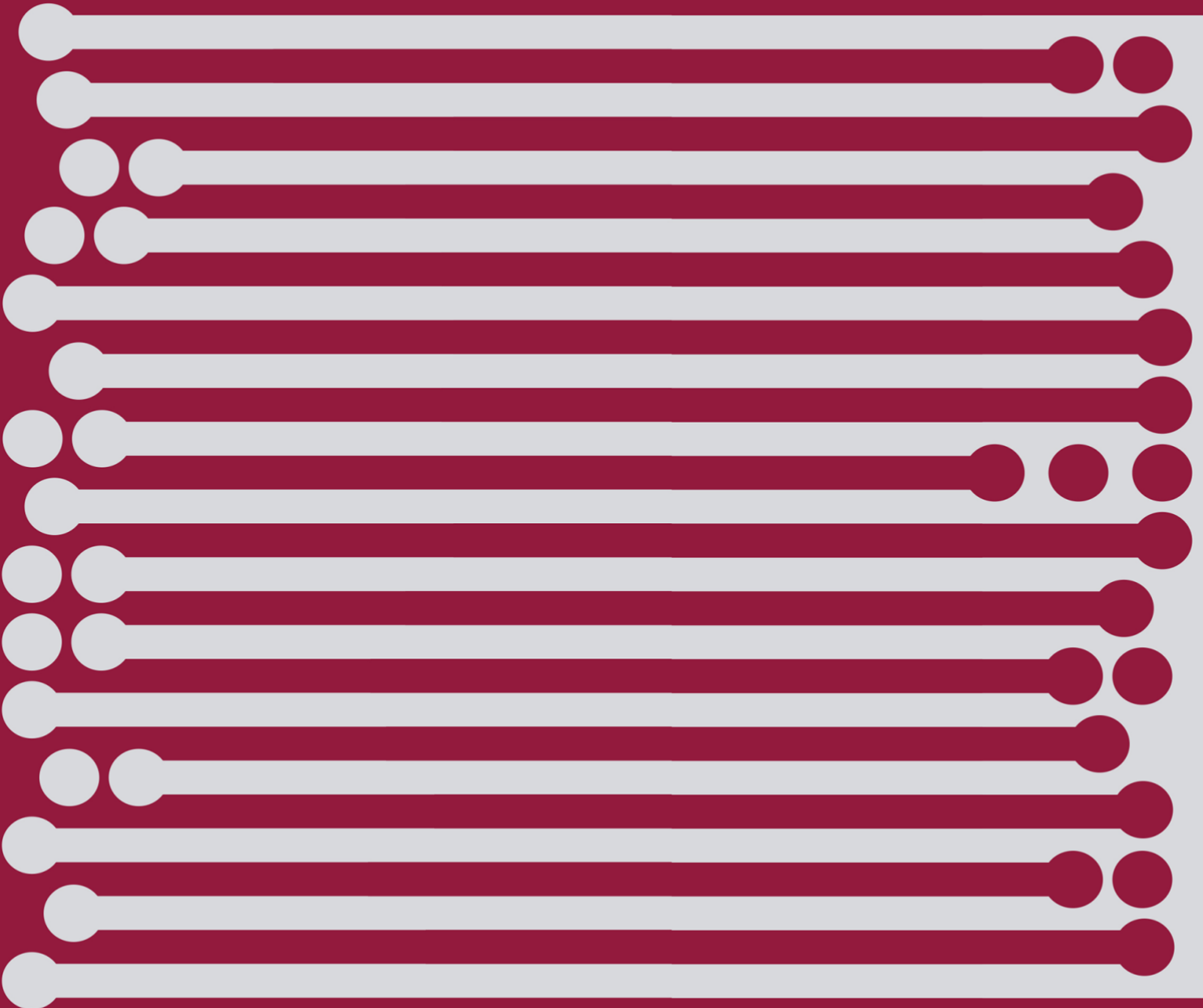


## Working Paper 42

# From sanctions to confiscation while upholding the rule of law

Andrew Dornbierer | February 2022



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# Executive summary

In light of recent world events, political leaders around the world have questioned whether it is justifiable to confiscate assets frozen under financial sanctions in order to redirect them to the victims of state aggression.

Some states have even sought to introduce legislative mechanisms to make it possible to confiscate an asset frozen under sanctions, purely on the basis that the asset has been made subject to a sanction. One state – Canada – has already done so.

The intention behind these mechanisms is clear: assets frozen under sanctions could be confiscated and repurposed to provide assistance and compensation to the victims of the sanctioned target. In the context of the Ukraine war, for example, proponents argue that these measures will allow states to permanently confiscate Russian-linked assets under sanction and redirect them to provide support to Ukraine.

## **The debate – should states be able to confiscate sanctioned assets<sup>1</sup> purely on the basis that they have been sanctioned?**

The justifiability and legality of mechanisms such as Canada's is currently the subject of debate. Two key issues include:

- Whether the confiscation of assets in such circumstances is acceptable in the context of established legal rights and norms; and
- Whether the confiscation of assets in such circumstances defeats the primary purpose of sanctions as a tool of coercion.

With regards to the first point, the lack of adequate judicial oversight included in such mechanisms, and the fact that these mechanisms aim to permanently deprive sanctioned targets of their assets, raises serious questions surrounding property and due process rights. If such a mechanism was introduced in Europe for example, it is likely to be challenged on the grounds that it violates Protocol 1 Article 1 as well as Article 6 of the European Convention on Human Rights.

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<sup>1</sup> Throughout this paper, the term 'sanctioned assets' is used as a shorthand to refer to assets of a sanctioned person or country, as per the definition at [\[https://www.lawinsider.com/dictionary/sanctioned-assets\]](https://www.lawinsider.com/dictionary/sanctioned-assets) (accessed 8 February 2023).

If such mechanisms were also applied to state-linked assets (such as sanctioned assets belonging to central banks) then this would also raise concerns regarding a possible infringement of domestic and international laws relating to state immunity.

With regards to the second point, permitting the confiscation of sanctioned assets arguably annuls the coercive purpose of sanctions regimes to act as a tool to persuade targets to cease their adverse behaviour. If states are permitted to confiscate sanctioned assets (and make it impossible for a target to retrieve their frozen assets) then this effectively removes any incentive for the target to change their behaviour. In such cases, rather than operating as tools of coercion, sanctions would instead primarily operate to punish a target and provide compensation to the victims for the harm that has been caused.

Of course, some have argued that there is a greater need for these latter objectives, particularly in the context of the war in Ukraine where financial assistance is required urgently. Others however argue that despite the urgency this situation presents, the long-term objective of sanctions should remain coercion, particularly if sanctioning states wish to compel the aggressing state, Russia, to contribute to post-war reconstruction efforts in the future. There are, in addition, several established avenues for seeking war reparations that should also be explored.

#### ***Other options through which to confiscate sanctioned assets***

Such established measures that states could adopt and apply to target sanctioned assets include:

- Traditional conviction based confiscation measures, including 'extended confiscation' mechanisms
- Non-conviction based confiscation (NCB) measures
- Unexplained wealth laws

These measures could be used to target:

- Assets that are involved in sanctions violations
- Sanctioned assets that are also the proceeds of crimes unrelated to the sanctions regime, such as corruption or organised crime offences)
- Unexplained wealth

While these avenues may be limited, and can only result in the permanent confiscation of a portion of sanctioned assets, states could take various steps to maximise their effectiveness. For example legislative amendments could be considered to broaden the scope of relevant terms like 'money laundering' and to specifically permit confiscated assets to be redirected to the victims of state aggression. Domestic and international

coordination could be improved by creating dedicated law enforcement bodies for example, or through participating in international coordination initiatives.

Importantly, these avenues target established criminal activity and/or include defined judicial processes through which a targeted person can challenge any attempts to confiscate their property. Therefore they can be applied without unacceptably infringing on legal rights.

Opting for mechanisms that abide by established legal rights will not only significantly increase the chance of recovering assets without subsequent legal challenges, but will also ensure that the very reason for targeting the assets in the first place – namely to seek justice and compensation for acts of aggression – is not undermined through the erosion of the rule of law.

# Introduction

In light of recent world events – and in particular the ongoing war in Ukraine – political leaders around the world have debated whether it is justifiable to confiscate assets frozen under war-related financial sanctions in order to redirect them to the victims of state aggression.

For example, when questioned whether sanctioned Russian funds could be used to compensate the damage caused in Ukraine, the European Council President, Charles Michel, stated:

*Personally, I'm absolutely convinced that this is extremely important not only to freeze assets but also to make [it] possible to confiscate [them], to make [them] available for the rebuilding country...<sup>2</sup>*

These sentiments have been echoed throughout the world. For example, Canada's Deputy Prime Minister, Chrystia Freeland told parliament last year:

*I can think of no better way to pay for the very expensive work of rebuilding Ukraine than with the seized assets of the Russian leadership that has waged this war.<sup>3</sup>*

Taking these sentiments a step further, some states have even sought to introduce new legislative bills to make this possible. One state, Canada, has passed such a bill. While this new mechanism has yet to be tested in the courts, assets frozen under sanctions can now legally be confiscated purely on the basis that the asset has been made subject to a sanctions regime.

While the motivation for creating such mechanisms to compensate victims of aggression is entirely understandable, the legality of these mechanisms is more debatable. This is particularly the case in the context of established legal rights as well as the traditional coercive purposes of imposing sanctions regimes.

In light of this, this Working Paper aims to provide a foundation for a discourse on this topic going forward. It does this through three parts.

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<sup>2</sup> I Somer, 'Interview: Donor conference on May 5 should become a starting point of the Marshall Plan for Ukraine', Interfax Ukraine, 5 May 2022, accessed 11 December 2022 at [<https://en.interfax.com.ua/news/interview/829655.html>].

<sup>3</sup> *Bill C-19 An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, Second Reading, House of Commons Debates 44-1, 1605 (Hon. Chrystia Freeland), accessed 1 December 2022 at [<https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-63/hansard#11655764>].



**Part 1** provides an explanation of the concept of ‘sanctions’. It outlines what the term ‘sanctions’ refers to in general, and what ‘financial sanctions’ are specifically. It explains the traditional objectives of these measures and what they are used to target. It also outlines the legal effect financial sanctions can have on the movement and ownership of assets, and whether states generally have the power to confiscate assets subjected to sanctions.

**Part 2** provides an overview of Canada’s approach to the confiscation of sanctioned assets, and discusses whether or not this approach could be adopted elsewhere, and particularly, whether it could be adopted in Europe.

**Part 3** provides an overview of available options that could be used by states to target sanctioned assets that are also the proceeds and instrumentalities of crime. Specifically, it explains how sanctioned assets could be confiscated in the context of sanctions violations and discusses traditional asset recovery mechanisms that could be used by states seeking to confiscate sanctioned assets on the basis of either sanctions offences or other offences (such as corruption or money laundering).

It should be noted that this paper does not aim to answer the question of whether or not it is morally correct to permanently confiscate assets linked to aggressor states. Instead it seeks to contribute to the current debate by discussing whether such efforts can be compatible with fundamental legal rights. It also examines whether or not such measures detract from the original purpose of sanctions. Finally, this paper also offers some alternative avenues that could be used by states seeking to confiscate funds – namely, asset recovery mechanisms.

