The%20Graham%2DWhitehouse%20amendment%20allows,benefit%20of%20the%20Ukrainian%20people>.

applicable to…So, I urge Congress to give us the additional authority so we can make the oligarchs pay for rebuilding Ukraine, as well."[62]

There are growing calls in the US by legislators [63]and other prominent individuals[64] to confiscate Russian state assets. Though it is generally recognized this would require new legislation, the view of some distinguished US legal scholars is that "neither constitutional nor international law presents an insurmountable barrier to a properly drafted statute permitting the confiscation of frozen Russian assets to satisfy outstanding judgments against Russia held by various claimants. And there are ways Congress and the president could permit this that would also redound to Ukraine's benefit."[65] In a *Washington Post* op-ed, three prominent former US officials, Lawrence Summers, Philip Zelikow and Robert Zoelleck, argued that the roughly $300 billion of Russian central bank assets held abroad could legitimately be repurposed for the reconstruction of Ukraine because "Those who hold Russian assets are entitled, under the international law of state countermeasures for a grave breach of international law, to cancel their obligations to the Russian state and apply Russian state funds to pay what Russia owes. This asset freeze should not be treated, as some think it should be, under a surreal 'sanctions' paradigm, waiting upon a fantasy of Russian surrender. Ours is a wartime paradigm, and the compensation cannot wait. And applying the debtor's funds to pay its debts is a common way to encourage a settlement."[66] We explore this further in the next section.

3.3.5. Is the Defence of Countermeasures Available?

Assuming for the sake of argument that the asset forfeiture and repurposing regime breaches some rule of international law, that is not necessarily the end of the matter. It would be open to Canada and other states to invoke the defence of "countermeasures," which is provided for in Chapter II of the *Articles on State Responsibility*. The idea of countermeasures is that one state (here, Canada) can suspend an obligation it has under international law in a way that is directed at

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[62] "US Justice Department Seeks New Authority to Transfer Seized Russian Assets to Ukraine" (19 April 2023), *VOA News*, online: <https://www.voanews.com/a/us-justice-department-seeks-new-authority-to-transfer-seized-russian-assets-to-ukraine-/7057685.html>.

[63] US, Bill HR 4283, A bill to authorize the confiscation of assets of the Russian Federation and the use of such assets to offset costs to the United States of assistance to Ukraine, 117th Cong, 2022.

[64] "Report: Proposals to Seize Russian Assets to Rebuild Ukraine" (29 December 2022), *Brookings*, online: <https://www.brookings.edu/research/proposals-to-seize-russian-assets-to-rebuild-ukraine>.

[65] Paul Stephan, "Justice and the Confiscation of Russian State Assets" (13 March 2023), *Lawfare*, online: <https://www.lawfareblog.com/justice-and-confiscation-russian-state-assets>. Also see, Paul Stephens, "Seizing Russian Assets," Vol. 17, Capital Markets Law Journal (2022) Virginia Public Law and Legal Theory Research Paper No. 2022-40 and Philip Zelikow, "A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine" (May 12, 2022), *Lawfare*, online: < https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine> and Laurence H. Tribe, "Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?"(May 23, 2022), *Lawfare*, online: <https://www.lawfareblog.com/does-american-law-currently-authorize-president-seize-sovereign-russian-assets>.

[66] Lawrence H. Summers, Philip D. Zelikow and Robert B. Zoellick, "The moral and legal case for sending Russia's frozen $300 billion to Ukraine" (20 March 2023), *The Washington Post*, online: <https://www.washingtonpost.com/opinions/2023/03/20/transfer-russian-frozen-assets-ukraine/>.

persuading the offending state (here, Russia) to stop its own breach (here, the invasion of Ukraine). If it is a valid countermeasure, then the failure to comply is not itself a breach of international law.

The argument here, then, is simple: if there is some prohibition on the forfeiture and repurposing regime, it is nonetheless a valid and lawful response to Russia's breach of the fundamental peremptory norm forbidding one state from mounting an armed attack on another. Moreover, the norm is an *erga omnes* one, i.e., it is a duty owed by Russia to all states, and therefore Canada is an injured state and entitled to invoke countermeasures. To be recognized as valid, countermeasures must respect a specific set of rules — they must be proportional to the wrong being done by the foreign state, not violate fundamental human rights and international humanitarian law norms, and not impact diplomatic personnel, premises or property. None of these seems like an obstacle in this situation.

It has been suggested[67] that while the sanctions, including seizing and freezing, could amount to valid countermeasures, repurposing the assets would go further than legally permitted. Once Russia changes its behaviour, the argument goes, Canada would be obliged to end the sanctions and restore the assets to their owners. Since the assets would be liquidated, there could be no restoration, and thus Canada would have breached international law; this is sometimes referred to as the "non-reversibility issue."

However, the law of countermeasures is quite specific: they must, "as far as possible," be taken "in such a way as to permit the resumption of performance of the obligations in question" once the offending state stops its conduct.[68] Whether there is necessarily an obligation to restore anything that was taken away as a result of the countermeasure is a more nuanced issue than the argument suggests; a state could not destroy a holy site that it had an obligation to protect, for example, since that would mean that there would be no way to go back to complying with the obligation. But it is unclear that confiscated monies or property would have to be returned. It is highly arguable that all Canada would be legally required to do is simply cease the sanctions, which would constitute a "resumption of performance of the obligations in question."

