

# **LEADING BY EXAMPLE: PROPOSED AMENDMENTS TO SPECIAL ECONOMIC MEASURES ACT TO ENABLE SEIZURE OF RUSSIAN STATE ASSETS**

## **White Paper**

### **INTRODUCTION AND AIM OF THIS PAPER**

1. Immediately after the start of Russia's full-scale invasion of Ukraine the G7 nations blocked c. \$300bn of Russian state assets held within their jurisdictions. Canada is the first, and so far, the sole G7 nation to explicitly permit, by legislation, the seizure of state assets. Despite initially strong support for the confiscation of Russian state assets to compensate and rebuild Ukraine, and continuing public support, the governments of the G7 nations to appear to have lost appetite for this idea citing its alleged incompatibility with international law. Furthermore, Canada which was bold enough to pass its law, appears reluctant to use it to seize Russian state assets unless it acts in concert with other G7 nations. This Paper argues that Canada can pave the way towards unblocking the \$300bn of Russia state funds and using them to start funding the rebuilding of Ukraine without exposure to undue risk.
2. According to the last published Central Bank of Russia accounts for the year ended 31 December 2021, Russia held c. CAD \$16 billion of its reserves in Canada. However, in the weeks prior to the full-scale invasion of Ukraine, Russia appears to have removed almost all of these funds from Canada to Belgium's Euroclear. It is understood that Canada may only hold c. CA\$ 100-200 of Russian Central Bank reserves (although the figure had not yet been officially confirmed).
3. Although it holds only a small fraction of the US\$300 billion Russian state assets immobilized by G7's joint actions, Canada has a unique opportunity to be the world-leader in using domestic law in accordance with international law mechanisms for the seizure of Russia's state assets. If it is true that Canada holds only CAD \$100-200 of Russian Central Bank reserves, it creates a low risk yet high impact opportunity for Canada to use SEMA to seize these reserves. Canada will be the first nation to use international law to seize funds which would be vital in any future rebuilding of Ukraine and repayment of reparations to the victims of the war.
4. While some might see the seizure of c. CA\$100-200 as symbolic, it would not be. Being the first nation to confiscate Russia's state funds, and explaining the

international law rational for doing so, will spur other nations to consider following the Canadian example and take similar actions. This would be hugely important and beneficial for Ukraine but will also uphold the rule of law in the international legal order by requiring Russia to comply with its obligations in international law. By seizing Russian sovereign assets and transferring them to Ukraine Canada will support the use of international law as a means of restoring international peace and security and compensating the victims of aggression.

5. Why act now? Whilst the war is ongoing, the international community is united in its condemnation of Russia's aggression and support for rebuilding Ukraine. On 14 November 2022, the United Nations General Assembly passed resolution ES-11/5 recognising that under international law Russia will owe Ukraine reparations at the end of the war.<sup>1</sup> On 17 May 2023, the Council of Europe announced the establishment of the *Register of Damage Caused by the Aggression of the Russian Federation against Ukraine* to document the damage Russian unlawful war caused to Ukraine from 24 February 2022. Secretary General Marija Pejčinović Burić declared the Register to be “*a first and necessary step towards any compensation mechanism*,” stating further: “*We all wish for peace in Ukraine. But that peace must be sustainable. To be sustainable it must be just. And, to be just, it must have accountability at its core.*”<sup>2</sup> At this stage, it is inconceivable that Russia will voluntarily pay reparation to Ukraine. At the same time, the damage caused to Ukraine's people and its economy is real and ever-growing and funds to repair this damage must be found now before the damage to Ukraine's economy becomes irreversible meaning that Russia wins even if it loses the war.
6. The Register was created for an initial period of just 3 years. Yet, despite references in the Secretary General's speech to the Action Plan on Resilience, Recovery and

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<sup>1</sup> The General Assembly of UN “*Recognizes that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.*” (full text of the resolution is here: <https://www.justsecurity.org/wp-content/uploads/2022/11/N2267912.pdf>; full transcript of the session: <https://press.un.org/en/2022/ga12470.doc.htm>)

<sup>2</sup> See the newsroom announcement by Council of Europe: <https://www.coe.int/en/web/portal/-/secretary-general-at-justice-conference-in-riga-the-register-is-the-first-step-towards-any-future-compensation-mechanism-#:~:text=The%20event%20entitled%20%E2%80%9COn%20the,Ukraine%2C%20established%20at%20the%20Reykjavik.>

Reconstruction of Ukraine,<sup>3</sup> no concrete steps towards the creation of a workable and sustainable compensation mechanism for Ukraine had been taken. The blocked Russian Central Bank reserves held by Ukraine's partners represent a ready pool of money which could be utilised to provide initial funding for reconstruction of the worst-hit sectors of Ukraine's economy. But given that the Register is only created for an initial period of 3 years, the international community must come up with a mechanism of funding compensation for those who suffered damage as a result of Russia's war sooner rather than later. For all these reasons, **the time to act is now without waiting for the end of the war.**

7. Yet the leaders of the G7 nations have all but announced that they will not seize state assets when they issued a joint statement on 19 May 2023 that "Russia's sovereign assets in our jurisdictions will remain immobilized until Russia pays for the damage it has caused to Ukraine."<sup>4</sup> **Unless a nation is bold enough to act, Russia's state assets will remain frozen and of no use to anyone long after the war is over.**
8. Canada is one of the few nations (alongside the US<sup>5</sup> and Ukraine itself) which by legislation permits the seizure of foreign state assets and Canada's legislation is the first to make this explicit. So far, draft legislation for the seizure of Russian state assets had been proposed in the UK (Seizure of Russian State Assets and Support for Ukraine Bill)<sup>6</sup> as well as Ukraine-focussed Bill the US (Rebuilding Economic Prosperity and Opportunity (REPO) for Ukrainians Bill), which explicitly targets Russian sovereign assets.<sup>7</sup> However, none of the legislative proposals are yet in force. It is also understood that Estonia has draft legislation concerning seizure and repurposing of Russian state and individual assets but no details of this have been released yet.

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<sup>3</sup> See full speech here: <https://www.coe.int/en/web/secretary-general/-/closing-session-of-the-justice-ministers-%C2%A0informal-conference>.

<sup>4</sup> See full text of the statement here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/>.

<sup>5</sup> See Section III of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>6</sup> A Private Members' Bill sponsored by Sir Chris Bryant and introduced on 7 February 2023. See the Bill here: <https://bills.parliament.uk/bills/3415#timeline>. See Sir Chris Bryant's speech introducing the Bill here: <https://www.theyworkforyou.com/debates/?id=2023-02-07c.796.0&s=conservative>.

<sup>7</sup> See the text of the REPO Bill here: [https://www.foreign.senate.gov/imo/media/doc/06-14-23\\_repo\\_act.pdf](https://www.foreign.senate.gov/imo/media/doc/06-14-23_repo_act.pdf). See also the US Senate press release here: <https://www.foreign.senate.gov/press/rep/release/risch-whitehouse-mccaul-kaptur-introduce-legislation-to-repurpose-sovereign-russian-assets-for-ukraine>.

9. The aim of this White Paper is two-fold:
  - 1) Explain why technical amendments to SEMA would be advisable in order to proceed with the seizure of Russian state assets (Part 1); and
  - 2) Debunk the myth that the seizure of Russian state assets would violate international law and to identify key legal arguments in support of confiscation of Russian state assets to satisfy Russia’s international obligation of reparation for the loss caused by its internationally wrongful acts (Part 2).