As stated above, this paper only aims to act as a foundation for further discussion. Additional research is required to further examine the compatibility of confiscation options with established legal rights, and to identify additional options that may be available to lawfully increase the amount of funds that can be confiscated and repurposed towards victims of aggression (including those available through international law)

# 1 What are sanctions and do they allow states to confiscate assets?

## 1.1 What are 'sanctions'?

A 'sanction' is a broad term used to refer to official restrictive measures imposed by a national or international body on a specific country or countries, groups, entities or individuals with the objective of influencing their policy or conduct.

Sanctions imposed by one country are referred to as 'unilateral sanctions' while sanctions imposed by a number of countries in unison – generally in connection to an international body such as the United Nations (UN) or the European Union (EU) – are usually referred to as 'multilateral sanctions'.

A 'sanctions regime' generally refers to a specific set of unilateral or multilateral sanctions that have a common theme or objective. This theme can be precise, and relate to a specific situation in a specific geographical area (such as the conflict in Syria) or it can be more general and relate to a wider issue (such as terrorism, cyber-attacks or the proliferation and use of chemical weapons).<sup>4</sup> The EU, for example, currently has over 40 different sanctions regimes in place.<sup>5</sup>

Generally, sanctions measures may include arms embargoes, travel restrictions, the freezing of assets or economic-based restrictions concerning specific sectors of economic activity (such as import and export restrictions, bans on investment and prohibitions regarding the supply of services).<sup>6</sup> The term 'sanctions' can also refer to broader measures such as the removal of diplomatic ties or the banning of a particular country's participation in certain sporting events.

This paper will predominantly refer to unilateral or multilateral sanctions that impose assets-based restrictions on a defined target. Specifically, this paper will focus on *financial sanctions* that seek to freeze or temporarily seize assets that are held, controlled or owned by the government of another country, or certain individuals and legal entities associated with that government. In line with this, the paper will largely make references to the

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<sup>4</sup> 'European Union Sanctions', European Union, accessed 30 November 2022 at [[https://www.eeas.europa.eu/eeas/european-union-sanctions\\_en#10704](https://www.eeas.europa.eu/eeas/european-union-sanctions_en#10704)].

<sup>5</sup> 'Overview of sanctions and related tools', European Commission, accessed 30 November 2022 at [[https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-tools\\_en](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-tools_en)].

<sup>6</sup> 'Different types of sanctions', European Council, accessed 30 November 2022 at [<https://www.consilium.europa.eu/en/policies/sanctions/different-types/>].

numerous financial sanctions regimes relating to Russian government-linked assets that are currently in place as a result of the war in Ukraine.

## 1.2 How are sanctions intended to achieve their objective?

Sanctions impose restrictions on a target in pursuit of an overarching objective (e.g. to halt the aggressive action of a particular state actor). Sanctions mechanisms traditionally seek to achieve their overall objective by:

- modifying the behaviour of the target;
- weakening the target or reducing their capacity to continue the relevant behaviour; and/or
- publicly denouncing their behaviour.<sup>7</sup>

Sanctions are typically 'coercive measures applied to effect change or constrain action' in that they:

*...entail the use of financial instruments and institutions to apply coercive pressure on transgressing parties—government officials, elites who support them, or members of non governmental entities—in an effort to change or restrict their behavior.<sup>8</sup>*

In the European context, EU sanctions seek to 'bring about a change in the policy and conduct of those targeted', in a way that minimises 'adverse consequences for those not responsible for the policies or actions leading to the adoption of sanctions'.<sup>9</sup>

EU sanctions may also seek to inhibit the capacity of a target to conduct adverse behaviour by imposing costs or obstacles for the target, or by weakening it economically. For example, the multiple restrictions imposed by the EU on Russia since its annexation of Crimea in 2014 and invasion of Ukraine in 2022 are designed 'to weaken Russia's economic base, depriving it of critical technologies and markets and significantly curtailing its ability to wage war'.<sup>10</sup>

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<sup>7</sup> 'International Sanctions', Ministerio de Asuntos Exteriores, Unión Europea y Cooperación (Spain), accessed 30 November 2022 at [\[https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/SancionesInternacionales.aspx\]](https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/SancionesInternacionales.aspx).

<sup>8</sup> The Swiss Federation in Cooperation with the United Nations Secretariat and the Watson Institute for International Studies Brown University, 'Targeted Financial Sanctions: A Manual for Design and Implementation', 2001, accessed 10 December 2022 at [\[https://www.eda.admin.ch/eda/en/dfa/foreign-policy/international-organizations/un/un-peace-security/sanctions.html\]](https://www.eda.admin.ch/eda/en/dfa/foreign-policy/international-organizations/un/un-peace-security/sanctions.html).

<sup>9</sup> 'How and when the EU adopts sanctions', European Council, accessed 30 November 2022 at [\[https://www.consilium.europa.eu/en/policies/sanctions/\]](https://www.consilium.europa.eu/en/policies/sanctions/).

<sup>10</sup> 'EU restrictive measures against Russia over Ukraine (since 2014)', European Council, accessed 30 November 2022 at [\[https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/\]](https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/).

It is important to note that sanctions are generally not intended to be ‘punitive’,<sup>11</sup> but of course, they are often perceived as ‘punishments’ regardless of the intended purpose behind them.<sup>12</sup>

### 1.3 What are financial sanctions and what effect do they have on assets?

Financial sanctions (sometimes referred to as ‘asset freezes’) impose restrictions on a target’s assets. As alluded to above, the ‘target’ of financial sanctions can be a natural person (or a group of natural persons), legal persons or states.<sup>13</sup> The sanctions will generally apply regardless of whether the relevant target owns or controls the asset directly, indirectly or jointly with another party.

Generally, financial sanctions prohibit the movement and use of a target’s assets, as well as the transfer of their ownership.

For example, the law governing financial sanctions in Luxembourg, the *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, permits the imposition of ‘restrictive measures’ such as the ‘freezing’ of funds, which includes:

*‘...any action to prevent any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the use of the funds, including portfolio management.’<sup>14</sup>*

As another example, the *International Emergency Economic Powers Act* permits the US President to:

*‘...investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or*

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<sup>11</sup> ‘Overview of Sanctions and Related Tools’, European Commission, accessed 30 November 2022 at [[https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-tools\\_en](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-tools_en)].

<sup>12</sup> ‘The West is running out of ways to punish Putin’, CNN, accessed 30 November 2022 at [<https://edition.cnn.com/2022/04/05/politics/putin-ukraine-war-atrocities-western-punishment/index.html>].

<sup>13</sup> ‘Sanctions FAQs’, Norton Rose Fulbright, 2015, accessed 9 December 2022 at [<https://www.nortonrosefulbright.com/en/knowledge/publications/9106cdb9/sanctions-faqs#section2>].

<sup>14</sup> (unofficial translation) *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, Article 2(4), accessed 6 December 2022 at [[https://www.cssf.lu/wpcontent/uploads/L\\_191220\\_restrictive\\_measures\\_eng.pdf](https://www.cssf.lu/wpcontent/uploads/L_191220_restrictive_measures_eng.pdf)].

*exercising any right, power, or privilege with respect to, or transactions involving, any property...'.<sup>15</sup>*

Depending on the relevant law, financial sanctions generally apply to a wide range of tangible and intangible assets such as cash, cheques, bank deposits, stocks, shares and real estate, as well as broader economic advantages such as debt instruments.<sup>16</sup>

Financial sanctions will also generally prohibit the provision of resources to the target. In other words, they will often ban individuals and companies from making payments to or supplying goods to a target.<sup>17</sup>

The restrictions imposed by sanctions are generally not permanent and if the circumstances allow they can be lifted (i.e. if the objective of the sanction regime has been achieved).

If an asset is subjected to a financial sanctions mechanism, this does not have an effect on the overall ownership of the asset in question. While such mechanisms may permit the freezing of assets, they do not in themselves typically permit the permanent confiscation of these assets (with the exception of Canada's sanctions mechanisms, which will be discussed below).

## 1.4 Who creates financial sanctions?

### 1.4.1 Sanctions at an international level

At an international level, sanctions are generally issued by the United Nations Security Council (UNSC), the Organization for Security and Cooperation in Europe (OSCE), or the EU.

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<sup>15</sup> *International Emergency Economic Powers Act*, 50 U.S. Code § 1702 (a)(1)(B), accessed 6 December 2022 at [<https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>].

<sup>16</sup> For example, Luxembourg's *Law of 19 December 2020 on the implementation of restrictive measures in financial matters* can apply restriction on 'financial assets and economic advantages of any kind, including cash, cheques, claims on money, drafts, money orders and other payment instruments, deposits with financial institutions or other entities, balances on accounts, debts and debt securities, public or private debt instruments, publicly or privately traded securities and shares and other equity securities, certificates of title, bonds, promissory notes, warrants, unsecured securities, derivative contracts, interest, dividends or other income or capital gains received on assets, credit, right of set-off, guarantees, performance bonds or other financial commitments, letters of credit, bills of lading, sales contracts, as well as any document evidencing an interest in a fund or financial resources, and any other instrument of export financing' (unofficial translation), see *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, Article 2(4) accessed 6 December 2022 at [[https://www.cssf.lu/wpcontent/uploads/L\\_191220\\_restrictive\\_measures\\_eng.pdf](https://www.cssf.lu/wpcontent/uploads/L_191220_restrictive_measures_eng.pdf)].

<sup>17</sup> *The 11<sup>th</sup> Report of Session 2016-2017: The Legality of EU Sanctions*, The United Kingdom Parliament EU Committee, accessed 4 December 2022 at [<https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/102/10202.htm>].

For the most part however, these sanctions are not in force at a state level until an individual state implements the sanctions through their respective legislative or executive branch of government. For example in Switzerland, the *Federal Act on the Implementation of International Sanctions (Embargo Act) of 22 March 2002* authorises the Federal Council (the executive body of the federal government) to implement sanctions imposed by the UNSC, the OSCE or the EU.<sup>18</sup> Similarly in Austria, the *Federal law on the implementation of international sanctions (Sanctions Act 2010)* empowers the Federal Government to implement regulations to impose EU and UNSC-drafted sanctions.<sup>19</sup>

It is not always compulsory for a member state to implement a sanctions regime authored by an international organisation of which they are a member. Exceptions to this are sanctions regimes created by the EU. These sanctions are drafted and passed by the European Council through a Common Foreign and Security Policy (CFSP) Council Decision, and are adopted by the member states of the EU by unanimity. The precise scope of the measures are set out in an accompanying Council Regulation.<sup>20</sup> These regulations are directly binding on member states of the EU and must be implemented.<sup>21</sup>

#### 1.4.2 Sanctions at domestic level

While states predominantly implement sanctions drafted at an international level, many states also have legal mechanisms that allow them to draft and impose sanctions autonomously.

For example, the US has created a number of financial sanctions regimes through executive orders issued by the President under the *International Emergency Economic Powers Act*.<sup>22</sup> In the United Kingdom, the government is empowered to make sanctions regulations autonomously under the *Sanctions and Anti-Money Laundering Act*.<sup>23</sup>

<sup>18</sup> The EU would qualify under this law as one of Switzerland's 'most important trading partners' (see: *Federal Act on the Implementation of International Sanctions (Embargo Act) of 22 March 2002*, Article 1, accessed 8 December 2022 at [<https://www.fedlex.admin.ch/eli/cc/2002/564/en>]).