As Franchini writes:

> …the extent to which non-reversibility poses such a major hurdle to countermeasures in the form of asset seizures can be debated. While

[67] Janyce McGregor, "Proposed powers to sell, redistribute Russian assets may violate international law, says legal expert" (6 June 2022), *CBC News*, online: <https://www.cbc.ca/news/politics/c19-russia-sanctions-un-articles-violation-1.6478115>. See also Paul Stephan, "Response to Philip Zelikow: Confiscating Russian Assets and the Law" (13 May 2022), *Lawfare*, online: <https://www.lawfareblog.com/response-philip-zelikow-confiscating-russian-assets-and-law>.

[68] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art 49(3).

> reversibility is an important concept, as Crawford has suggested, it should be interpreted broadly. According to Article 49(3) ARSIWA, countermeasures only need to be reversible "as far as possible." The ILC's Commentary to Article 49(3) acknowledges that the coercive nature of countermeasures is not necessarily compromised, even if it is not possible to fully reverse their effects. This is particularly true when a State is enforcing a judgment of an international court or tribunal.[69]

So far as the specific issue of confiscation as a breach of sovereign immunity goes (i.e., if state-owned assets are confiscated), we are attracted to Moiseienko's argument that, despite the fundamental character of the customary international law of sovereign immunity, a principled interpretation of the law of countermeasures suggests that there is nothing that would preclude otherwise immune assets from being affected by countermeasures.[70] That said, and in light of the controversy around "reversibility," a measured approach would be best.

Methodological precision is required at this point.[71] Countermeasures would affect not the assets themselves but the obligation on the part of states to provide them with immunity. Once that obligation is suspended, say on the initiative of Canada, then Canada is free to make moves that affect the funds. Recall that the breach to which the countermeasures would be responding is Russia's violation of Ukraine's territorial integrity, which would bring compensation obligations. The most principled use of state authority vis-à-vis state assets would be not to "seize" or "confiscate" them at all, but to transfer them to an escrow account so that compensation can be provided to injured parties — the ordinary legal course — but so that, in the end, some of the assets could be repatriated to Russia when the countermeasures are lifted. This course of action is not without precedent; one of the most often-cited examples is the UK's attempt to seize Albanian assets to enforce the ICJ's judgment in the *Corfu Channel* decision. While the effort was unsuccessful, the method was legally sound.[72]

This international law response could be brought about by measures in Canadian law. Having publicly invoked countermeasures against Russia, Canada could suspend its sovereign immunity obligations by way of an amendment to the SIA. As noted earlier, Cabinet's power under s. 4 of SEMA could be modified to explicitly include the ability to "transfer" the assets, potentially into an account created pursuant to the *Seized Property Management Act*.[73] There may be other potential routes, such as designating Russia "a foreign state that supports

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[69] Franchini, *supra* note 37.

[70] Moiseienko, *supra* note 38.

[71] We gratefully acknowledge that this argument has been formulated by Professor Zelikow.

[72] Oscar Schachter, "The Enforcement of International Judicial and Arbitral Decisions" (1960) 54 AJIL 1.

[73] SC 1993, c 37.

terrorism" under s. 6.1 of SIA, which would have the effect of removing immunity over Russia itself and, pursuant to s. 12(1)(d) of SIA, its property.[74]

As to the ultimate fate of the assets, in its resolution declaring Russia's outlawry, the General Assembly also proposed the creation of an international register of damage that could start recording claims, and there is precedent for the collective disposal of such claims, such as the United Nations Compensation Commission created to deal with claims arising from the Iraqi invasion of Kuwait.[75] The government of Ukraine has proposed creating just such a body to adjudicate upon claims for compensation arising from Russia's invasion.[76] Again, recall the point: transfer of Russian state assets, in particular, as an exercise of countermeasures against Russia's illegal conduct, remains lawful even after the countermeasures themselves have ended because the confiscated funds are used to pay out damages accruing from the original breach. There is legal and moral authority behind this.

[74] We owe this suggestion to Canadian Task Force Against Global Corruption colleague Sabine Nölke. This seems particularly apposite given Russia's recent apparent destruction of the Kakhovka Dam.

[75] For a detailed proposal see Thomas Grant, "Multilateral Action Model on Reparations" (25 October 2022), *New Lines Institute for Strategy and Policy*, online: <https://newlinesinstitute.org/wp-content/uploads/20221031-MAMOR-Doc-w-toc-NLISP.pdf>.

[76] Chiara Giorgetti et al, "Launching an International Claims Commission for Ukraine" (20 May 2022), *Just Security*, online: <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>.

4. Conclusion

Canada and some like-minded states have taken steps into a somewhat uncertain legal milieu with their confiscation and repurposing measures. However, it is beyond doubt that grand corruption presents a significant threat to any number of international values, and principled creativity is called for. On the specific issue of Russia's attack on Ukraine it is worth remembering that, were the offending state here not a permanent member of the United Nations Security Council and thus possessing a veto, that body could easily pass a resolution that authorized these measures and some that would be much harsher. Beyond that, international law is a complex arena—one in which there is a lot of nuance and give-and-take. In this situation, Canada's measures may be creative, but they are by no means illegal. And they serve a larger purpose of the entire international legal order: to prevent states from waging aggressive, destructive war on each other and all its attendant fallout.

Canada has compelling and persuasive arguments on its side, along with the "spirit of the law" since the measures in question align entirely with the fundamental purposes of international law. Working in concert with close allies, Canada has the capacity to contribute to the important geopolitical goals at stake and continue to push back against the dual malignancies of corruption and warmongering.

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