## **PART I. The Proposal to Amend SEMA**

### **1. Existing Canadian legislative framework**

10. Special Economic Measures Act (as amended on 23 June 2022) (“SEMA”) enables the Governor in Council, acting via the Minister of Foreign Affairs (section 6(1)), to order the seizure of assets held or controlled by any foreign state (section 4(1)(b)) in certain circumstances specified in §4(1.1), which include “*a grave breach of international peace and security ... that has resulted in or is likely to result in an international crisis*”. It is beyond doubt that Russia’s seizure of Ukrainian territories by force and continuing unlawful war in Ukraine amount to the gravest breach of international peace and security since the Second World War.<sup>8</sup> See Appendix 1 to this note setting out key international court orders and resolutions by international organisations condemning Russia’s actions.
11. Section 5.6 of SEMA permits any confiscated assets to be repurposed for:
  - 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*

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<sup>8</sup> Russia remains in continuous breach of the United Nations General Assembly Resolution ES-11/1 (adopted on 2 March 2022) demanding full withdrawal of the Russian troops from Ukraine; the International Court of Justice’s provisional measures ruling made on 17 March 2022 demanding *inter alia* that Russia “*immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine*”; and the interim measures ruling by the European Court of Human Rights calling on the Russian Government to “*refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.*”

- 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.*
12. On its face, Canadian current legislative framework appears sufficient to permit confiscation of Russian Central Bank reserves held in Canada for use to compensate victims of the war and reconstruction of Ukraine.
13. However, SEMA has an easily correctable technical flaw that might prevent it from realising its aim of seizure and repurposing of *state* assets.

## **2. Technical flaw in SEMA proposed to be addressed by further legislation**

14. Under sections 5.3 and 5.4 of SEMA, the forfeiture order may only be made by a judge of a superior court of the province where the relevant property is situated following an application by the relevant Minister (currently, the Minister of Foreign Affairs). In all cases of the seizure of state assets, the asset owner, namely a foreign state, has to be given notice of the forfeiture hearing and may make submissions to the court as regards any forfeiture order (sections 5.4(2) and (3) of SEMA).
15. However, under section 3(1) of the Canadian State Immunity Act 1985 (“SIA”), “*except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada*” (the so-called immunity from adjudication). This means that, if the Canadian government were to commence judicial proceedings to confiscate foreign state’s assets, the relevant foreign state would be able to claim its immunity from such proceedings on the basis that no Canadian court has any jurisdiction to adjudicate in any proceedings involving a foreign state thereby blocking any attempt by the court to make any order as regards its state property.<sup>9</sup>
16. Further, foreign states also enjoy immunity from execution and enforcement. Thus, section 12(1) of SIA provides that “*property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture*” subject to limited and specified exceptions (in

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<sup>9</sup> Under SIA § 4(3)(a) “*any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court*” does not amount to an exception from sovereign immunity.

sections 12(1)(a)-(d) SIA) none of which would apply for the purpose of forfeiture proceedings under SEMA. An even greater immunity applies to foreign central banks' assets under section 12(4) SIA which provides that "*property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.*"<sup>10</sup> The sole exception is an explicit agreement by the relevant foreign government to waive its immunity (section 12(5) SIA), the chances of which are highly unlikely in a situation where SEMA's forfeiture provisions would usually be invoked (namely, where a foreign state was involved in a grave breach of international peace and security or permitted gross and systematic human rights violations to occur or was responsible for, complicit in, controlling or directing acts of corruption<sup>11</sup>).

17. This means that, in practice, no Canadian court would be able to make a forfeiture order against any foreign state assets since every single state is granted an immunity from the jurisdiction of the court under section 3(1) SIA and the assets of the state are immune from any detention, seizure or forfeiture order by the court under section 12(1) SIA.
18. Therefore, as currently drafted, SEMA can only be used to confiscate individual but not state assets. This could not have been intended by the Canadian Parliament, which clearly expected an order under section 4(1)(b)(i) of SEMA to be made as regards property owned by a foreign state.

### **3. Proposed legislative solution**

19. In order to prevent the foreign state's plea of sovereign immunity defeating any attempt to use SEMA's powers to seize its assets, it is proposed that SEMA is amended to permit the forfeiture of state assets to be carried out by executive action alone, rather than through the courts.
20. The reason is that the doctrine of immunity applies only to the adjudicative and enforcement jurisdiction of national courts.<sup>12</sup> In other words, the international law

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<sup>10</sup> Arguably, the forfeiture order under SEMA is not an order for "attachment and execution" under sections 12(1) and 12(4) SIA. However, it will certainly amount to an action in rem for seizure and forfeiture under section 12(1) SIA.

<sup>11</sup> See section 4(1.1) of SEMA.

<sup>12</sup> See *The Law of State Immunity* by Hazel Fox and Philippa Webb, 3<sup>rd</sup> edition, 2015 (OUP) at

doctrine of state immunity bars the national court of one state from adjudicating in proceedings involving another state. It does not, however, prevent the Parliament of another state from mandating the state's executive arm<sup>13</sup> to take action against the assets belonging to a foreign state.

21. This view is also supported by the textual analysis of the relevant legislation in Canada, as well as the UN convention on jurisdictional immunities and the decisions by the International Court of Justice (ICJ), the European Court of Human Rights and the UK Supreme Court:

- 1) Section 3(1) SIA provides that “*a foreign state is immune from the jurisdiction of any court in Canada*” (emphasis added).
- 2) Section 12(1) SIA provides that “*property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture*” (emphasis added). This suggests that immunity applies only to execution and enforcement of any judgment of the court (and the forfeiture order is specifically confined to any order in “an action in rem”, i.e., proceedings that determine the rights in the property).
- 3) Article 5 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property<sup>14</sup> (not yet in force, although its aim was to distil the principles of customary international law), “*A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention*”. Article 2(1)(a) provides that “*“court” means any organ of a State, however named, entitled to exercise judicial functions*”.
- 4) In *Jurisdictional Immunities (Germany v Italy judgment of 3 February 2012)*, the International Court of Justice held at [93] that: “*the rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State*” (emphasis added).

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<sup>13</sup> Such as, for instance, the Minister of Foreign Affairs identified in SEMA as the minister “*responsible for the administration and enforcement of this Act*”.

<sup>14</sup> Adopted by United Nations General Assembly Resolution A/59/38 of 2 December 2004; but its entry into force requires the deposit of 30 instruments of ratification, acceptance, approval or accession, which had not yet been achieved.

- 5) In *Al-Adsani v UK* (2002) 34 EHRR 111 at [54] the court noted that “*sovereign immunity is a concept of international law, developed out of the principle par in parem non habet imperium, by virtue of which one State shall not be subject to the jurisdiction of another State.*”
- 6) In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, the UK Supreme Court (UK) (per Lord Sumption) stated at [17]: “*State immunity is a mandatory rule of customary international law which defines the limits of a domestic court’s jurisdiction*”.
22. Under section 5.4(1) of SEMA, the judge is only responsible for identifying 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.” Neither of these issues are controversial when it comes to Russian Central Bank reserves held in Canada and it is extremely unlikely that any hearing would be required to confirm that such Central Bank reserves would indeed be held by Russia.
23. It is proposed that SEMA is amended by clarifying that the court procedure is appropriate only in respect of forfeiture of property owned by individuals or corporates and not foreign states and that the forfeiture of foreign state property can be achieved by means of an executive order alone.

## **PART 2. Analysis of International Law Supporting Confiscation of Russian State Assets**

### **1. Russia has an obligation to pay reparations under international law.**

24. The UN International Law Commission’s (“ILC”) Articles on State Responsibility (“ARSIWA”)<sup>15</sup> reflect the customary international law obligation that states that commit an internationally wrongful act must “make full reparation for the injury caused by the intentionally wrongful act.”<sup>16</sup> The legal obligation of the responsible state to

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<sup>15</sup> ARSIWA were adopted by the ILC on 9 August 2001 and are the product of almost 40 years’ work by the ILC codifying international law on state responsibility. The International Court of Justice (ICJ) has repeatedly relied on ARSIWA in its judgments as reflecting principles of customary international law defining the states’ wrongful acts and the use of countermeasures in response; and the UN General Assembly has repeatedly recommended ARSIWA to its member states (see FN 465, 466 to the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>16</sup> ARSIWA, art. 31.



make full reparations for the injury caused by its internationally wrongful act includes an obligation to make reparations for both material and moral damage.<sup>17</sup> Further, the obligation to make reparations is the obligation of the responsible state (rather than a right of the injured state or states).<sup>18</sup> Importantly, the obligation of the responsible state may be owed to the international community as a whole, depending on the character and content of the obligations<sup>19</sup> (for instance, an obligation under a treaty concerning protection of human rights or the UN Charter itself may exist towards all the other parties to a treaty or the charter). Finally, there is no requirement for the responsible state to consent before reparations, including compensation, are made.<sup>20</sup>

25. This means that Russia's obligation to make reparations to Ukraine is owed to the entire international community and the international community is able to enforce such an obligation without Russia's consent. In other words, **states not directly injured by Russia's conduct may seize and transfer Russian state assets to Ukraine without any form of agreement from Russia.**<sup>21</sup>
26. There is no real dispute that Ukraine and probably other states are entitled to compensation from Russia. It is undeniable that since 22 February 2022 (and arguably, since its invasion and annexation of Crimea in 2014) Russia has violated numerous international laws,<sup>22</sup> including Article 2(4) of the UN Charter (generally considered the cornerstone of the charter) which provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State,”<sup>23</sup> the ruling of the International Court of Justice

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<sup>17</sup> ARSIWA, art. 31(a).