<sup>19</sup> *Federal law on the implementation of international sanctions (Sanctions Act 2010)*, Article 2, accessed 8 December 2022 at [<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20006805>].

<sup>20</sup> 'Adoption and review procedure for EU sanctions', The European Council, accessed 4 December 2022 at [<https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/>].

<sup>21</sup> *Treaty on the Functioning of the European Union*, Article 288, accessed 1 December 2022 at [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT>].

<sup>22</sup> *International Emergency Economic Powers Act*, 50 U.S. Code § 1701-1708 accessed 6 December 2022 at [<https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>].

<sup>23</sup> *Sanctions and Anti-Money Laundering Act 2018*, Section 1(2), accessed 7 December 2022 at [<https://www.legislation.gov.uk/ukpga/2018/13/introduction>].

## 1.5 Where do sanctions apply and how are they enforced?

How sanctions are applied and enforced will depend on the nature of the particular sanction and the legal framework of the individual state that is seeking to impose it.

The ability to apply and actually enforce a financial sanction is limited to the jurisdictional reach of the state that implements it. For most states, this will mean that financial sanctions can only be effectively imposed on assets, individuals and companies that are within their geographical borders, or which operate externally but still have a connection to the state.

For example, the financial restrictions under Luxembourg's *Law of 19 December 2020 on the implementation of restrictive measures in financial matters* apply to:

- Natural persons of Luxembourg nationality who reside or operate in Luxembourg or abroad;
- Legal persons having their registered office, a permanent establishment or their centre of main interests on the territory of Luxembourg and which operate in or from Luxembourg or abroad;
- Branches of Luxembourg legal persons established abroad;
- Branches in Luxembourg of foreign legal persons; and
- All other natural and legal persons operating on the territory of Luxembourg.<sup>24</sup>

It is important to note however that sanctions imposed by some states may be applied beyond geographical boundaries to natural and legal persons that do not necessarily have a strong connection to sanctioning jurisdictions. For example, the US will often enforce 'secondary sanctions', which extend compliance obligations to individuals and entities residing in foreign countries that are not directly subject to US jurisdiction. Such sanctions prohibit foreign parties from dealing with US-sanctioned parties, and are intended to deter non-US individuals and entities from engaging in transactions that are deemed contrary to US foreign policy interests. Failure to comply with secondary sanctions may result in an entity's access to, or exclusion from, the US financial system and the US marketplace.<sup>25</sup>

Countries often have a designated agency with the responsibility of investigating and prosecuting sanctions violations. For example in the US, the responsibility for enforcing sanctions primarily rests with the US Department of the Treasury's Office of Foreign Assets

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<sup>24</sup> *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, Article 3, accessed 6 December 2022 at [[https://www.cssf.lu/wp-content/uploads/L\\_191220\\_restrictive\\_measures\\_eng.pdf](https://www.cssf.lu/wp-content/uploads/L_191220_restrictive_measures_eng.pdf)].

<sup>25</sup> 'Overview of US Sanctions laws and regulations', Norton Rose Fulbright, 6 June 2022, accessed 7 December 2022 at [<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/220606-overview-of-us-sanctions-laws-and-regulations.pdf>].

Control (OFAC). In the European Union, the day-to-day administration and enforcement of EU sanctions is conducted by designated agencies in each member state.

An authority empowered to enforce sanctions will often have wide enforcement powers enabling them to identify assets that fall under sanctions regimes. For example, OFAC has broad subpoena powers and can impose civil fines for violations (criminal violations however are handled by the US Department of Justice).<sup>26</sup>

## 1.6 Are financially sanctioned assets considered the proceeds of crime?

It is important to distinguish between assets that are targeted by financial sanctions and assets that are 'instrumentalities' or 'proceeds' of crime.

If the assets of a government, individual or entity are targeted by a sanctions regime this does not in itself mean that these assets are connected to, or derived from, crime. Instead this only means that the author of the sanctions regime has deemed it necessary to include these assets within the sanctions regime on the basis that their restriction may contribute to the overall objective of that regime.<sup>27</sup>

Of course, in many cases, instrumentalities or proceeds of crime may inadvertently still fall under a sanctions regime on the basis that the target being sanctioned acquired his or her assets through criminality. Furthermore, in some countries, assets frozen under sanctions may subsequently become proceeds of crime if they are involved in a sanctions violation (this is discussed in more detail below).

## 1.7 If assets subjected to financial sanctions are not the proceeds of crime, can they be confiscated?

For the most part, financial sanctions mechanisms do not permit the permanent confiscation of an asset solely on the basis that the asset has been subjected to the sanctions regime. Unlike legal frameworks surrounding proceeds of crime – which do

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<sup>26</sup> 'Sanctions FAQs', Norton Rose Fulbright, 2015, accessed 9 December 2022 at [\[https://www.nortonrosefulbright.com/en/knowledge/publications/9106cdb9/sanctions-faqs#section2\]](https://www.nortonrosefulbright.com/en/knowledge/publications/9106cdb9/sanctions-faqs#section2).

<sup>27</sup> There was one exception to this amongst the countries assessed for this paper. Under Latvia's *Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing*, any funds directly or indirectly controlled by a person who is 'included on the list of subjects of sanctions drawn up by the Cabinet on the basis of the *Law on International Sanctions and National Sanctions of the Republic of Latvia* with the view to combat the involvement in terrorist activity or productions, possession, transportation, use or distribution of weapons of mass destruction' shall 'be considered the proceeds of crime' (see: the *Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing*, Section 4(3)(2), accessed 5 December 2022 at [\[https://likumi.lv/ta/en/id/178987-law-on-the-prevention-of-money-laundering-and-terrorism-financing\]](https://likumi.lv/ta/en/id/178987-law-on-the-prevention-of-money-laundering-and-terrorism-financing)).



permit the permanent confiscation of assets – financial sanctions mechanisms normally only permit temporary restrictions regarding the movement and use of assets.

There are some exceptions to this that are worth noting. For example, some countries will permit the confiscation of sanctioned assets if they are involved in a proven violation of a sanctions regime. As such violations are considered a criminal offence, the assets involved in this crime are potentially subjected to standard criminal confiscation mechanisms (this is explained further in 3.2.1 below).<sup>28</sup>

Other countries will include provisions in their sanctions law that permit the confiscation of sanctioned assets if certain special circumstances arise. For example, the *International Emergency Economic Powers Act* permits the US President to confiscate property subjected to sanctions if:

- ‘the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals’; and
- the President determines that the owner of the asset ‘planned, authorized, aided, or engaged in such hostilities or attacks against the United States’.<sup>29</sup>

The confiscated assets can then subsequently be ‘administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States’.<sup>30</sup> The US used this power in 2003 to confiscate USD 1.7 billion of Iraqi government-linked assets that had been blocked under a sanctions regime.<sup>31</sup>

Switzerland’s *Embargo Act* permits the forfeiture of assets subject to financial sanctions ‘in the event that their continued lawful use is not guaranteed’, and ‘irrespective of the criminal

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<sup>28</sup> For example, under Luxembourg’s *Criminal Code*, an infringement of the law governing sanctions regimes is considered a predicate offence to money laundering. Consequently, the assets involved in the commission of such an offence may be considered proceeds of crime and subjected to ‘special confiscation’ (see: *Criminal Code*, Articles 31, 506-1, accessed 6 December 2022 at [[https://legilux.public.lu/eli/etat/leg/code/penal/20220812#art\\_506-1](https://legilux.public.lu/eli/etat/leg/code/penal/20220812#art_506-1)]; *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, Article 10, accessed 6 December 2022 at [[https://www.cssf.lu/wp-content/uploads/L\\_191220\\_restrictive\\_measures\\_eng.pdf](https://www.cssf.lu/wp-content/uploads/L_191220_restrictive_measures_eng.pdf)]).

<sup>29</sup> *International Emergency Economic Powers Act*, 50 U.S. Code § 1702 (a)(1)(C), accessed 6 December 2022 at [<https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>].

<sup>30</sup> *Ibid.*

<sup>31</sup> *Executive Order 13290 – Confiscating and Vesting Certain Iraqi Property*, 20 March 2003, accessed 6 December 2022 at [<https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030320-10.html>]; E Andrews ‘A Nation at War: Iraqi Assets; Bush Asks Seizure of \$1.7 Billion Held in U.S.’, *New York Times*, 22 March 2003, accessed 6 December 2022 at [<https://www.nytimes.com/2003/03/22/world/a-nation-at-war-iraqi-assets-bush-asks-seizure-of-1.7-billion-held-in-us.html>].

liability of any particular person'.<sup>32</sup> The exact situations in which this forfeiture mechanism could be applied, however, is unclear.

Arguably the most controversial exception exists in Canada, which was recently introduced as a response to Russia's aggressive war against Ukraine starting on 24 February 2022. In June 2022, Canada amended two of its laws governing sanctions – the *Special Economic Measures Act* and the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* – to include significant powers of confiscation.

The *Special Economic Measures Act* enables the Government of Canada to take economic measures (including the freezing of assets) if they are 'of the opinion that' one of the following circumstances has occurred:

- An international organisation of states or association of states, of which Canada is a member, has made a decision or a recommendation or adopted a resolution calling on its members to take economic measures against a foreign state;
- A grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis;
- Gross and systematic human rights violations have been committed in a foreign state; or
- A national of a foreign state, who is either a foreign public official or an associate of such an official, is responsible for or complicit in acts of significant corruption.<sup>33</sup>

Following this year's amendments, the Canadian government can now also apply to the court for an order to permanently confiscate an asset that has been frozen for one of the above reasons.

In deciding whether or not to permit confiscation, the court is only required to confirm that:

- 1) The asset in question has been 'described' in a measure made by the government under the Act to sanction it; and
- 2) The asset 'is owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person'.<sup>34</sup>

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<sup>32</sup> *Federal Act on the Implementation of International Sanctions (Embargo Act) of 22 March 2022*, Article 13, accessed 8 December 2022 at [<https://www.fedlex.admin.ch/eli/cc/2002/564/en>].

<sup>33</sup> *Special Economic Measures Act*, Section 4, accessed 7 December 2022 at [<https://laws-lois.justice.gc.ca/eng/acts/S-14.5/page-1.html>].

<sup>34</sup> *Ibid.*, Section 5.4.

Notably, the court is not required to adjudicate on whether any wrongdoing has occurred, or whether the assets in question have come from lawful (or unlawful) sources. Practically speaking, the new amendments have granted the state the power to confiscate an asset purely on the basis that the government made a decision to financially sanction the asset. Similar amendments were also made to the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, which empowers the Government of Canada to impose financial sanctions in specific circumstances of perceived corruption or the killing of journalists and rights activists.<sup>35</sup>

The powers granted by these amendments have sparked mixed reactions.<sup>36</sup> A similar amendment was proposed by US legislators in March 2022, according to which the President would have been empowered to specifically confiscate sanctioned assets of ‘foreign persons whose wealth is derived in part through corruption linked to or political support for the regime of Russian President Vladimir Putin’.<sup>37</sup> This Act however has stalled in the Senate following legal rights concerns.

