

Should states and private parties be entitled to recover reparations from aggressor states, and if so, how?

Ukraine's President Volodymyr Zelensky wants Russia to 'learn the words "reparations" and "contributions"'.<sup>1</sup> Few would disagree given the sheer scale of human suffering inflicted by Russia's invasion. And yet the road to reparation is paved with obstacles. Each of the fora to which one might turn - the ICC, the ICJ, the ECtHR - is prevented by some jurisdictional or institutional limitation from providing for comprehensive reparations on the scale on which they will be required. In any event, it seems unlikely that the current Russian government would comply with any reparations order.

At the same time, hundreds of billions of pounds in assets belonging to the Russian state and to oligarchs and businessmen have been frozen since last year.<sup>2</sup> It is no surprise then that some have begun imagining a somewhat crude, self-help form of justice: why not funnel this money into rebuilding Ukraine? The answer: it's too temptingly simple to be true.

Sovereign immunity would appear to bar liquidating another state's frozen assets.<sup>3</sup>

Proponents of liquidation point to the law of state responsibility: the wrongfulness of an act is precluded if it constitutes a countermeasure to another state's internationally wrongful act.<sup>4</sup>

The prohibition of aggression is an *erga omnes* obligation - owed to, and invocable by, all

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<sup>1</sup> <https://www.ukrinform.net/rubric-ato/3418898-zelensky-calls-on-russia-to-get-ready-to-pay-reparations-and-contributions.html>.

<sup>2</sup> <https://www.france24.com/en/live-news/20220629-allies-freeze-330-bn-of-russian-assets-since-ukraine-invasion-task-force>.

<sup>3</sup> <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets>

<sup>4</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries ('ARS'), UN Doc A/56/83, Article 22.

states.<sup>5</sup> Any state, the argument goes, may therefore liquidate an aggressor's assets as a countermeasure.

But countermeasures are intended to be temporary. Under the Articles on State Responsibility, they 'shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question' and they are to be terminated as soon as the state resumes compliance.<sup>6</sup> As a 'shield' rather than a 'sword', countermeasures 'may not affect the continued existence of the obligation as such.'<sup>7</sup> This is why asset *freezing* is a paradigmatic countermeasure. Seizure or liquidation, by contrast, are irreversible - states opting for that path might one day face demands for restitution from the onetime-aggressor.

Such objections seem like technicalities compared to the bloody reality of aggression. But compliance with international law matters in the headlines *and* in the fine print. The best response to an egregious violation is one that reaffirms the status of international law as a coherent order that must be respected *in its entirety*. Besides, self-interest cautions against establishing this kind of precedent. A better approach is to keep assets frozen not just until hostilities end, but until the aggressor makes reparations.<sup>8</sup>

Confiscating the assets of private persons will engage due process/fair trial and property rights in domestic or international law.<sup>9</sup> These may be surmountable obstacles: interference

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<sup>5</sup> *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, I.C.J. Reports 1970 p. 3, paras 33-34; Art. 48(1)(b) ARS.

<sup>6</sup> Articles 49(3), 53 ARS.

<sup>7</sup> Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018), 262.

<sup>8</sup> <https://www.lawfareblog.com/response-philip-zelikow-confiscating-russian-assets-and-law>, Articles 48(2)(b), 54 ARS.

<sup>9</sup> <https://www.cbc.ca/news/politics/canada-seize-assets-russian-oligarch-charter-1.6695583>

with these rights may be capable of justification.<sup>10</sup> However, the range of persons whose property could legitimately be *seized* would be much narrower than the range of persons whose property may be *frozen*. Asset-freezing, travel bans and related measures target elites in hopes they pile on pressure on those in power. Anyone who finds an open ear with the regime is a legitimate target. Seizure is more punitive in nature, more drastic in its effects - hence why it typically follows criminal conviction. One *may* find this justified for those with direct control over the decision to launch the war or its prosecution, or perhaps those who directly profit from it. But in the absence of a criminal conviction, justifying confiscation will be even trickier. And this is before one considers the obstacles to expropriation posed by bilateral investment treaties - hitherto discussed in relation to Russia's threats of retaliation, but no less applicable to other states considering such measures.<sup>11</sup>

If these matters *were* successfully resolved, an incongruent situation would result in which the assets of a small circle of individuals is fair game while the aggressor *state's* property remains immune. One might respond pragmatically: better something than nothing. But one might equally say: not worth the trouble.

In the meantime, other states standing in solidarity with the victim state could offer contributions to rebuilding the country while aiming to recover those costs once funds from the aggressor are legitimately available.

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<sup>10</sup> <https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/enacting-echr-compliant-measures-confiscate>.

<sup>11</sup> <https://verfassungsblog.de/are-we-in-for-a-new-wave-of-investment-arbitrations/>;  
<https://news.bloomberglaw.com/us-law-week/putins-threat-to-seize-u-s-investments-could-be-costly-to-russia>

At that future point in time, reparations should be available both to the victim state - to claim for damage to infrastructure, for example - and to individual civilians harmed by the aggressor's conduct. The flagrant breach of the *ius ad bellum* should suffice to establish liability, it not being necessary to show that particular acts violated international humanitarian or international human rights law.<sup>12</sup> It is by the same logic that the UN Human Rights Committee holds that deprivations of life resulting from acts of aggression *ipso facto* violate the right to life under the ICCPR.<sup>13</sup>

While this approach may suggest that military harm and damage should also be recoverable,<sup>14</sup> pragmatism militates in favour of a narrower approach, in order to maximise the resources available to address harm to civilians and infrastructure. In this vein, claims commissions for Iraq/Kuwait and Eritrea/Ethiopia stipulated that no awards would be made for military loss and damage except for that resulting from laws of war violations.<sup>15</sup>

If both the victim state and private individuals are entitled to reparations, the awarding body should be independent of the victim state's government to avoid it simultaneously being both claimant and arbiter - possibilities include an international claims commission or an inter-state mixed arbitration process. Setting up a register of damages now, as endorsed by the UN General Assembly, would lay the groundwork for such a future process.<sup>16</sup>

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<sup>12</sup> see *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Reparations, Judgment of 9 February 2022, para 214.

<sup>13</sup> UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, para 70.

<sup>14</sup> <https://opiniojuris.org/2022/04/01/sanctions-for-war-reparations-for-peace/>.

<sup>15</sup> <https://reparations.qub.ac.uk/assets/uploads/Reparation-Options-for-the-War-in-Ukraine-Moffett.pdf> para 73.

<sup>16</sup> <https://www.justsecurity.org/wp-content/uploads/2022/11/N2267912.pdf>

Postponement may seem like a denial of justice. But where victimisation and suffering are ongoing, beginning the reparations work may simply not make sense - rebuilding a bridge that will be destroyed again in the next wave of airstrikes is not productive. Neither could seized assets be used to fund the victim state's war effort under the head of reparations, lest the very meaning of the word be distorted.

Better to focus for the time being on using whatever means available to end the fighting, while continuing to meticulously record and document losses, damage and international law violations. The day of reckoning will surely come.

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