<sup>18</sup> ARSIWA, art 31 and *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* by James Crawford (2002) at p.202.

<sup>19</sup> ARSIWA, art 33(1). See also the monograph by CHRISTIAN J TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 232, 241 (2005) (CAMBRIDGE UNIVERSITY PRESS) (concluding that states not individually injured by the breach of international law obligation are entitled to adopt (and have previously adopted) countermeasures in response to systematic or large scale breaches of international law: “States resorting to countermeasures have hardly ever denied the legal relevance of their conduct. In short, practice provides strong support for the view that even in the absence of individual injury, States are entitled to respond to serious breaches of obligations erga omnes.”).

<sup>20</sup> E.g., JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 267–269 (2013).

<sup>21</sup> See also support for this proposition in Section D.1(a) and FN 481 of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>22</sup> See, generally, section IV(C) of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>23</sup> As recorded in the United Nations General Assembly Resolution ES-11/1 (adopted on 2 March 2022) which deplored “in the strongest terms the aggression by the Russian Federation against Ukraine in violation of art. 2(4)

dated 17 March 2022 ordering that the Russian Federation “*shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine*”, as well as multiple provisions of the European Convention on Human Rights and the Genocide Convention.<sup>24</sup> As such, Ukraine and other parties to the UN Charter and the Genocide Convention, which include Canada, have the *obligation* to do what they can to stop these actions and hold Russia accountable for committing them, including by transferring Russia’s frozen sovereign assets to Ukraine.<sup>25</sup>

27. **Given the existence of this obligation, Russian frozen assets can, and indeed, must be seized and transferred to Ukraine in satisfaction of Russia’s existing obligation to make reparation. Any subsequent amount of reparation paid by Russia would be reduced by the amount of Russian confiscated assets already transferred to Ukraine.**
  
28. Such a proposal has several historical precedents. Following the conclusion of World War II, the agreement which established an Inter-Allied Reparations Commission provided that state parties shall “*hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets*” (emphasis added).<sup>26</sup> Whilst there is a difference between the previous historic precedent of WWI and WWII (which involved combatant states confiscating enemy assets) and the current proposal (where Ukraine’s partners are not involved in the armed conflict itself), such a factor is not decisive given Russia’s obligation to make reparations is owed not just to Ukraine but all the nations that are parties to the international conventions which Russia’s actions are breaching (including the UN Charter and the Genocide Convention, both of which post-date WWII).

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of the Charter” and demanded a full withdrawal of the Russian forces and a reversal of Russia’s decision to recognise the self-declared People’s Republics of Donetsk and Luhansk.

<sup>24</sup> See, e.g., *The Russian Federation’s Escalating Commission of Genocide in Ukraine: A Legal Analysis*, NEW LINES INSTITUTE (July 2023), <https://newlinesinstitute.org/rules-based-international-order/genocide/the-russian-federations-escalating-commission-of-genocide-in-ukraine-a-legal-analysis/>.

<sup>25</sup> See New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, p. 9 (2023).

<sup>26</sup> See “*The Policy and Practice of the United States in the Treatment of Enemy private Property*” (1948) 34 *Virginia Law Review*, 928, 939-940. See also pp 931-2 making clear that this, in turn, was based on the approach taken in the post World War 1 Treaty of Versailles.

29. Arguably the most applicable countermeasures precedent is the transfer of Iraqi state funds during the Gulf War in 1992.<sup>27</sup> After Iraq invaded Kuwait in 1990, former U.S. President George Bush issued an October 1992 executive order “directing and compelling” every U.S. bank holding Iraqi state funds to transfer them to the Federal Reserve Bank of New York in compliance with a U.N. resolution that called for compensation of the victims of that aggression. The executive order “authorized, directed, and compelled” the Federal Reserve Bank of New York to receive these funds and to “hold, invest, or transfer” them to serve the purposes of the U.N. resolution. The funds in the U.S. escrow account were then transferred to another escrow account controlled by the U.N. Secretary General, and used to satisfy claims made against Iraq under arrangements established in other international agreements. The immunity of the assets was suspended in order to effectuate the transfer and subsequent compensation.<sup>28</sup>

## **2. The international law principle of state countermeasures permits other nations to confiscate Russia’s assets to compensate for losses caused by Russia’s unlawful actions.**

30. The international law of state countermeasures for wrongful state action provides the legal justification for the confiscation of Russian state assets. In the absence of a centralized enforcement authority or a universal mechanism for dispute resolution, countermeasures provide a permitted form of “self-help” for ensuring compliance with international law.<sup>29</sup> The concept of countermeasures has long been recognised by international law and the requirements governing countermeasures are codified in the ARSIWA.<sup>30</sup>

31. In international law, a state may take countermeasures in response to the internationally wrongful act of another state, which is intended to induce the latter state to comply with its international legal obligations. Countermeasures are, by definition, state acts that would *ordinarily be unlawful*, and thus would attract international legal responsibility (liability), if not taken in response to an internationally wrongful act by the offending

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<sup>27</sup> See New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, pp. 22-23 (2023).

<sup>28</sup> *Ibid.*

<sup>29</sup> See New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, p. 14 (2023).

<sup>30</sup> See e.g. generally, JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* (2013). See also the *monograph* CHRISTIAN J TAMS, *ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW* (2005) (concluding that all states should be entitled to respond to *erga omnes* breaches of international law (i.e. obligations owed to all) with countermeasures).

state in order to achieve a specific objective: namely, cessation and/or reparation.<sup>31</sup> The purpose of countermeasures is the need to restore the equality between sovereign states and to re-establish the balance that has been disturbed by the commission of the internationally wrongful act. Although the analogy is imperfect, countermeasures operate much like justifications or excuses found in criminal law.<sup>32</sup> Therefore, a validly executed countermeasure is legal under international law.

a. “Countermeasures” are distinct from “sanctions,” and it is time to move from sanctions to countermeasures.

32. Sanctions and countermeasures are two distinct concepts used for two different, but related purposes, and in two different contexts. **It is vital to distinguish between sanctions and countermeasures.**
33. Sanctions are designed to deter further violations of international law, and are used within and according to the *ordinary legal obligations of states*.<sup>33</sup> They can include economic measures such as trade restrictions, financial sanctions, or the freezing of assets, as well as non-economic measures such as travel restrictions, diplomatic sanctions, and other political measures.<sup>34</sup> The purpose of sanctions is distinct from that of countermeasures, namely that sanctions are intended to coerce or change behaviour, or constrain access to resources needed to engage in certain activities.<sup>35</sup> Sanctions are, by their nature, punitive measures.
34. By contrast, countermeasures are specific measures taken by a state in response to a breach of international law by another state *that would ordinarily be unlawful*, but the taking of which in these exceptional circumstances does not attract liability to the state taking them. Countermeasures are a tool to enforce international obligations within a narrow frame. While sanctions are intended to be a deterrent, countermeasures are

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<sup>31</sup> See New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, p. 14 (2023).