The debate surrounding the justifiability of such mechanisms, and whether or not states should introduce them, is discussed in the next part of this paper.

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<sup>35</sup> Specifically, sanctions may be imposed on foreign nationals under this mechanism when, in the opinion of the Governor in Council, they are responsible for, or complicit, in acts of corruption, or alternatively in the ‘extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek to expose (i) illegal activity carried out by foreign public officials; or (ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections.’ (see: *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, Section 4, accessed 7 December 2022 at [<https://laws.justice.gc.ca/eng/acts/J-2.3/page-1.html>]).

<sup>36</sup> It should be noted that amongst the countries examined for this paper, Latvia also has a mechanism that appears to permit the permanent confiscation of sanctioned assets, but only in the context of sanctions imposed to combat terrorism (see: the *Law on the Prevention of Money Laundering and Terrorism Financing, 2008*, Section 4(3)(2) and the *Criminal Law, 1999*). Note that it was not possible to confirm whether or not this mechanism had ever been successfully applied.

<sup>37</sup> *Amendment in the Nature of a Substitute to H.R. 6930 Offered by Mr. Malinowski of New Jersey*, 3 March 2022, accessed 9 December 2022 at [[https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/MALINJ\\_075%20ASSET%20SEIZURE%20ACT.pdf](https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/MALINJ_075%20ASSET%20SEIZURE%20ACT.pdf)]; *H.R 6930 Asset Seizure for Ukraine Reconstruction Act*, 3 March 2022, accessed 7 February 2023 at [<https://www.congress.gov/bill/117th-congress/house-bill/6930/text/ih>].

## 2 Should states be permitted to confiscate sanctioned assets simply on the basis that the government has frozen them?

The war in Ukraine has ignited an extensive discussion over whether or not a state should have powers to permanently confiscate assets frozen under financial sanctions.

Legislators and politicians around the world are pushing for the introduction of measures that would permit states to confiscate assets purely on the basis that the government of the day has passed a decision to freeze them under a sanctions mechanism.

The intention behind these mechanisms is clear: assets frozen under sanctions should be confiscated and repurposed to provide assistance and compensation to the victims of the sanctioned target. In the context of the Ukraine war, proponents argue that these measures will allow states to permanently confiscate Russian-linked assets and redirect them to provide support to Ukraine.

For example, the new confiscation mechanism in Canada's *Special Economic Measures Act* includes provisions for the repurposing of funds along these lines, and empowers the government to use any confiscated funds 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
- (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.<sup>38</sup>

Legislators in jurisdictions beyond Canada have also pushed for similar powers. For example, as noted above, the US introduced a bill in early 2022 that seeks to permit the government to specifically confiscate Russian-linked funds under sanction and repurpose them 'for the benefit of the people of Ukraine'.<sup>39</sup>

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<sup>38</sup> *Special Economic Measures Act*, Section 5.6, accessed 7 December 2022 at [<https://laws-lois.justice.gc.ca/eng/acts/S-14.5/page-1.html>].

<sup>39</sup> *Amendment in the Nature of a Substitute to H.R. 6930 Offered by Mr. Malinowski of New Jersey*, 3 March 2022, accessed 9 December 2022 at [[https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/MALINJ\\_075%20ASSET%20SEIZURE%20ACT.pdf](https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/MALINJ_075%20ASSET%20SEIZURE%20ACT.pdf)].

Regardless of the understandable motivation for these types of mechanisms, there has been significant debate over whether or not it is justifiable to create mechanisms that permit the confiscation of financially sanctioned assets. The arguments for and against the introduction of mechanisms of this kind are focused on two broad questions:

- Firstly, whether the confiscation of assets in such circumstances is acceptable in the context of established legal rights and norms; and
- Secondly, whether the confiscation of assets in such circumstances defeats the primary purpose of sanctions as a tool of coercion.

## 2.1 Does the confiscation of sanctioned assets contravene established legal rights and norms?

Most legal jurisdictions guarantee certain rights relating to the ownership and enjoyment of property. In Europe, property rights are protected by the *European Convention of Human Rights* (ECHR), which guarantees that ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions’ and that no one ‘shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law...’.<sup>40</sup> In Canada, the *Bill of Rights* protects ‘the right of... the enjoyment of property and the right not to be deprived thereof except by due process of the law’.<sup>41</sup> The right to due process is also similarly protected under most legal jurisdictions.<sup>42</sup>

Confiscation mechanisms such as the Canadian mechanism described above effectively permit a government to not only freeze a party’s assets, but permanently deprive them of those assets, with very little judicial oversight. Consequently, critics argue that this runs contrary to the rule of law and that these mechanisms may not be justified in the context of property and due process rights.

Under the Canadian mechanism, the threshold for subjecting a person to a sanctions regime is already somewhat low, and is based on the ‘opinion’ that certain circumstances exist (e.g. a grave breach of international peace or security has occurred).<sup>43</sup> Furthermore,

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<sup>40</sup> *European Convention on Human Rights*, Protocol 1, Article 1, accessed 8 December 2022 at [[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)].

<sup>41</sup> *Canadian Bill of Rights*, Article 1(a), accessed 8 December 2022 at [<https://laws-lois.justice.gc.ca/eng/acts/c-12.3/page-1.html>].

<sup>42</sup> For example, the right to due process is covered by Article 6 of the *European Convention on Human Rights*.

<sup>43</sup> *Special Economic Measures Act*, Section 4, accessed 7 December 2022 at [<https://laws-lois.justice.gc.ca/eng/acts/S-14.5/page-1.html>].

the specifications on the type of person that can be subjected to a sanctions regime are also very broad, and include ‘any person’ in a foreign state.<sup>44</sup>

In addition to this, as stated above, once the government has made a decision to subject a person’s asset to financial sanctions, this asset can then be forfeited permanently through a simple judicial process where the government is only required to demonstrate that the asset was sanctioned in the first place, and that it is ‘owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person’.<sup>45</sup>

Further, while the process under this mechanism does include an opportunity for an innocent third party to claim an interest in the property before it is forfeited, the overall process does not require any judicial finding of wrongdoing by the affected foreign national, and does not include a defined legal threshold on which an affected person can argue against the merits of forfeiture.<sup>46</sup> The role of the judiciary in this process is arguably non-existent.<sup>47</sup> As noted in the Canadian Parliament:

*...a court would be hard pressed to disagree with an order by government to seize assets on grounds that have to do with international peace and security and which will surely be couched in all manner of privileged and classified information. In such situations, I fear the court will be largely a rubber stamp dressed up as the rule of law.<sup>48</sup>*

Consequently, critics argue that this mechanism may not be justified in the context of rule of law and property rights and could be challenged on the basis that it permits the permanent confiscation of property without due process.

Similar concerns regarding rights infringements have also been raised in other jurisdictions. For example, the above mentioned bill introduced in the US in March 2022 was ultimately opposed by the American Civil Liberties Association on the basis of due process concerns, and specifically that it did not include a mechanism through which a person could challenge

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<sup>44</sup> Ibid., Section 4(2).

<sup>45</sup> Ibid., Section 5.4.

<sup>46</sup> ‘Sanction. Confiscate. Compensate. Briefing: Comparative Laws for Confiscating and Repurposing Russian Oligarch Assets’, Redress, 2022, accessed 8 December 2022 at [<https://redress.org/wp-content/uploads/2022/09/Briefing-on-Comparative-Laws.pdf>].

<sup>47</sup> The Canadian mechanism has not yet been applied at this stage.

<sup>48</sup> *Bill S-217, An Act respecting the repurposing of certain seized, frozen or sequestered assets*, 3rd reading, Senate Debates 44-1, 1550 (Hon Yuen Pau Woo) accessed 8 December 2022 at [[https://sencanada.ca/en/content/sen/chamber/441/debates/035db\\_2022-04-26-e](https://sencanada.ca/en/content/sen/chamber/441/debates/035db_2022-04-26-e)]. Note, Bill S-217 was a precursor to Bill C-19, in which the amendments to the Special Economic Measures Act were eventually included and passed.

the decision to confiscate.<sup>49</sup> A new mechanism is currently being proposed that provides a greater emphasis on due process.<sup>50</sup>

### 2.1.1 Would a mechanism of this kind in Europe contravene the ECHR?

In response to the war in Ukraine, a number of EU leaders have also called for more expansive confiscation mechanisms to target assets linked to the Russian government.<sup>51</sup> As noted however in the EU's *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy* ('Sanctions Guidelines'), any such restrictive measures:

*...must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy in full conformity with the jurisprudence of the EU Courts.*<sup>52</sup>

Consequently any attempts to introduce a mechanism such as Canada's will be scrutinised on whether or not it complies with the rights outlined in the ECHR, including both the property rights covered under Protocol 1 Article 1 and the right to due process outlined in Article 6. It is unclear at this stage how the European Court of Human Rights would interpret this issue.

On the one hand, jurisprudence from the court has already emphasised that regular sanctions restrictions should respect fundamental rights – including the right to due process

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<sup>49</sup> *Amendment in the Nature of a Substitute to H.R. 6930 Offered by Mr. Malinowski of New Jersey*, 3 March 2022, accessed 9 December 2022 at [[https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/MALINJ\\_075%20ASSET%20SEIZURE%20ACT.pdf](https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/MALINJ_075%20ASSET%20SEIZURE%20ACT.pdf)]; J Stein, 'ACLU helped to defeat plan to seize Russian oligarchs' funds for Ukraine', *Washington Post*, 8 April 2022, accessed 9 December 2022 at [<https://www.washingtonpost.com/us-policy/2022/04/08/aclu-ukraine-russia-oligarchs/>].

<sup>50</sup> The bill instead sought to establish 'a working group to determine the legal mechanisms that may be used to seize assets belonging to certain foreign persons (i.e., individuals and entities) affiliated with Russia's political leadership and addresses related issues' and 'determine the constitutional mechanisms by which the President may take steps to seize and confiscate assets belonging to any sanctioned foreign person whose wealth is derived through support for or corruption related to the regime of Russian president Vladimir Putin' (see: *H.R. 6930 – Asset Seizure for Ukraine Reconstruction Act*, United States Congress, accessed 10 December 2022 at [<https://www.congress.gov/bill/117th-congress/house-bill/6930>]). A subsequent bill has now been introduced that would create special 'administrative' confiscation powers specifically connected to the war in Ukraine (this bill is further explained and referenced in footnote 57 below).

<sup>51</sup> For example in May 2022, a joint letter from Lithuania, Slovakia, Latvia and Estonia called on EU members to identify legal avenues to confiscate funds already frozen in Europe belonging to Russian individuals, entities and the central bank, see: 'Baltics, EU uses frozen assets for Ukraine reconstruction', *Central European Initiative*, 30 May 2022, accessed 9 December 2022 at [<https://www.cei.int/ansa/108846>]; 'Joint statement by Estonia, Latvia, Lithuania and Slovakia Calling to use the frozen Russian assets for rebuilding Ukraine' accessed 9 December 2022 at [<https://www.politico.eu/wp-content/uploads/2022/05/24/Joint-statement-RU-assets-Ukraine-final-05.2379.pdf>].

<sup>52</sup> *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the Eu Common Foreign and Security Policy*, Council of the European Union, 2018, p.46, accessed 9 December 2022 at [<https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>].