<sup>32</sup> Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>33</sup> Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW (2016), <https://www.ohchr.org/sites/default/files/Documents/Issues/UCM/ReportHRC48/Academia/submission-tom-ruys-2.pdf>.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

intended to restore justice and encompass the obligation for an offending state to pay reparations. In contrast with sanctions, the object of countermeasures cannot be merely punitive.<sup>36</sup>

35. The sanctions construct is appropriate for freezing Russian assets, which has accomplished the goals of constraining Russia's access to its financial resources and hampering its economic growth and ability to attract foreign capital. Yet sanctions alone have proven to be ineffective in persuading Russia to call off its war, much less to deliver reparation to Ukraine and other states for the moral and material damage Russia's war has caused and continues to cause.<sup>37</sup> Thus, countermeasures are the most appropriate tool in the international law arsenal which could and should be used to enforce Russia's compliance with its obligations to cease its breaches of international law and make reparations for the injuries caused by its actions.

*b. Defining the nature of Canada's proposed countermeasure.*

36. Under customary international law, sovereign states are obligated to respect the territorial integrity and sovereignty of other states, including refraining from any act that would infringe upon another state's territory or interfere with its sovereign property.<sup>38</sup> The countermeasure suspends the ordinary respect one sovereign state extends to the property of another sovereign.
37. If a sovereign takes another sovereign's property, the recourse is not a claim of sovereign immunity—it is a claim for compensation.<sup>39</sup> Russia would ordinarily be entitled to seek compensation for the alleged wrongful taking of its property, either from the state that transferred its property or from the state or states that ultimately received it as compensation. Thus, the countermeasure lawfully suspends a state's obligation to compensate the Russian state for a transfer of its property, because

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<sup>36</sup> ARSIWA, art. 49(1); *see also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 284 (2002).

<sup>37</sup> *See* New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, p. 19 (2023).

<sup>38</sup> *E.g.*, Samantha Besson, *Sovereignty*, in MAX PLANCK ENCYCLOPAEDIAS OF INT'L LAW (Apr. 2011), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472>.

<sup>39</sup> Kate Parlett, *The application of the rules on countermeasures in investment claims*, in SOVEREIGNTY, STATEHOOD, AND RESPONSIBILITY 389-405 (2015), <https://www.cambridge.org/core/books/sovereignty-statehood-and-state-responsibility/application-of-the-rules-on-countermeasures-in-investment-claims/FA9A9D719CDB74219C8AAD35D0237407>.

Russia’s prior breach of peremptory norms of international law created a duty for it to compensate.<sup>40</sup> In other words, **the lawfulness of the countermeasure provides a defence to the seizure of Russia’s state property that might otherwise not be permitted.**

38. Notably, the proposed amendment to SEMA that would effectuate this countermeasure invokes purely Canada’s executive arm to seize Russia’s state property—without the involvement of the courts. As such, neither international nor domestic defence of sovereign immunity applies, because Russia and its property are not entitled to “immunity” from the formal actions of another equal sovereign.<sup>41</sup>
39. An example of the operation of this principle in practice can be found in the U.S. International Economic Powers Act (IEEPA), in which Congress granted the President the authority to address certain international emergencies.<sup>42</sup> Specifically, Subsection B of IEEPA authorizes the President to, among other things, “block” and/or “direct and compel” the “transfer” of “any right, power, or privilege with respect to” foreign sovereign property.<sup>43</sup> The IEEPA does not invoke any adjudicatory measures. The proposed amendment to SEMA contemplates a similar scheme, in principle, as the one contained in the IEEPA statute: to permit the seizure of state assets to be carried out by executive action alone, rather than through the courts.

### **3. Transfer of sovereign assets to Ukraine is a justified and permissible countermeasure against Russia.**

40. The burden will be on Russia to make claims for a return of its seized assets. The defence against those claims will be the lawfulness of the countermeasure—both in the nature of Russia’s breach and the constraints on the responsive countermeasure. As detailed above, Russia has repeatedly and flagrantly violated the most fundamental tenants of international law. As such, the remaining determination of lawfulness turns on the validity of the countermeasure.

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<sup>40</sup> *Id.*; see also *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007), ¶¶ 121, 125.

<sup>41</sup> See support for this proposition in Section IV D.3 of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al. (2023).

<sup>42</sup> 50 U.S.C. § 1702(a)(1)(B)-(C).

<sup>43</sup> *Ibid.*; See support for this proposition in Section III of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

41. A lawful countermeasure should only seek for cessation and/or to obtain reparation for the injury caused. A lawful countermeasure has to fulfil several additional prerequisites: such a countermeasure must be:
- 1) taken in response to a previous international wrongful act of another state,
  - 2) directed against that state,
  - 3) taken after a prior call upon the responsible state and prior offer to negotiate, and
  - 4) such a measure must be proportionate.
42. Additionally, the countermeasure must be:
- 1) temporary and, “as far as possible, be taken in such a way to permit the resumption of performance of the obligations in question” (also known as the “reversibility” requirement), and
  - 2) not imposed when the dispute is pending before a court or tribunal.<sup>44</sup>
43. The transfer of Russia’s sovereign assets is a valid countermeasure under these conditions.
- 1) First, Russia is plainly in breach of international law (see Appendix 1).
  - 2) Second, the countermeasure of transferring Russia’s sovereign property satisfies the common-sense concept of proportionality and is not gratuitous. In effect, this countermeasure would constitute a narrowly limited abrogation of Russia’s property interest in certain sovereign assets. In any event, Russia could make a claim for the return of its seized property, but any such claim would be offset against a credit Russia would receive for payments already made to Ukraine out of its seized sovereign assets against Russia’s total liability for full reparation. Russia would only be entitled to a return of its assets from transferring or recipient states if the transferred funds exceeded its total liability for reparations. In practice, that will almost certainly not be the case since even conservatively estimated damage caused

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<sup>44</sup> For the sake of brevity, this analysis will be limited to the most pertinent and most often discussed requirements. For a full analysis of each of these conditions, please refer to Section IV of the New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al. (2023).

to Ukraine by Russia far exceeds the amount of its frozen sovereign assets (see paragraph 53 below).

- 3) Third, the international community has already put Russia on notice—indeed, has done so repeatedly—that it is in breach of obligations owed to the international community (see Appendix 1).
- 4) Finally, it satisfies the reversibility requirement: the transfer operates as a temporary and narrow de-recognition of the obligations concerning Russia’s property that Canada ordinarily owes to Russia. Once Russia resumes compliance with international law, and complies with its own international law obligation to make reparation, that de-recognition would be reversed, any payments already made to Ukraine out of Russia’s sovereign assets by third party states, such as Canada, would be credited against the debt Russia owes Ukraine, and Russia’s legal relations with Canada and other nations would be normalized. As reversibility is a counter-argument that is commonly levied against asset seizure, it is discussed in more detail in Part III below.

*International law authorizes the transfer of Russia’s sovereign assets by G7 states other than Ukraine.*

44. Typically, countermeasures are invoked by the state directly injured by the violation of international law. But ARSIWA also permits other states to invoke a violating state’s responsibility to comply with international law if that state is in breach of an obligation owed to the international community as a whole.<sup>45</sup> This authorization to “third-party” states to enforce obligations owed to the international community finds ready support in settled state practice.<sup>46</sup>
45. In light of the ICJ’s firm (15-1) decision last year in *The Gambia v. Myanmar*, little doubt remains that the grave breach of a peremptory norm of international law can give

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<sup>45</sup> ARSIWA art. 48(1)(b) & cmts. 8-10; *see also* arts. 33, 42(b).

<sup>46</sup> As many have noted, the term “third-party” is a misnomer here because it improperly suggests that the third-party state has no legal interest in the preservation of international law. *See* Anton Moiseienko, *Sovereign Immunities, Sanctions, and Confiscation: The Case of Central Bank Assets* at 28 n.197 (Apr. 17, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4420459](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4420459). For example, although a state like Canada may not be the direct victim of Russia’s aggression in the same way that Ukraine is, Russia’s violation of an international obligation *erga omnes* by definition violates an obligation owed to Canada just as much as it is owed to Ukraine.



any state the basis to make a claim of injury and seek damages.<sup>47</sup> There is, in short, a more than adequate foundation of state practice, and accompanying juridical opinion, to establish authority to pursue countermeasures under customary international law to induce compliance with the so-called obligations *erga omnes*, i.e. obligations specifically owed to the international community as a whole, which include abstaining from acts of aggression and genocide.<sup>48</sup>

46. In the circumstances of this war, Russia left the means to compensate in the jurisdictions of law-abiding states. Those states, such as Canada, can choose to seize Russia's sovereign assets such that, in effect, those assets will then be used to perform Russia's duty to compensate. Canada could further justify future confiscations and strengthen its position by entering into an international agreement between a number of G7 and other nations which already have proposals for the confiscation of Russian state assets (such as US, UK and Canada) to create a special fund, holding all confiscated Russian state assets, which could be used to establish a common international compensation mechanism for victims of the Russian war (the need for which was internationally acknowledged by the UN General Assembly resolution ES-11/5 of 14 November 2022).