– and a confiscation mechanism similar to that of Canada would likely attract higher scrutiny in this regard on the basis that it would have a permanent and potentially ‘punitive’ effect.<sup>53</sup>

On the other hand, additional jurisprudence has also established that many rights protected by the ECHR are not absolute, and can be infringed upon in certain appropriate circumstances. Specifically, there is a possible argument that such confiscation mechanisms may be acceptable if they are deemed a proportionate means of pursuing the ‘public interest’.<sup>54</sup>

### 2.1.2 Would the confiscation of assets linked to a foreign state violate laws on community and investment protection?

There are also wider concerns over whether measures permitting the confiscation of state assets in particular (such as those belonging to a foreign central bank) would violate international norms regarding sovereign immunity.

Customary international law generally provides immunity to the assets of a foreign state from judicial action in another state.<sup>55</sup> This immunity is also often guaranteed in domestic laws, such as the US *Foreign Sovereign Immunities Act*. While it can be argued that the freezing of a foreign state’s assets under sanctions does not violate this immunity (on the grounds that the freezing measure is imposed outside of a judicial action) it will be difficult to argue that the court-ordered confiscation of the same sanctioned assets is not a violation.

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<sup>53</sup> As a general rule, EU sanctions (and asset freezes in particular) are of a temporary and non-punitive nature (see e.g. judgment of the ECJ in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para. 358; judgment of the General Court in Case T-47/03, *Sisan v. Council*, para. 101). Although sanctions inevitably entail a restriction of the right to property, they are not intended to result in a permanent deprivation thereof. This has several implications, notably on the standard of proof required for the adoption of CFSP sanctions, the assessment of their proportionality (notably with respect to the right to property), and the (absence) of the need to prove a criminal offence (under Article 49(1) of the Charter of Fundamental Rights of the EU). Therefore, from both legal and sanctions policy perspectives, it is important to preserve the temporary and non-criminal nature of sanctions to avoid raising the procedural and evidentiary thresholds required for the adoption of sanctions in the first place.

<sup>54</sup> T. Koch, C. Somers-Joce, and E. Rowland, ‘Enacting ECHR compliant measures to confiscate property: imposing sanctions on Russian oligarchs for the invasion of Ukraine’, Oxford University, 2022, accessed 8 December 2022 at [<https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/enacting-echr-compliant-measures-confiscate/>].

<sup>55</sup> I Brunk ‘Immunity from Execution of Central Bank Assets’ in T Ruys, N Angelet, L Ferro (eds.), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019, accessed 9 December 2022 at [[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3125048](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125048)]; K F Achermann, ‘Völkerrechtliche Grundlagen und Hürden für eine Einziehung russischer Gelder und wirtschaftlicher Ressourcen’, *suis generis*, 2022, p.133-142, accessed 16 December 2022 at [[https://suisgeneris-verlag.ch/img/uploads/articles/oa\\_pdf-213-1663575294.pdf](https://suisgeneris-verlag.ch/img/uploads/articles/oa_pdf-213-1663575294.pdf)].



It is technically possible for legislators to create a confiscation mechanism directed at state assets that doesn't require a judicial order. For example, the US recently confiscated assets of the Afghan central bank this way,<sup>56</sup> and a current bill in the US is also proposing to empower the President to administratively confiscate Russian central bank assets through an administrative process.<sup>57</sup> Such mechanisms, however, are likely to attract scrutiny on the basis of due process concerns.

Notably, immunities of this kind can also be extended to the assets of individuals, if those individuals are acting in a state capacity.<sup>58</sup> Consequently, there is also an argument that judicial actions concerning the assets of such individuals could similarly invoke immunity claims under both international and domestic laws (at least to the extent that the individuals could show that they are using such assets for state purposes).<sup>59</sup>

As a final note, efforts to confiscate sanctioned funds may also face scrutiny under international economic law. Specifically, in the context of the war in Ukraine, states may have previously signed international agreements with Russia guaranteeing the protection of certain investments in their jurisdiction, particularly against expropriation. For example,

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<sup>56</sup> 'FACT SHEET: Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan', The White House, 11 February 2022, accessed 9 December 2022 at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/11/fact-sheet-executive-order-to-preserve-certain-afghanistan-central-bank-assets-for-the-people-of-afghanistan/>; L H Tribe and J Lewin, '\$100 Billion. Russia's Treasure in the U.S. Should Be Turned Against Putin', New York Times, 15 April 2022, accessed 9 December 2022 at <https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html?searchResultPosition=1>; I Wuerth, 'Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?', Lawfare, 7 March 2022, accessed 9 December 2022 at <https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks>.

<sup>57</sup> This process – which is currently in bill form as a proposed amendment to the *FY2023 National Defense Authorisation Act* – would apply specifically to the context of the war in Ukraine, and would permit the President to authorise the administrative seizure of property and their repurposing towards humanitarian purposes in Ukraine. The drafters of the bill claim it will also ensure due process by 'requiring notice to the asset owner and providing judicial review, including a right to appeal'. It is unclear at this stage whether this process will be enacted, and if so, how it will operate. See: 'Senators Offer Russian Asset Seizure Legislation', United States Foreign Relations Committee, 4 October 2022, accessed 12 December 2022 at <https://www.foreign.senate.gov/press/rep/release/senators-offer-russian-asset-seizure-legislation>; 'Risch, Whitehouse Offer Legislation to Repurpose Sovereign Russian Assets for Ukraine' United States Foreign Relations Committee, 4 October 2022, accessed 12 December 2022 at <https://www.foreign.senate.gov/press/rep/release/risch-whitehouse-offer-legislation-to-repurpose-sovereign-russian-assets-for-ukraine>; Also see 'Text of Amendments; Congressional Record Vol. 168, No.158', Sec. 1283. Authority to Provide Additional Assistance to Ukraine Using Assets Confiscated from the Central Bank of the Russian Federation and other Sovereign Assets of the Russian Federation, accessed 1 February 2023 at <https://www.congress.gov/congressional-record/volume-168/issue-158/senate-section/article/S5572-1>.

<sup>58</sup> K F Achermann, 'Völkerrechtliche Grundlagen und Hürden für eine Einziehung russischer Gelder und wirtschaftlicher Ressourcen', *suis generis*, 2022, p.133-142, accessed 16 December 2022 at [https://suisgeneris-verlag.ch/img/uploads/articles/oa\\_pdf-213-1663575294.pdf](https://suisgeneris-verlag.ch/img/uploads/articles/oa_pdf-213-1663575294.pdf).

<sup>59</sup> *Ibid.*; 'State immunity', Swiss Federal Department of Foreign Affairs, accessed 16 December 2022 at <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/privileges-and-immunities/state-immunity.html>.

Switzerland signed an agreement of this kind with the former Soviet Union.<sup>60</sup> If this is the case, attempts to confiscate certain Russian sanctioned assets could potentially be challenged on the grounds that they would violate a bilateral investment agreement such as this.<sup>61</sup>

## 2.2 Does the confiscation of sanctioned assets defeat the purpose of sanctions as a tool of coercion? And if so, is this justified?

A second major question regarding the permanent confiscation of sanctioned assets is whether such measures defeat the original purpose of imposing sanctions.

As noted previously, financial sanctions traditionally aim to influence the behaviour of the target. They also seek to weaken the target and reduce its capacity to continue their adverse behaviour. Moreover, sanctions are typically not intended to be punitive.

This is specifically the case in the context of financial sanctions issued by the EU. As stated in the EU's Sanctions Guidelines:

*In general terms, restrictive measures are imposed to bring about a change in policy or activity by the targeted country, part of a country, government, entities or individuals. They are preventive, non-punitive, instruments which should allow the EU to respond swiftly to political challenges and developments. Sanctions should be used as part of an integrated and comprehensive policy approach involving political dialogue, complementary efforts and other instruments.*<sup>62</sup>

This interpretation is also somewhat reinforced in international law through the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* which outlines that

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<sup>60</sup> K F Achermann, 'Völkerrechtliche Grundlagen und Hürden für eine Einziehung russischer Gelder und wirtschaftlicher Ressourcen', *suis generis*, 2022, p.133-142, accessed 16 December 2022 at [\[https://suisgeneris-verlag.ch/img/uploads/articles/oa\\_pdf-213-1663575294.pdf\]](https://suisgeneris-verlag.ch/img/uploads/articles/oa_pdf-213-1663575294.pdf); *Russian Federation - Switzerland BIT (1990)*, accessed 16 December 2022 at [\[https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2853/russian-federation---switzerland-bit-1990-\]](https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2853/russian-federation---switzerland-bit-1990-).

<sup>61</sup> K F Achermann, 'Völkerrechtliche Grundlagen und Hürden für eine Einziehung russischer Gelder und wirtschaftlicher Ressourcen', *suis generis*, 2022, p.133-142, accessed 16 December 2022 at [\[https://suisgeneris-verlag.ch/img/uploads/articles/oa\\_pdf-213-1663575294.pdf\]](https://suisgeneris-verlag.ch/img/uploads/articles/oa_pdf-213-1663575294.pdf).

<sup>62</sup> Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the Eu Common Foreign and Security Policy, Council of the European Union, 2018, p.46, accessed 9 December 2022 at [\[https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf\]](https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf).

'countermeasures' (such as sanctions) can be imposed to induce a behaviour change, but only so far as they are reversible.<sup>63</sup>

Confiscating sanctioned assets arguably annuls the coercive purpose of sanctions regimes. If states are permitted to confiscate sanctioned assets then this effectively removes any incentive for the target to change their behaviour. In such cases, rather than operating as tools of coercion, sanctions would instead primarily operate to punish a target and provide compensation to the victims for the harm that has been caused.

Some have argued that there is a greater need for these latter objectives, particularly in the context of the war in Ukraine. Specifically, if states were empowered to confiscate sanctioned Russian assets, this would allow them to 'provide help where help is so pressing needed' and would permit them to 'secure funds that are needed to support Ukraine now as it defends itself, and in the future as it repairs itself'.<sup>64</sup>

Others have argued however, that sanctions should primarily remain a tool of coercion. As noted in Canadian parliamentary debates:

*...justice and restitution are important objectives, but so is the objective of inducing a change in behaviour. The latter is in effect the classical motivation for imposing a sanction. A sanctioned asset that is frozen has the potential for the asset to be returned to the owner if that person changes his or her behaviour in accordance with the objective of the sanction. On the other hand, a sanctioned asset that is repurposed removes any incentive for the owner to change.*<sup>65</sup>

There is also an argument that retaining the traditional coercive objective of a sanctions regime will also facilitate efforts to rebuild victim states following acts of aggression. As outlined by European Commissioner for Justice Didier Reynders in the context of Ukraine, Russian assets currently under sanction could remain sanctioned as long as necessary to compel Russia to contribute to post-war reconstruction efforts:

<sup>63</sup> This instrument limits countermeasures to 'the non-performance for the time being of international obligations of the State taking measures towards the responsible State' and shall 'be taken in such a way as to permit the resumption of performance of the obligations in question' (see: *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Article 49, accessed 16 December 2022 at [[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)]).