### **PART 3. Common Counterarguments and Frequently Asked Questions**

#### **1. Transfer of Russia's sovereign assets satisfies the reversibility requirement.**

47. The objection most frequently made to the validity of confiscation of Russia's sovereign assets as a countermeasure is that it would not satisfy the requirements of being temporary and reversible. As these critics argue, once Russia's assets have been seized, liquidated, and expended for the benefit of Ukraine, those same assets can no longer be returned to Russia, rendering the countermeasure of asset transfer permanent.

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<sup>47</sup> In this July 2022 decision, only on jurisdictional issues, not yet the merits or the damages, The Gambia sued Myanmar for genocide against the Rohingya. The court concluded that The Gambia had standing to bring the suit, since it alleged a violation of the Genocide Convention. In other words, the ICJ seems to have firmly endorsed the principle that any state has standing to make a claim for a violation of peremptory norms of international law. And, ultimately, it affirms the principle that The Gambia could eventually get an ICJ judgment assessing financial damages, and possibly more, against Myanmar.

<sup>48</sup> See e.g. New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, pp. 16-18; see also the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al., pp. 99, 112, 116-17, 165.

48. First, this objection incorrectly assumes that “reversibility” applies to the assets. Rather, countermeasures apply to Russia’s sovereign right to respect of its state assets, and not the assets themselves. In other words, the countermeasure is the suspension of Russia’s right to respect of its sovereign property rights that allows third-party states to confiscate Russia’s assets to pay Russia’s debts. By definition, countermeasures are taken against a state and not, as it were, *in rem* against an asset.<sup>49</sup> Thus, **the “reversibility” does not apply to the assets themselves, but rather the temporary and narrow de-recognition of Russia’s sovereign property rights under customary international law and its bilateral investment treaty (“BIT”) with Canada.** Russia’s sovereign right to reciprocal respect of state property does not cease to exist. It is suspended, dormant, until Russia returns to compliance with international law (i.e., makes full compensation to Ukraine) and the necessity for countermeasures disappears. To be clear, the payments made while countermeasures are in effect are not reversible nor should they be under international law. They simply reduce the final amount of reparations that Russia will owe to Ukraine.
49. Second, the reversibility objection incorrectly casts the reversibility principle under ARSIWA as an ironclad and inflexible requirement. Yet ARSIWA itself states that a countermeasure should be reversible “as far as possible,” and that **the duty to choose measures that are reversible is “not absolute.”**<sup>50</sup> In its commentary, the ILC explains that this language reflects a requirement that if the state “has a *choice* between a number of lawful *and* effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.”<sup>51</sup> But because it “may not be possible in all cases to reverse all of the effects of countermeasures,”<sup>52</sup> that duty to choose measures that are reversible is “not absolute.” In short, the ILC’s explanation of the reversibility principle is far less categorical than the opponents of transfer have suggested.
50. Accordingly, even *if* the transfer of Russia’s sovereign assets did not fully comport with the reversibility principle, this would be a prime example in which the expectation of

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<sup>49</sup> See New Lines Report on *Multilateral Asset Transfer: A Proposal for Ensuring Reparations to Ukraine*, by Yuliya Ziskina, et. al, p. 23; see also Section IV D(1)(d) of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>50</sup> ARSIWA, art. 49 cmt. 9.

<sup>51</sup> *Ibid.* (emphasis added).

<sup>52</sup> *Ibid.*

reversibility must yield to the more pressing need to pursue a countermeasure that would be most effective. As explained, Russia has brazenly violated international law, and the international community has responded with a series of escalating sanctions, including temporary and plainly reversible asset freezes. Russia's continued aggression in the face of these responses manifestly demonstrates their inadequacy, and G7 countries must choose a more effective lawful response available to them. In such a situation, ARSIWA's preference for reversibility plainly does not bar G7 countries from reaching for one of the most effective tools for bringing a belligerent country back into international order.<sup>53</sup>

51. In any event, Russia's obligation to pay reparation to Ukraine would, once Russia agrees to pay reparations, be adjusted by deducting the payments already made to Ukraine out of Russia's seized state assets. However, neither Ukraine nor the international community can afford to wait until Russia agrees to pay reparations, an outcome which at this stage seems almost impossible.
52. The damage suffered by Ukraine is already extensive, real and urgent. It has to be addressed in real time for the remedies to be effective. Otherwise, the scale of damage only grows larger until it becomes irremediable.
53. The debt Russia already owes to Ukraine exceeds the sum total of its frozen Central Bank Reserves. A year ago, on 9 September 2022, the joint statement by the World Bank, the European Commission and the Government of Ukraine estimated the current cost of reconstruction and recovery in Ukraine at \$349 billion.<sup>54</sup> A more recent report released on 23 March 2023 by the World Bank, Government of Ukraine, the European Commission and the United Nations estimated that the cost of reconstruction and recovery of Ukraine had grown to US \$411 billion. These figures are incredibly conservative estimates and carry on rising with more devastating attacks on Ukrainian infrastructure. Ukraine itself estimates that Russia has caused close to \$1 trillion damage<sup>55</sup> since the start of full-scale invasion of Ukraine on 24 February 2022.

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<sup>53</sup> See Section IV D(1)(d) of the Renew Democratic Initiative report on *The legal, practical and moral case for transferring Russian sovereign assets to Ukraine* by Laurence H. Tribe et al.

<sup>54</sup> <https://www.worldbank.org/en/news/press-release/2022/09/09/ukraine-recovery-and-reconstruction-needs-estimated-349-billion>

<sup>55</sup> In direct and indirect costs (according to President Zelensky's economic counsellor, Oleg Ustenko: <https://www.wionews.com/world/russian-invasion-has-caused-1-trillion-worth-of-damage-to-ukraine-report-518716>).

54. Thus, if Russia did agree to pay satisfactory compensation to Ukraine, the sums of reparation payable to Ukraine would far exceed the amounts of Russian assets held by the international community. Any potential compensation that Russia would be entitled to as a result of the seizure and the transfer of its assets to Ukraine would be dwarfed by the amount owed by Russia itself in reparations even if the war stopped tomorrow. For this reason, the credit that would be given to Russia in respect of sums already transferred for the rebuilding of Ukraine out of Russia's state assets would simply reduce the amount of reparations owed.

**2. Transferring assets to Ukraine will not set an unfavorable precedent (“unintended consequences” and “slippery slope” arguments).**

55. Among the most frequently voiced objections to transferring Russia's frozen assets to Ukraine is that doing so would set a dangerous precedent in the future. If exceptions to fundamental principles like reciprocal regard for sovereign property are invoked too often, objectors say, the principle could eventually be eroded altogether.

56. However, such concerns are fundamentally misplaced. First, Russia's conduct is fortunately exceedingly rare, if not unique, in the modern international system (arguably since World War II). There is already ample and substantial evidence that Russia's actions have violated international law, resulting in decisions by formal bodies like the UN General Assembly, the International Court of Justice, and the European Court of Human Rights (see Appendix 1). **Yet, there is no viable mechanism by which to hold Russia accountable** given its veto as a permanent member of the UN Security Council, the very body which 192 member states to the UN Charter tasked with the responsibility for taking prompt and effective action for the maintenance of international peace and security. **If Canada or any other country were to hold Russia accountable for this egregious behaviour by transferring its assets to victims of its aggression, it would not be doing so arbitrarily.**

57. Second, to the extent that this proposal sets a precedent, it sets a positive one. The norms against aggression, war crimes, and genocide are currently being tested to a degree the

world has never seen since WWII.<sup>56</sup> If states, considering similar acts of aggression, see that this conduct would be met with swift and severe consequences—such as the seizure of sovereign assets and their transfer to victims—then they are far more likely to make the rational decision to comply with their international obligations.<sup>57</sup> As Sir Henry Maine wrote in 1899 “*War appears to be as old as mankind, but peace is a modern invention*”.<sup>58</sup> Adopting lawful international measures aimed at preserving the peace can only be a good thing.

58. **In short, if Canada and other western states want to face fewer crises like that in Ukraine, they should send the unmistakable message to the international community that Russia’s conduct will not be tolerated, and should avoid sending the aggression-encouraging signal that such conduct will be met with hesitation and appeasement.**

59. Last, if Canada or other countries are worried about the precedent they may set and are dissatisfied with the limitations already written into law, the solution is to narrow the effect of the precedent that is set, not to abstain from action altogether.

### **3.Speculation about Russian retaliation should not stop needed action.**

60. A worry associated with seizing Russia’s frozen assets is that it could “provoke” Russia to retaliate, either in kind by seizing assets belonging to Canada and its allies, or by escalating its military operations.

#### *a. Retaliation through expropriation*

61. At the outset, because Russia is not a financial centre and the rouble is not a reserve currency, Russia does not hold other countries’ (including Canada’s) sovereign funds. Instead, Russia would have to settle for seizing assets belonging to Canadian private individuals and companies. But many of those companies already fled from Russia

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<sup>56</sup> And one must remember that it was not until the Kellogg-Briand Pact of 1928 (ratified by Germany, the US, Belgium, France, Britain, Italy, Japan, Poland, Czechoslovakia and Ireland) that warfare was renounced as an instrument of national policy.

<sup>57</sup> See generally Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Andrew T. Guzman, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

<sup>58</sup> Quoted in *The Invention of Peace and the Reinvention of War* (2002) by Professor Sir Michael Howard, at p.1.

following its full-scale invasion of Ukraine.<sup>59</sup> For the foreign companies that remain in Russia, either by choice or by necessity, Russia has already used “countermeasures” to justify the seizure of private property from countries that it deems “unfriendly” (i.e., any country that has levied sanctions against it), even though no valid case for countermeasures exists.<sup>60</sup>

62. In April 2023, for example, Russia seized power plants owned by Finnish and German companies.<sup>61</sup> And in July 2023, Russia placed two of the largest consumer-goods companies in the world, Carlsberg and Danone, under state control.<sup>62</sup> Given this rapid pace of expropriation and Putin’s own motivation to continue it, there is little reason to believe that the decision to seize Russia’s frozen assets would affect his decision to expropriate further.

*b. Retaliation through escalation of military operations*

63. There is speculation that if Canada and its allies seize Russia’s frozen assets, Russia might announce an intent to retaliate through military means in Ukraine or further. But it is unclear how Russia could meaningfully escalate its already-egregious conduct. From the beginning, Russia devoted the vast majority of its military resources to invading Ukraine and has not held back on using its resources,<sup>63</sup> and thus far, Russia has suffered setback after setback, costing it both lost equipment and a staggering number of casualties.<sup>64</sup> Every day, Putin loses the capacity to maintain Russia’s current operations in Ukraine, let alone meaningfully escalate them.

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<sup>59</sup> *Companies Are Getting Out of Russia, Sometimes at a Cost*, N.Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/article/russia-invasion-companies.html>; Jonathan Yerushalmy, *Bean counters: how Russia’s wealthy profited from exit of western brands*, GUARDIAN (June 14, 2023), <https://www.theguardian.com/world/2023/jun/14/sale-how-russia-wealthy-profited-from-exit-of-western-brands-starbucks-operations/>.

<sup>60</sup> Lawrence Summers, Philip Zelikow and Robert Zoellick on why Russian reserves should be used to help Ukraine, ECONOMIST (Jul. 27, 2023), <https://www.economist.com/by-invitation/2023/07/27/lawrence-summers-philip-zelikow-and-robert-zoellick-on-why-russian-reserves-should-be-used-to-help-ukraine>.

<sup>61</sup> Alexander Morrow, Gleb Stolyarov & Anne Kauranen, *Kremlin warns of more asset seizures after move against Fortum and Uniper*, REUTERS (Apr. 26, 2023), <https://www.reuters.com/business/energy/fortum-says-investigating-news-russian-asset-seizure-2023-04-26>.

<sup>62</sup> Georgi Kantchev & Saabira Chaudhuri, *Russia Steps Up Economic War With West, Seizing Assets of Big Conglomerates*, WALL ST. J. (July 17, 2023), <https://www.wsj.com/articles/russia-steps-up-economic-war-with-west-seizing-assets-of-big-conglomerates-e592f137?ns=prod/accounts-wsj>.

<sup>63</sup> Peter Weber, *Putin has committed 75 percent of Russia’s total military to the Ukraine war, Pentagon estimates*, WEEK (Mar. 17, 2022), <https://theweek.com/russo-ukrainian-war/1011404/putin-has-committed-75-percent-of-russias-total-military-to-the-ukraine>.

<sup>64</sup> Alexander Smith, *The ‘stunning’ scale of Russian deaths in Ukraine signals trouble ahead for Putin*, NBC NEWS (May 2, 2023), <https://www.nbcnews.com/news/world/russia-casualties-soldiers-killed-ukraine-counteroffensive-putin-war-rcna82380>.

64. Further escalation also appears unlikely given the measures that the G7 has already imposed upon Russia. Already, Canada and other countries have imposed a long list of sanctions on Russia, have provided Ukraine with military intelligence and military equipment, frozen billions of dollars of assets belonging to the Russian state and its nationals, and seized millions belonging to its oligarchs.<sup>65</sup> The US has also supplied Ukraine with a number of offensive military weapons, from cluster munitions to tanks to F-16 fighters, despite clear warnings from Russia that such weapons would cause it to escalate and retaliate. If these actions did not prompt Russia to retaliate, it is difficult to see why the transfer of Russia's assets (which have already been frozen for more than year) would.

#### 4. Bilateral Investment Treaties (BITs)

65. As some have noted, the transfer of Russia's sovereign assets could constitute a violation of G7 countries' BITs with Russia. All G7 members, except the US, have a BIT with Russia—including Canada.<sup>66</sup> But states have at least three separate defences that would likely prevail if Russia were to challenge the transfer of its state assets under its BITs with G7 countries.

66. First, there are substantial doubts about whether transfer of Russia's sovereign assets would even implicate a BIT's protections for investments.<sup>67</sup> Canada and other states could argue, for example, that Russia's reserves do not fit the definition of "investments" in their BITs or that the transfer of those reserves to Ukraine does not constitute an "expropriation" as defined in the BITs. G7 states could also argue that Russia is not an "investor" entitled to the protection of BITs. In Canada's BIT with Russia, for example, "investor" is defined to mean only "any natural person" or "any corporation, partnership, trust, joint venture, organization, association or enterprise."<sup>68</sup>

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<sup>65</sup> Alona Mazurenko, *US to give Ukraine money confiscated from Russian oligarchs for first time*, UKRAINSKA PRAVDA (Sept. 7, 2023), <https://www.pravda.com.ua/eng/news/2023/09/7/7418771/>.

<sup>66</sup> *Russian Federation*, International Investment Agreements Navigator, INVEST. POLICY HUB <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation> (last accessed Aug. 29, 2023).

<sup>67</sup> Anton Moiseienko, *Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options*, INT'L LAWS. PROJ. at 40 (July 2022), <https://www.wrmcouncil.org/wp-content/uploads/2022/07/Frozen-Russian-Assets-Ukraine-Legal-Options-Report-WRMC-July2022.pdf>.

<sup>68</sup> Agreement Between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (1991), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/632/download>. Further to the dissolution of the USSR in 1991, the treaty now binds Russia as the continuing state.