<sup>64</sup> *Bill S-217, An Act respecting the repurposing of certain seized, frozen or sequestered assets*, 3rd reading, Senate Debates, 44-1, at 1540-1550 (Hon. Stan Kutcher) accessed 8 December 2022 at [[https://sencanada.ca/en/content/sen/chamber/441/debates/035db\\_2022-04-26-e](https://sencanada.ca/en/content/sen/chamber/441/debates/035db_2022-04-26-e)].

<sup>65</sup> *Bill S-217, An Act respecting the repurposing of certain seized, frozen or sequestered assets*, 3rd reading, Senate Debates 44-1, 1550 (Hon Yuen Pau Woo) accessed 8 December 2022 at [[https://sencanada.ca/en/content/sen/chamber/441/debates/035db\\_2022-04-26-e](https://sencanada.ca/en/content/sen/chamber/441/debates/035db_2022-04-26-e)].

*The goal is not to seize for the sake of it. Rather, the goal is to ensure Russia's participation in the reconstruction of Ukraine, since it's Russia's invasion that created the need for it.<sup>66</sup>*

### 3 Do other options exist to facilitate confiscation and reparation?

If states want to actively pursue the confiscation of funds so that they can be redirected to victims of another state's aggression, there are a number of more established measures that states could adopt and apply to help achieve this objective, including:

- Conviction based confiscation measures;
- Non-conviction based confiscation measures; and
- Unexplained wealth (illicit enrichment) laws.

These avenues are less controversial than the mechanism mentioned in Part 2, on the basis that they target established criminal activity, or at the very least, include defined judicial processes through which a targeted person can challenge any attempts to confiscate their property.

These measures could be used to target sanctioned assets that:

- are involved in a sanctions violation offence;
- are the proceeds of other offences (e.g. corruption or fraud); or
- can be considered 'unexplained wealth'.

This Part will first provide a brief explanation of these tools and will then examine how they can be used to target assets connected to sanctions violations specifically, and wider crimes more generally. It will also outline some steps that states could take to increase the chance of applying these tools successfully.

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<sup>66</sup> G Baczyńska, 'Explainer – EU's headache with seizing – not just freezing – Russian assets', Thomson Reuters, 25 July 2022, accessed 10 December 2022 at [<https://www.reuters.com/article/ukraine-crisis-eu-sanctions-idUSL8N2Z12RQ>].

## 3.1 An explanation of traditional asset recovery tools

### 3.1.1 Conviction based confiscation mechanisms

Virtually all states have mechanisms that permit a court, upon the conviction of a crime, to permanently confiscate any assets that are shown to be the proceeds or instrumentalities of that crime. These mechanisms can be included as part of the punishments relating to a specific offence, or can be applied through separate ‘proceeds of crime’ legislation encompassing all offences (such as the UK’s *Proceeds of Crime Act*).

### 3.1.2 Non-conviction based confiscation mechanisms

Many states also have non-conviction based (NCB) confiscation mechanisms (also referred to as ‘civil recovery’ or ‘civil forfeiture’ or ‘non-conviction based forfeiture’ mechanisms).

NCB confiscation mechanisms permit a state to confiscate assets where it can be demonstrated to a civil standard of proof (e.g. ‘on the balance of probabilities’) that the assets were derived from, or used in, criminal activity. Critically, NCB mechanisms do not require a criminal conviction before they can be applied.

NCB mechanisms do not exist in all jurisdictions. Furthermore, the scope of these mechanisms can vary significantly in the states where they do exist. For instance, traditional NCB mechanisms can only be applied in specific circumstances, such as where a charged individual has absconded or died before trial and a conviction has become unattainable. Other NCB mechanisms, however, can be applied much more broadly to virtually all circumstances where it is possible to prove, to a civil standard, that certain assets are connected to criminal activity.<sup>67</sup>

### 3.1.3 Unexplained wealth (illicit enrichment) laws

A number of states around the world have civil-procedure based laws that reverse the burden of proof onto a person to demonstrate the lawful sources of their assets. In accordance with these laws (known commonly as unexplained wealth or illicit enrichment laws), if a person is unable to demonstrate, to a civil standard, that their assets were

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<sup>67</sup> For example, the US has a very broad NCB mechanism under *18 U.S. Code § 981*; The United Kingdom also has a broad NCB mechanism under Part 5 of the *Proceeds of Crime Act 2002*.

derived from lawful sources, then the state is empowered to confiscate them.<sup>68</sup> The vast majority of civil mechanisms of this kind apply to all people, not only political exposed persons.

Traditional forms of unexplained wealth laws do not require any proof whatsoever of criminal activity before a burden of proof is reversed onto a person to explain the lawful sources of their assets. There are some versions of this mechanism however that require the state to first establish a 'reasonable suspicion' or a 'reasonable belief' that certain assets are connected to crime before a person is required to explain them. In any case, this evidential threshold is arguably less onerous than the civil burden required by the NCB confiscation mechanisms described above.

## 3.2 How could asset recovery tools be used to target the sanctioned assets of individuals and entities?

The tools listed above could be adopted and used by states to achieve the confiscation of sanctioned assets through several avenues. These are explained below.

### 3.2.1 Using asset recovery tools to target assets involved in a sanctions violation

Transactions that violate a sanctions regime are a criminal offence in many countries. If a sanctioned asset is provably involved in a violation of this kind, some countries will permit the confiscation of this asset through conviction based and NCB confiscation mechanisms.

The mechanisms permitting confiscation in this context usually either exist in the sanctions law itself, or may be applied through wider legislative instruments.

#### ***Direct mechanisms for confiscation within sanctions laws***

For example, Canada's *United Nations Act* (an additional sanctions law to the Canadian laws mentioned previously) contains provisions that make it a criminal offence to contravene sanctions measures made under the Act. In addition to the potential imposition of prison sentences and fines, the Act includes a conviction based confiscation measure whereby '[a]ny property dealt with contrary to any order or regulation... may be seized and detained and is liable to forfeiture' through court proceedings.<sup>69</sup>

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<sup>68</sup> A full list of these jurisdictions is contained in the Basel Institute on Governance's comprehensive study of unexplained and illicit wealth provisions, see: A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel Institute on Governance, 2021, available at [\[https://illicitenrichment.baselgovernance.org\]](https://illicitenrichment.baselgovernance.org).

<sup>69</sup> *United Nations Act*, Section 3, accessed 11 December 2022 at [\[https://laws-lois.justice.gc.ca/eng/acts/U-2/page-1.html\]](https://laws-lois.justice.gc.ca/eng/acts/U-2/page-1.html).

### ***Indirect mechanisms for confiscation using wider laws***

Other states take a less direct approach and apply their existing confiscation based or NCB confiscation mechanisms from wider legislative instruments to violations of the sanctions law. The application of these mechanisms will often be on the basis that the violation of the sanctions law falls under a general definition of unlawful activity, or is even potentially considered a predicate action to money laundering.

For example in the US, a sanctions violation falls under the definition of ‘specified unlawful conduct’ under its money laundering-related laws (18 U.S. Code § 1956 and 18 U.S. Code § 1957), and therefore any assets involved in this conduct can be subjected to NCB confiscation under the state’s ‘civil forfeiture’ mechanism (18 U.S. Code § 981). Additionally, by virtue of a separate law again (28 U.S. Code § 2461) these assets may also be subjected to conviction based confiscation in the event that a person is convicted for the original violation.

Luxembourg takes a similar approach. While Luxembourg’s sanctions law does not include a mechanism for confiscation in itself, the *Criminal Code* includes a violation of the sanctions law as a predicate action to the money laundering offence, and therefore makes it possible for the assets involved in the violation to be confiscated under a ‘special confiscation procedure’.<sup>70</sup> Luxembourg’s confiscation mechanism can even be applied in cases where the property in question does not belong to the person who committed the infringement.<sup>71</sup> Moreover, the application of the mechanism can be applied with or without a conviction.<sup>72</sup>

Similarly in Liechtenstein, a violation of the *Law of the 10<sup>th</sup> of December 2008 on the enforcement of international sanctions* can be considered a predicate action to the offence of money laundering under the *Criminal Code*, with any assets involved in the offence liable to confiscation.<sup>73</sup> Also in Switzerland, as a serious sanctions violation can be punished by up to five years in prison, this qualifies a violation of this kind as a possible money laundering offence – invoking powers of confiscation.<sup>74</sup>

<sup>70</sup> *Criminal Code*, Articles 506-1, 31, accessed 6 December 2022 at [https://legilux.public.lu/eli/etat/leg/code/penal/20220812#art\\_506-1](https://legilux.public.lu/eli/etat/leg/code/penal/20220812#art_506-1); *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, Article 10, accessed 6 December 2022 at [https://www.cssf.lu/wp-content/uploads/L\\_191220\\_restrictive\\_measures\\_eng.pdf](https://www.cssf.lu/wp-content/uploads/L_191220_restrictive_measures_eng.pdf).

<sup>71</sup> *Criminal Code*, Article 31(3), accessed 6 December 2022 at [https://legilux.public.lu/eli/etat/leg/code/penal/20220812#art\\_506-1](https://legilux.public.lu/eli/etat/leg/code/penal/20220812#art_506-1).

<sup>72</sup> Ibid.

<sup>73</sup> *Criminal Code of 24 June 1987*, Articles 165, 19a, 20, accessed 8 December 2022 at <https://www.gesetze.li/konso/1988.37>.

<sup>74</sup> *Federal Act on the Implementation of International Sanctions (Embargo Act) of 22 March 2022*, Article 9 para. 2, accessed 15 December 2022 at <https://www.fedlex.admin.ch/eli/cc/2002/564/en>; *Criminal Code*, Articles 305, 70, accessed 15 December 2022 at [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en).

### ***Use of these mechanisms to confiscate assets involved in sanctions violations***

While targeting sanctioned assets through mechanisms such as these may not lead to the confiscation of all sanctioned assets (unlike the mechanism described in Part 2 of this paper) they can permit states to at least confiscate any assets involved in a subsequent attempt to violate a sanctions regime.

The confiscation of assets in this way is also less likely to result in legal rights challenges. This process requires proof of a defined criminal activity (a sanctions violation), which is evidenced through an appealable judicial procedure, therefore making it more difficult to contest on due process concerns. Furthermore, the fact that the confiscation process only arguably targets the proceeds and instrumentalities of a crime (i.e. the assets provably involved in the sanctions violation) means that it is also less likely that it will be successfully challenged on the grounds that it violates property rights.<sup>75</sup>

This avenue, and the amount of assets that can be confiscated under it, can also be maximised through ensuring that the scope of the relevant sanctions offence is as wide as possible. For instance, the definition of property covered by the law should take into account all forms of tangible and intangible assets that can, and should, be subjected to sanctions, including digital currencies. Additionally, countries can potentially widen the scope of the sanctions violation to cover individuals and entities outside of its jurisdiction that facilitate the circumvention of sanctions within the jurisdiction. This will cover cases where individuals and entities seek to circumvent sanctions by transferring property via third countries to disguise their true origin or destination.<sup>76</sup>

As noted above, a large number of states around the world already classify the violation of sanctions as a criminal offence. In Europe for example, the majority of EU states have enacted such offences.<sup>77</sup> Furthermore, following a European Council decision on 28 November 2022, the violation of the EU's restrictive measures will be added to the list of EU crimes included in the *Treaty on the Functioning of the European Union*. This means the approach to sanctions violations, and the designation of these acts as offences, will

<sup>75</sup> For example, as stated in the *High Court (Ireland) Gilligan v Criminal Assets Bureau* [1997] IEHC 106, 1 January 1998 at [136], in the context of a challenge to property rights imposed by Ireland's forfeiture mechanism under the Proceeds of Crime Act: '[t]he right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held'; It should also be noted that any new laws designating certain sanctions violations as crimes should also take into account rights relating to the retroactive application of laws (for instance, in Europe, any new laws along these lines would need to be applied in line with Article 7 of the *European Convention on Human Rights*).