The Central Bank of Russia is certainly not a “physical” or “natural” person, and it is very likely not a “company” either.<sup>69</sup>

67. Second, Russia could face significant difficulties in enforcing its BIT against Canada because of Russia’s own repeated violations of the same BIT since February 2022. Russia’s own conduct could, at the least, provide Canada a strong “unclean hands” defence if Russia pursues arbitration under the BIT.<sup>70</sup>
68. Third, Canada could persuasively argue that Russia’s conduct toward Ukraine excuses its obligations to abide by its BIT with Russia. As an initial matter, Canada could argue that it was not observing its obligations to Russia under its BIT as a form of countermeasure.<sup>71</sup> Arbitral tribunals have explicitly accepted countermeasures as a valid defence pursuant to customary international law as applied to an investment agreement.<sup>72</sup> For example, in doing so, the ICSID in *Archer Daniels Midland v. Mexico* relied heavily on ARSIWA to determine the lawfulness of the countermeasure. Canada could also argue that its obligations under its BIT with Russia is inconsistent with its superseding obligation under international law, including the obligation to obtain reparations for victims and the UN Charter’s right to collective self-defence.<sup>73</sup>

## **5. Seizure of Russian state assets does not violate the international law of state immunity.**

69. This objection arises from the fundamental misunderstanding of the function and scope of the law of state immunity. As explained in Part 1(3) above, the doctrine of state immunity restricts only the operation of a state’s *judicial power* as against another state or assets of another state. It does not preclude Parliament of another state from mandating its executive from seizing assets that belong to another state in the exercise

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<sup>69</sup> In its 2023 merits judgment, the ICJ concluded that Bank Markazi, a bank in Iran, “cannot be characterized as a ‘company,’” despite the fact that it earned revenue from bonds held in a U.S. commercial bank and even paid taxes to the Iranian government on that revenue. *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Mar. 30, 2023), ¶¶ 49-54, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf>.

<sup>70</sup> See, e.g., *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Feb. 13, 2019), ¶¶ 122-23, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>; *Certain Iranian Assets (Iran v. United States of America)*, ICJ Judgment (Mar. 30, 2023), ¶¶ 82-83, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf> (requiring that an “unclean hands” defense establish a “nexus” between one state’s wrong and the claim, such as mutual violations of the same treaty).

<sup>71</sup> Parlett, n. 30;

<sup>72</sup> *ADM v. Mexico*, n. 31.

<sup>73</sup> See Vienna Convention on the Law of Treaties (1969), art. 53, 1155 U.N.T.S. 331 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”).



of the State's right to take countermeasures in response to serious breaches of international law obligations embodied in the UN Charter and the Genocide Convention owed to the international community as a whole. Even those academics arguing that sovereign immunity protection prevents the confiscation of central bank funds acknowledge that such immunity only applies to "measures of confiscation involving *judicia power*"<sup>74</sup> and not to the exercise of parliamentary will or executive power. The matter is explained best in the Cambridge Handbook of Immunities and International Law: "...it must be recalled that the rules pertaining to the immunity of States and State officials were created primarily to avoid the courts of one State to sit in judgment of another State, and to prevent private persons from litigating against foreign States before domestic courts. By contrast, immunity law was not created to curtail the foreign policy powers of States' executive or legislative branches..."<sup>75</sup>

## **6. Countermeasures can be deployed without the need for legislation**

70. In Canada, customary international law is automatically incorporated into Canada's common law. It follows that Canada may take lawful countermeasures with respect to suspending customary international obligations with respect to Russian state assets, provided that doing so does not violate domestic law.
71. As discussed above, given the provisions of the SIA, if the Canadian government were to commence judicial proceedings to forfeit Russian state assets as envisioned under the current SEMA (*i.e.* through application for a court order), Russia would likely claim its immunity to the proceedings.
72. Whilst the Canadian government may seize and transfer Russian state assets to Ukraine via executive order outside of the SEMA scheme, that would beg the question as to why the government chose to act outside the legislative scheme mandated by Parliament and may expose it to judicial review proceedings challenging such actions. Accordingly, given the existence of SEMA, the safest option would be to revise the scheme under SEMA to ensure that it is workable to achieve its intended objective, namely the forfeiture of both state and individual assets. The use of SEMA in respect of the Russian

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<sup>74</sup> See Ingrid (Wuerth) Brunk *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds* (2023) George Washington University Law Review.

<sup>75</sup> Tom Ruys *Immunity, Inviolability and Countermeasures – a Closer Look at Non-UN Targeted Sanctions*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW (2019).

state assets would amount to a domestic implementation of the countermeasure. However, should SEMA be used by the Canadian government in a different situation, and in respect of different state's assets, in each case any such further use of forfeiture orders under SEMA would have to be separately justified under the international law.

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## Appendix

### International Orders and Resolutions

**24 February 2022:** Russia launches a large-scale invasion against Ukraine.

#### United Nations

**25 February 2022:** a draft resolution deploring the invasion and calling for the withdrawal of Russian troops from Ukraine was introduced in the United Nations Security Council<sup>76</sup> but vetoed by Russia.<sup>77</sup> This prompted the Security Council to convene an emergency special session on the subject of Ukraine.

**27 February 2023:** the Security Council convened an emergency special session on the subject of Ukraine with the United Nations Council Resolution 2623.<sup>78</sup> An emergency special session is an unscheduled meeting of the United Nations General Assembly (“UNGA”) to make urgent recommendations for the maintenance of international peace and security in any instance where the Security Council fails to act owing to the veto of a permanent member. The mechanism for calling such an emergency special session was introduced in 1950 with the “Uniting for Peace” resolution of the UN General Assembly 377 which declares that “... *if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. ...*” Resolution 2623 was the 13th time the Uniting for Peace resolution has been invoked to call an emergency session of the General Assembly, including the 8<sup>th</sup> such invocation by the Security Council.<sup>79</sup>

**28 February 2022:** the Eleventh Emergency Special Session of the UN General assembly opened to address the Russian invasion of Ukraine. This session was adjourned on 2 March 2022 with the passing of the UNGA Resolution ES-11/1, and had since been reconvened a further five times resulting in the following resolutions:

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<sup>76</sup> See full text of the resolution here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/271/07/PDF/N2227107.pdf?OpenElement>.

<sup>77</sup> See the meeting record here: <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N22/269/25/PDF/N2226925.pdf?OpenElement>.

<sup>78</sup> See: <https://www.reuters.com/world/un-security-council-calls-rare-general-assembly-session-ukraine-2022-02-27/> (the vote for this resolution was procedural so Russia could not veto it).

<sup>79</sup> Resolution 377 A (V) of 3 November 1950. See, e.g. B Simma (ed), *The Charter of the United Nations: A commentary* (Oxford University Press, 1995), pp 231-232. 235-236. See a brief overview of the invocation of the “Uniting for Peace” resolution at [https://en.wikipedia.org/wiki/United\\_Nations\\_General\\_Assembly\\_Resolution\\_377#Invocation\\_of\\_General\\_Assembly\\_Resolution\\_377](https://en.wikipedia.org/wiki/United_Nations_General_Assembly_Resolution_377#Invocation_of_General_Assembly_Resolution_377).

1. **United Nations General Assembly Resolution ES-11/1 (adopted on 2 March 2022)** deplored “in the strongest terms the aggression by the Russian Federation against Ukraine in violation of art. 2(4) of the Charter” and demanded a full withdrawal of the Russian forces and a reversal of Russia’s decision to recognise the self-declared People's Republics of Donetsk and Luhansk.<sup>80</sup> (**Voting record:** 141 votes in favour; 5 against (Russia, Belarus, Syria, North Korea and Eritrea), 35 abstaining, and 12 absent)
2. **United Nations General Assembly Resolution ES-11/2 (adopted on 24 March 2022)**<sup>81</sup> reaffirmed the UN's former commitments and obligations under its Charter, and reiterated its demand that Russia withdraws from Ukraine's recognized sovereign territory; it also deplored, expressed grave concern over and condemned attacks on civilian populations and infrastructure. This resolution also affirmed 14 principles “of humanity, neutrality, impartiality and independence in the provision of humanitarian assistance.” (**Voting record:** 140 votes in favour; 5 against (Russia, Belarus, Syria, North Korea and Eritrea); 38 abstaining, and 10 absent).
3. **United Nations General Assembly Resolution ES-11/3 (adopted on 7 April 2022)**<sup>82</sup> suspended Russia’s membership in the United Nations Human Rights Council over "grave concern at the ongoing human rights and humanitarian crisis in Ukraine [...] including gross and systematic violations and abuses of human rights" committed by Russia. (**Voting record:** 93 votes in favour, 24 against, 58 abstaining, 18 absent.)
4. **United Nations General Assembly Resolution ES-11/4 (adopted on 12 October 2022)**<sup>83</sup> declared that the referendums held in the Donetsk, Kherson, Lugansk and Zaporizhzhia oblast, as well as their subsequent annexation by Russia, are invalid and illegal under international law and calls upon all states to not recognize these territories as part of Russia. Furthermore, it demands that Russia "immediately, completely and unconditionally withdraw" from Ukraine as it is violating its territorial integrity and sovereignty. This resolution reiterates principles that have been recognized in international law for decades, especially the principle that illegal use of force under the UN Charter cannot lead to legally recognizable annexations. (**Voting record:** 143 votes in favour, 5 against (Russia, Belarus, Syria, North Korea and Nicaragua), 35 abstaining and 10 absent). This resolution achieved more votes in favour of condemning Russia's actions than Resolution ES-11/1, the initial resolution on the Russian invasion of Ukraine.

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<sup>80</sup> See full text of the resolution, as adopted, here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement>

<sup>81</sup> See full text of the resolution, as adopted, here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/301/67/PDF/N2230167.pdf?OpenElement>

<sup>82</sup> See full text of the resolution, as adopted, here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/312/47/PDF/N2231247.pdf?OpenElement>

<sup>83</sup> See full text of the resolution, as adopted, here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/630/66/PDF/N2263066.pdf?OpenElement>.

5. **United Nations General Assembly Resolution ES-11/5 (adopted on 14 November 2022)**<sup>84</sup> recognising that under international law Russia will owe Ukraine reparations in respect of the damage caused by the war and stating that the UN General Assembly “Recognizes that *the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.*” (**Voting record:** 94 votes in favour, 14 against (Russia, Belarus, Syria, North Korea, Eritrea, Nicaragua, China, Cuba, Central African Republic, Zimbabwe, Ethiopia, Iran, Mali, Bahamas), 73 abstaining and 12 absent).
  
6. **United Nations General Assembly Resolution ES-11/6 (adopted on 23 February 2023)**<sup>85</sup> called for called for "a comprehensive, just and lasting peace in Ukraine" based on the principles of the Charter of the United Nations. (**Voting record:** 141 votes in favour, 7 against (Russia, Belarus, Syria, North Korea, Eritrea, Mali, Nicaragua), 32 abstaining and 13 absent).

### **International Court of Justice (ICJ): principal court of the UN**<sup>86</sup>

**26 February 2022:** Ukraine filed an application instituting proceedings against the Russian Federation before the ICJ<sup>87</sup>, the principal judicial organ of the United Nations, concerning “*a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*” (the “Genocide Convention”). In its Application, Ukraine contends, inter alia, that “*the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’, and then declared and implemented a ‘special military operation’ against Ukraine*”. Ukraine “*emphatically denies*” that such genocide has occurred and states that it submitted the

<sup>84</sup> See full text of the resolution, as passed, here <https://www.justsecurity.org/wp-content/uploads/2022/11/N2267912.pdf>; full transcript of the session is here: <https://press.un.org/en/2022/ga12470.doc.htm>)

<sup>85</sup> See full text of the resolution, as passed, here: [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_res\\_es\\_11\\_6.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es_11_6.pdf)

<sup>86</sup> The ICJ is the principal judicial organ of the United Nations. Notably, however, the court has no enforcement mechanism. It can refer countries who refuse to heed its rulings to the UN Security Council, where Russia has a permanent seat and would almost certainly veto any action against it.

<sup>87</sup> See: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-PRE-01-00-EN.pdf> (the ICJ press release states the application was filed on 26 February 2022, whilst Ukraine’s own application for provisional measures states that the application was filed on 25 February 2022: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-WRI-01-00-EN.pdf>)

Application “to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide”. In the Application, Ukraine also accuses the Russian Federation of “planning acts of genocide in Ukraine” and contends that Russia “is intentionally killing and inflicting serious injury on members of the Ukrainian nationality”.<sup>88</sup>

**17 March 2022:** the ICJ issued its ruling containing the following provisional measures: “(1) By thirteen votes to two,<sup>89</sup> The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine; ... (2) By thirteen votes to two, The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above; ... (3) Unanimously, Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve...”.<sup>90</sup>

## Council of Europe

### 15 March 2022:

- The Parliamentary Assembly unanimously adopted an Opinion<sup>91</sup> which considered that the Russian Federation can no longer be a member State of the Organisation.
- The Government of the Russian Federation informed the Secretary General of its withdrawal from the Council of Europe in accordance with the Statute of the Council of Europe and of its intention to denounce the European Convention on Human Rights.

**16 March 2022** – as from this date, after 26 years of membership, Russia is expelled from the Council of Europe by an unprecedented decision of the Committee of Ministers under Article 8 of the Statute of the Council of Europe.<sup>92</sup>

**16 September 2022** – Russia ceases to be a party to the European Convention on Human Rights<sup>93</sup>

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<sup>88</sup> The full text of the application by Ukraine is here: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

<sup>89</sup> The Russian and Chinese members of the ICJ voted against the first two provisional measures.

<sup>90</sup> See full text of the ICJ’s decision here: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf>.

<sup>91</sup> See text here: <https://pace.coe.int/en/files/29885/html>.

<sup>92</sup> See text of the decision here:

[https://search.coe.int/cm/pages/result\\_details.aspx?objectid=0900001680a5d7d9](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5d7d9). See also press report here: <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>

<sup>93</sup> See Council of Europe’s press release: <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022#:~:text=Following%20its%20expulsion%20from%20the,by%20the%20Committee%20of%20Ministers>.

## European Court of Human Rights (ECtHR)<sup>94</sup>

**28 February 2022:** Ukraine filed an application against Russian on grounds of “*massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine*”. Ukraine requested the court to take interim measures, which means “*urgent measures which apply only where there is an imminent risk of irreparable harm*”, according to the ECHR practice.

**1 March 2022:** the ECtHR granted urgent interim measures by calling on the Russian government to “*refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops*”.<sup>95</sup>

**22 March 2022** – ECtHR resolves to deal with applications directed against Russia in relation to the alleged violations of the Convention that occurred until 16 September 2022.

**1 April 2022** – ECtHR expanded its interim measures, including by ordering Russia to ensure the existence of evacuation routes which should allow civilians to seek refuge in safer regions of Ukraine, as opposed to forcing all civilians to evacuate to Russia only. This appears to be the first time in international jurisprudence that a court is effectively ordering a belligerent state to open specific evacuation routes, which must include the safer territory of the state on which a war is being fought.<sup>96</sup>

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<sup>94</sup> This is the court adjudicating on the obligations of each state which is party to the European Convention on Human Rights. Pursuant to the resolution of the ECtHR of 22 March 2022, the Court will deal with applications directed against Russia in relation to alleged violations of the Convention that occurred until 16 September 2022.

<sup>95</sup> See the ECtHR’s press release regarding its decision to grant urgent interim measures here: [https://jusmundi.com/en/document/decision/en-ukraine-v-russia-x-decision-granting-urgent-interim-measures-concerning-russian-military-operations-on-ukrainian-territory-tuesday-1st-march-2022#decision\\_20704](https://jusmundi.com/en/document/decision/en-ukraine-v-russia-x-decision-granting-urgent-interim-measures-concerning-russian-military-operations-on-ukrainian-territory-tuesday-1st-march-2022#decision_20704).

<sup>96</sup> See the ECtHR press release here: <file:///C:/Users/tyn/Downloads/Expansion%20of%20interim%20measures%20in%20relation%20to%20Russian%20military%20action%20in%20Ukraine.pdf>.