<sup>76</sup> N Sichevlyuk, 'Confiscation of assets of the Russian Federation and oligarchs: how Ukraine's partners plan to act', *European Pravda*, 27 October 2022, accessed 12 December 2022 at [<https://www.eurointegration.com.ua/articles/2022/10/27/7149494/>].

<sup>77</sup> 'Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis', The European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (the 'Genocide Network'), December 2021, p.22, accessed 11 December 2022 at [<https://www.eurojust.europa.eu/publication/expert-report-prosecution-sanctions-restrictive-measures-violations-national-jurisdictions/>].



become more consistent throughout the region.<sup>78</sup> If states are seeking avenues to confiscate sanctioned funds, a relatively easy option will be to ensure that an already existing sanctions offence includes a penalty that permits confiscation – either through the law itself, or through ensuring that already established conviction based and NCB measures in other laws can be applied to the assets involved in the violation.

As a final note, many states do already have significant criminal and civil penalties in place for sanctions violations. For example, under Luxembourg’s offence mentioned above, a perpetrator of an offence can be fined up to four times the value of the assets involved.<sup>79</sup> Moreover under the US laws mentioned above, those committing a sanctions violation could be civilly fined for the entire value of the assets involved the transaction.<sup>80</sup> The potential amounts that can be recovered under such penalties is substantial. For example the total civil penalties and settlements for sanctions violators in the US reached over USD 38 million in 2022.<sup>81</sup>

While fines are not technically classified under asset recovery mechanisms, it is still worth noting that many states could place a greater emphasis on enforcing existing fines measures under sanctions laws. Additionally states could also consider increasing the legislated amount of such fines if they are not in line with international standards. Such penalties could not only target the owner of sanctioned assets, but could also be used to target the facilitators of an offence. The amounts acquired through this avenue could also ultimately be repurposed to assist countries that are the victims of the relevant aggression.

### 3.2.2 Using asset recovery tools to target assets that are the proceeds of other offences

States are not just limited to cases of sanctions violations when using asset recovery tools. Many individuals currently under sanction have suspected links to corruption, organised crime and other criminal activities. Consequently, there is a strong chance that a portion of sanctioned assets are also the proceeds of crimes unrelated to the objective of the sanctions regime.

<sup>78</sup> ‘Sanctions: Council adds the violation of restrictive measures to the list of EU crimes’, Council of Europe, 28 November 2022, accessed 11 December 2022 at [<https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/sanctions-council-adds-the-violation-of-restrictive-measures-to-the-list-of-eu-crimes/>].

<sup>79</sup> *Law of 19 December 2020 on the implementation of restrictive measures in financial matters*, Article 10, accessed 6 December 2022 at [[https://www.cssf.lu/wp-content/uploads/L\\_191220\\_restrictive\\_measures\\_eng.pdf](https://www.cssf.lu/wp-content/uploads/L_191220_restrictive_measures_eng.pdf)].

<sup>80</sup> *18 U.S. Code § 1956*, Section (b)(1), accessed 8 December 2022 at [<https://uscode.house.gov/view.xhtml?req=granuleid:USC-2000-title18-section1956&num=0&edition=2000>].

<sup>81</sup> ‘Civil Penalties and Enforcement Information’, United States Department of the Treasury, accessed 12 December 2022 at [<https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information>].

If a link can be established between these assets and this criminal activity, then they can be targeted using asset recovery tools and established legal processes.

**Conviction based confiscation mechanisms**

If sanctioned assets can be linked to an offence for which someone has been convicted (such as a corruption, fraud or money laundering offence) then the state can use conviction based measures to confiscate the sanctioned assets on the basis that they represent the proceeds or instrumentalities of crime.

Establishing a link between the assets and the offence can also be made easier if the state has an ‘extended confiscation’ mechanism that permits a court to make a presumption that all assets controlled by a convicted person over a certain period of time around the offence were derived from criminal activity (unless proven otherwise).<sup>82</sup>

In practice however, using conviction based confiscation measures to target sanctioned assets will be difficult. Due to the international nature of sanctions regimes, it will be challenging for law enforcement agencies to establish a crime to which the sanctioned assets can be linked. This is particularly the case if the alleged offending occurred in the state that is also being sanctioned. A sanctioned state is unlikely to cooperate effectively with mutual legal assistance requests from a sanctioning state, therefore a law enforcement agency will be hard pressed to acquire the requisite evidence to achieve a conviction. For example, in the context of the war in Ukraine, it will be difficult to prove that assets held by Russian oligarchs were derived from specific corruption offences, as the Russian government is unlikely to cooperate with any requests from a foreign country for evidence that would establish that a corruption offence of this kind occurred in Russia.

States can take measures to alleviate these challenges. For example, if a state defines offences such as money laundering broadly – to the point where it is not necessary to prove a predicate offence beyond reasonable doubt – then this will ease the burden on law enforcement authorities to establish the link between the money being laundered and the original crime. For example, it is not necessary to prove a predicate offence to convict a person of money laundering in the UK under the *Proceeds of Crime Act*.<sup>83</sup> Instead, it is only necessary for the state to show that certain circumstances exist which give rise to an ‘irresistible inference’ that the property being laundered was derived from crime.<sup>84</sup>

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<sup>82</sup> An example of an extended confiscation mechanism exists in the UK’s *Proceeds of Crime Act 2002*, Sections 6, 10, and 75.

<sup>83</sup> *Proceeds of Crime Act 2002*, Part 7, accessed 8 December 2022 at [<https://www.legislation.gov.uk/ukpga/2002/29/contents>].

<sup>84</sup> *R v Anwoir* [2008] EWCA Crim 1354, referenced by the Crown Prosecution Service, ‘Money Laundering Offences (Legal Guidance)’, 11 June 2021, accessed 12 December 2022 at [<https://www.cps.gov.uk/legal-guidance/money-laundering-offences>].

Consequently, sanctioned assets suspected of also being used to launder proceeds of crime could be targeted this way, without the need to establish, beyond reasonable doubt, the original crime that generated the proceeds in question.

### ***NCB confiscation mechanisms***

As outlined previously, NCB mechanisms permit a state to confiscate assets where it can be demonstrated to a civil standard that the assets were derived from, or used in, criminal activity. In the event that a state suspects sanctioned assets are the proceeds of crime (e.g. corruption) but are unable to acquire the requisite evidence to prove that crime beyond reasonable doubt, then NCB mechanisms may still make it possible to confiscate these assets in a civil procedure.

An example of this type of mechanism exists in the US, and the recently created 'Task Force KleptoCapture' is already exploring the use of this mechanism as a means to confiscate sanctioned Russian-linked assets on the basis that they represent the proceeds of offences such as bank fraud.<sup>85</sup>

It should be noted, however, that in practice the application of NCB mechanisms can also be challenging. Most states do not have broad NCB mechanisms, and there is a significant lack of harmonisation surrounding these laws globally. Consequently, in cases where mutual legal assistance is necessary to even achieve the lower standard of proof required by NCB mechanisms, such assistance can often be difficult to acquire.

### **3.2.3 Using asset recovery tools to target sanctioned assets that can be considered unexplained wealth**

Unexplained wealth laws could be used to confiscate sanctioned assets in cases where:

- It is not possible to establish a link between the assets and a crime to a civil or criminal standard; and
- The assets do not appear to have been derived from lawful sources.

As noted above, these laws place a burden on the owner of the assets to prove, to a civil standard, that they have been acquired legitimately. Consequently, these laws could significantly boost a state's ability to confiscate financially sanctioned assets, as they would not necessarily require the state to acquire evidence from potentially uncooperative

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<sup>85</sup> 'Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture', The United States Department of Justice, 2 March 2022, accessed 12 December 2022 at [<https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture>]; S Cassella, 'Application for Warrant to Seize Russian Oligarch's Yacht', Asset Forfeiture Law LLC, 8 April 2022 accessed 14 December 2022 at [<https://assetforfeiturelaw.us/?p=2921>].

jurisdictions. Instead, they would obligate the sanctioned person to provide the requisite evidence to demonstrate that their assets have come from lawful sources.

It is important to note that the introduction and application of unexplained wealth mechanisms would also likely face a number of challenges.

For example, like the mechanisms highlighted in Part 2 of this paper, these unexplained wealth mechanisms have also faced criticisms that they infringe on established legal rights; the vast majority of legal challenges along these lines, however, have been dismissed.<sup>86</sup>

Despite their significant success in certain jurisdictions, most states around the world do not have unexplained wealth mechanisms. Consequently, mechanisms of this kind could certainly be considered as a new option in many jurisdictions to facilitate the confiscation of sanctioned assets.

### 3.2.4 Additional necessary actions to enhance the effectiveness of crime-related asset recovery efforts

If states sought to introduce and apply the asset recovery mechanisms listed above, there are additional actions that they should take to increase the likelihood that these mechanisms would be applied effectively.

#### ***Consideration of legislative amendments to broaden scope of relevant terms***

For example, states could also consider broadening the scope of certain concepts within their laws to ensure that these mechanisms will apply to a wide set of circumstances. As mentioned in the context of sanctions violations, states should ensure that their legislative definitions of ‘property’ are extensive enough to ensure that all forms of tangible and intangible assets fall within the scope of these mechanisms.

Furthermore, particularly in the context of NCB mechanisms, states should ensure that these mechanisms apply to the widest possible definition of ‘unlawful conduct’.<sup>87</sup>

#### ***Domestic coordination and allocation of adequate resources***

The effectiveness of confiscation laws depends significantly on the capability of the agencies tasked with enforcing them. Therefore, if states seek to introduce and implement any of the mechanisms listed above – including mechanisms relating to sanctions violations

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<sup>86</sup> A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel Institute on Governance, 2021, Part 4, available at [<https://illicitenrichment.baselgovernance.org>].

<sup>87</sup> M Nizzero, ‘From Freeze to Seize: How the UK Can Break the Deadlock on Asset Recovery’, The Royal United Services Institute for Defence and Security Studies, 10 October 2022, accessed 12 December 2022 at [<https://rusi.org/explore-our-research/publications/commentary/freeze-seize-how-uk-can-break-deadlock-asset-recovery>].

– it is critical that adequate financial and human resources are allocated to the agencies responsible for applying them.

For example, lessons can be drawn from attempts to introduce unexplained wealth laws in different jurisdictions. Two of the most successful mechanisms of this kind – that of Ireland and Western Australia – are enforced by multidisciplinary agencies with adequate intelligence-gathering, investigative and legal capacities.<sup>88</sup>

Furthermore, in the context of the war in Ukraine, lessons can also be drawn from the efforts currently being made by certain states to identify relevant assets and link them to crime. For example, as mentioned previously, the US created a designated body – Task Force KleptoCapture – to target assets for potential confiscation. This Task Force is made up of prosecutors, investigators, analysts and other specialists and has already achieved significant success in freezing high-value assets linked to Russia.<sup>89</sup>

### ***Enhanced coordination at an international level***

As mentioned above, the ability of enforcement agencies to identify, freeze and eventually confiscate criminal assets is often hindered by challenges relating to international cooperation.

To counter this, states can set up multinational bodies to facilitate coordination. Several countries have already taken actions along these lines in the context of the war in Ukraine, with proven results. For example, in 2022, law enforcement agencies from the US, Australia, Canada, the European Commission, Germany, Italy, France, Japan and the UK formed the Russian Elites, Proxies, and Oligarchs (REPO) Task Force.<sup>90</sup> In its first 100 days of operation, the REPO Task Force facilitated the blocking or freezing of more than

<sup>88</sup> A Dornbierer and J Simser, 'Working Paper 41: Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia', Basel Institute on Governance, accessed 12 December 2022 at [<https://baselgovernance.org/publications/wp-41>]. Note, the classification of the Irish law as an 'unexplained wealth law' is not certain. The Irish law can more accurately be classified as a mixture of both an unexplained wealth law and a civil recovery law (see: A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel Institute on Governance, 2021, available at [<https://learn.baselgovernance.org/course/view.php?id=65>]).

<sup>89</sup> 'Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture', The United States Department of Justice, 2 March 2022, accessed 12 December 2022 at [<https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture>]; '\$90 Million Yacht of Sanctioned Russian Oligarch Viktor Vekselberg Seized by Spain at Request of United States', The United States Department of Justice, 4 April 2022, accessed 12 December 2022 at [<https://www.justice.gov/opa/pr/90-million-yacht-sanctioned-russian-oligarch-viktor-vekselberg-seized-spain-request-united>].

<sup>90</sup> 'U.S. Departments of Justice and Treasury Launch Multilateral Russian Oligarch Task Force', The United States Department of Justice, 16 March 2022, accessed 12 December 2022 at [<https://www.justice.gov/opa/pr/us-departments-justice-and-treasury-launch-multilateral-russian-oligarch-task-force>].

USD 30 billion worth of assets, and immobilised more than USD 300 billion worth of Russian central bank assets.<sup>91</sup>

When appropriate, consideration could also be given to setting up ad hoc joint or multi-jurisdictional investigation teams to assist with cross-border cases.

Finally, states should also seek to better harmonise laws relating to the mechanisms listed above, to enable such coordinated investigations and reduce the likelihood that mutual legal assistance requests will be delayed or blocked, particularly on the grounds of dual criminality.

### ***Legislative mechanisms governing the end use of confiscated assets***

Many states may not have the legal basis to repurpose any confiscated funds towards states that are the victims of aggression. While many states will already have mechanisms in place that dictate that confiscated funds must be transferred into specified government accounts, they may also need to amend their legislative frameworks to include provisions that specifically permit the redirection of such funds towards victims of aggression.<sup>92</sup>

For example, the US recently passed a law along these lines in the context of the war in Ukraine. Since 29 December 2022, if a Russian-linked asset subjected to a sanctions regime is subsequently forfeited through a criminal procedure, the asset can now be transferred to the Secretary of State for the purpose of providing ‘assistance to Ukraine to remediate the harms of Russian aggression...’.<sup>93</sup>

## **3.3 A less established option: special recovery measures based on the classification of sanctioned parties as organised crime or terrorist groups**

Several countries have separate confiscation measures that can be applied specifically to organised criminal groups or terrorist groups. These mechanisms will often include special measures (such as reversed burdens of proof) once the state has demonstrated to a court that the owner of an asset is linked to groups such as these.

<sup>91</sup> ‘Press Releases: Russian Elites, Proxies and Oligarchs Task Force Joint Statement’, United States Department of the Treasury, 29 June 2022, accessed 12 December 2022 at [<https://home.treasury.gov/news/press-releases/jy0839>].

<sup>92</sup> This is particularly the case in the context of corruption offences, where existing laws may obligate states to return confiscated funds relating to corruption to their country of origin. In the context of the Ukraine war, if corruption-related offences were used as a basis to confiscate funds of Russian oligarchs, then legislative frameworks may obligate states to return these funds to the victim of the corruption offences, i.e. the Russian state – particularly in view of Article 57 of the *United Nations Convention Against Corruption* regarding the return and disposal of assets.

<sup>93</sup> *Consolidated Appropriations Act 2023*, s.1708, accessed 1 February 2023 at [<https://www.congress.gov/bill/117th-congress/house-bill/2617/text>].

For instance in Switzerland, if the owner of an asset is found to participate in, or belong to, a criminal or terrorist organisation under the *Criminal Code* then the court will presume that their assets 'are subject to the power of the disposal of the organisation until proven otherwise', and will thus be subject to confiscation.<sup>94</sup>

Italy's *Legislative Decree 159/2011* (or 'Anti-Mafia Code') also contains special measures of administrative confiscation for persons who may be considered a 'danger to society' on the grounds of their established involvement in criminal activity or their association with an organised criminal group or terrorist group.<sup>95</sup> Once the state has demonstrated this precondition, and has further established that the person controls property that is suspicious (for example on the basis of its disproportionality to the person's lawful source of income) a burden is reversed onto the person to show their assets were lawfully obtained. If they are unable to, the assets will be confiscated.<sup>96</sup>

In the context of sanctions, it is unclear how likely it is that a foreign sanctioned government could be classified as an organised crime or terrorist group. For example, considering current events, it is unclear whether or not jurisdictions could classify individuals linked to the Putin regime as forming part of a group such as this in order to invoke the special confiscation measures mentioned above. There is precedent however, for the classification of a head of state, their family members and members of their government in this way. In Switzerland, the Federal Supreme Court categorised the Nigerian Abacha family as a criminal organisation, which then triggered reverse burdens under the Swiss Criminal Code.<sup>97</sup> Consequently there is an argument that such a classification could be made by a court for sanctioned individuals belonging to, or linked to, the current Russian government.

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<sup>94</sup> *Criminal Code*, Article 72, accessed 15 December 2022 at [[https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en)].

<sup>95</sup> M Nizzero, 'How to Seize a Billion: Exploring Mechanisms to Recover the Proceeds of Kleptocracy', Royal United Services Institute, 19 December 2022, accessed 19 December 2022 at [<https://static.rusi.org/rusi-emerging-insights-how-to-seize-a-billion-exploring-mechanisms-to-recover-the-proceeds-of-kleptocracy.pdf>], referencing Altalex, 'Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia 2022' ('Code of anti-mafia laws and prevention measures, as well as new provisions on anti-mafia documentation 2022'), accessed 22 November 2022, at [[https://www.altalex.com/documents/codici\\_altalex/2014/07/24/codice-antimafia\\_edizione-giugno-2014](https://www.altalex.com/documents/codici_altalex/2014/07/24/codice-antimafia_edizione-giugno-2014)].

<sup>96</sup> Ibid.

<sup>97</sup> This was through a previous version of the Article 72 mechanism currently in the Swiss *Criminal Code*, see: E Monfrini, 'The Abacha Case', in M Pieth (ed.), *Recovering Stolen Assets*, 2000, Peter Lang.

## 4 Conclusion

Identifying sources of funding to support victims of aggression – in the current context for example Ukraine – is a necessary and justified cause. Forcing aggressors to pay compensation to the victims of their aggression is also in the interests of justice. In pursuit of this, it is understandable that governments are exploring ways to confiscate the financially sanctioned assets of the aggressors, or those closely linked to them.

It is important, however, that any such mechanisms used for this purpose are in line with established legal rights. If they are not, it is likely that attempts to use them will be overturned by the inevitable legal challenges that will be made against them. For example, while the Canadian mechanism discussed in this paper is an understandable response to the current war in Ukraine, it is likely that any future use of this mechanism will face significant scrutiny on the basis that it does not provide due process.

Alternatively, rather than introducing potentially contestable mechanisms to seize sanctioned assets, states could look at more established pathways for confiscation such as traditional conviction based confiscation measures and ‘extended confiscation’ provisions that permit a court to presume that all assets controlled by a convicted person around the time of the offence were derived from criminal activity. It is also recommended to adopt broad non-conviction based asset recovery mechanisms and make greater efforts to provide mutual legal assistance in such cases.

These mechanisms have already proven themselves to be in line with legal rights, and could be used to at least confiscate a portion of sanctioned assets – namely those that can be linked to offences such as sanctions violations, money laundering or organised crime.

States should also consider less traditional asset recovery mechanisms that reverse the burden of proof, such as unexplained wealth laws. While these laws are also likely to face legal challenges, efforts to apply them in a number of countries have already proven successful.

Additional legislative reforms may be needed to enhance the effectiveness of the above asset recovery efforts. These include amendments to broaden the scope of relevant terms such as ‘money laundering’ and amendments to laws governing the end use of confiscated assets. Beyond legislation, states could improve both domestic and international coordination by establishing specialist law enforcement task forces, allocating adequate resources and participating in international coordination initiatives.

Beyond this, there are additional options that states could also explore that have not been covered by this paper. For example, there is a possibility that a victim state could seek



compensation as a *partie civile* in criminal actions that take place in certain civil law systems. This should also be explored.

Moreover, specifically in the context of the war in Ukraine, there are traditional (albeit long-term) international avenues for seeking war reparations through mechanisms such as the United Nations Claims Commission set up to process claims against damage caused by Iraq during its 1991 invasion of Kuwait.<sup>98</sup>

There are also routes to reparation through the International Court of Justice,<sup>99</sup> and there is even a possibility that multilateral action could be taken by a group of countries outside the United Nations system, to obligate Russia to pay compensation for the intentional torts that have been committed.<sup>100</sup>

Therefore, while this paper has discussed some options in detail, further research and discussion is also certainly required to identify additional avenues that have not yet been considered.

In any case, opting for mechanisms that abide by established legal rights will not only significantly increase the chance of recovering assets, but will ensure that the very reason for targeting the assets in the first place – namely to seek justice and compensation for acts of aggression – is not undermined through the erosion of the rule of law.

Last but not least, and especially if states take measures to enhance the effectiveness and scope of these measures, additional benefits can be derived for the broader fight against financial crime and kleptocracy.

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<sup>98</sup> The process was completed this year, with USD 52.4 billion paid out to 1.5 million claimants (see: L Moffet, 'Sanctions for War, Reparations for Peace?', *OpinioJuris*, 1 April 2022, accessed 10 December 2022 at [<https://opiniojuris.org/2022/04/01/sanctions-for-war-reparations-for-peace/>]).

<sup>99</sup> In the context of the Russian war, Ukraine already filed a complaint in February 2022 against Russia in the International Court of Justice relating to allegations of genocide (see: *Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022 – Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, accessed 16 December 2022 at [<https://www.icj-cij.org/en/case/182/institution-proceedings>]).

<sup>100</sup> R E Litan, 'Russia can be made to pay for Ukraine damage now', *The Brookings Institution*, 17 March 2022, accessed 10 December 2022 at [<https://www.brookings.edu/opinions/russia-can-be-made-to-pay-for-ukraine-damage-now/>].