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

The principled arguments in favour of the entitlement to reparations are not difficult to make. For states, any act of aggression is a violation of the territorial integrity of the aggrieved state. Practically, reparations are meant to provide a viable means of compensation. Conceptually, reparations are meant to reinforce the territorial integrity of a state. They are a necessary instrument for enforcing Article2(4) of the UN Charter which prohibits the threat or use of force against the 'territorial integrity or political independence' of any State.

Secondly, for states, the complexity involved in cross-border asset-tracing and quantifying the full extent of damages after a prolonged war justifies the need for a framework of repayment guaranteed under international law.

Thirdly, for private parties, the imbalances in power and privileges with the aggressor state makes reparations a necessary counterweight. Reparations are both a shield against the machinery of state power and a sword with which their individual rights to restorative justice can be reinforced.

Due to the scale of potential losses covered, reparations for wars of aggression cover not only loss of civilian life but all losses including that of combatants. The United Nations Human Rights Committee General Comment (para 70) notes that acts of aggression under international law "violate ipso facto" the right to life under Article 6 of the International Covenant on Civil and Political Rights. The law makes no distinction between civilian and combatant life. This is a departure from the conventional approach adopted by both the United Nations Claims Commission (UNCC) and EECC which prevented claims for the deaths/injury of combatants and losses of military hardware.

But legal purity has to give way to political pragmatism when dealing with the subject of quantifying reparations. Reparations for aggressions rarely reflect the actual cost of war. This would make most payments, particularly in the post-modern context with the unimaginable scale of damage caused by technologically advanced military equipment, unfeasible. The ICJ has often found it difficult to specifically quantify the loss suffered, the extent of the harm and the numbers of victims. Evidence may have easily been destroyed or rendered inaccessible after a protracted military battle.

Although states and private parties should be entitled to recover reparations from aggressor states, establishing a degree of *balance* rather than *blame* is critical to finding a reasonable settlement between states and/or private parties. One commentator succinctly notes that although reparations are a means to reinforce the law after the breach, rather than a means to buy off the victims, they should not be humiliating or financially unfeasible to the aggressor state. For example, in *DRC v Uganda*, despite the ICJ ruling ordering Uganda to pay 'full reparations' for its occupation and annexation of Ituri in Eastern Congo, it ordered Uganda to pay the DRC $325 million in reparations. This was only a small percentage of the original $11 billion claimed.

A relatively novel solution is the idea of a 'reparations tax' placed on critical imports from the aggressor state. Luke Moffet, a legal academic from Queen's University Belfast has mooted this idea in the context of the on-going Russia-Ukraine conflict. Moffet notes that a reparations tax could be imposed on Russia's oil and gas imports to fund reparations, similar to that used to fund the UNCC. As a corollary, Moffet argues that "there may be bilateral agreements between Ukraine and Russia, or US and EU with Russia that the removal of sanctions would be subject to reparations being made to Ukraine. The moral and practical logic of linking taxable imports to the reduction of sanctions seems uncontroversial.

However, a reparations tax and an agreement to offset sanctions through reparations requires both the political will and acquiescence of the aggressor state. Power politics and dynamics dictate whether such agreements can ever be crystallised. Sudan's payment for its role in state sponsoring militant extremism in the Horn of Africa was only possible because of a fundamental change in political actors i.e. the overthrow of Omar El-Bashir leading to a level of political neutrality that allowed concessions to be made.

The idea of reparations conceptually suffers from two overarching limitations. The first is the problem of 'victor's justice'. Commentators have widely noted that "reparations for aggression ultimately depends on who 'wins the war, whether through outright victory of one side, settlement or cessation of hostilities".

The second limitation of reparations is the binary categorisation of 'aggressor' vs 'victim'. The quantification of damages begins with the false presumption that the identity of aggressors and victims will always be clear. How are we to determine the scope of reparations where both states have committed acts of aggression? What is the proper procedure for a scenario where it is politically unclear who the dominant 'aggressors' are in the conflict? As Mark A Brumbl notes, the '*symbolic economy'* of international criminal law is one of finality and absolutes: "guilty or not-guilty", "persecutor or persecuted" and "powerful or powerless". In the fog of war, violence often distorts such neat boundaries of moral blameworthiness. This false dichotomy

in international criminal law is inapplicable in two contexts. Firstly, *in the case of states,* reparations are an unsatisfactory tool where two states have equally played the role of protagonist in military aggression. The Iraq-Iran war of the 1980s is a classic example where Iraq proverbially fired the first bullet with its invasion of Iran on 22 September 1980, with Iran retaliating through a 'counter-invasion' almost 2 years later with the attack on Basra during Operation Ramadan.

Secondly, *in the case of private parties,* reparations become complicated where the original victims in a conflict slowly morph into perpetrators. Dominic Ongwen, a formerly abducted child soldier during the conflict in Northern Uganda in the late 1980s rose to become a Brigade Commander in Joseph Kony's Lord's Resistance Army (LRA).

Notwithstanding these limitations, reparations can still be creatively applied to offer a pathway to restorative justice. Firstly, by developing an international 'claims commission' to govern reparations. This commission would be made up of experts who would conduct a valuation of assets and make recommendations as to their management. Secondly, peace agreements can include a specific trigger clause to either ease or increase the level of sanctions based on the nature of the acts committed by the aggressor state. Thirdly, receivers could be appointed to manage assets, providing regular updates to the relevant authorities to ensure assets are being preserved with full transparency and accountability. Both the US and France have recently announced measures to improve the forfeiture of assets used to fund the Russian invasion of Ukraine.

Reparations are a legally imperfect tool. They are applied to international and national legal regimes that often have differing rules on the operation of sanctions and forfeitures. However, the imperfection of reparations does not fundamentally diminish its importance. In the complicated cauldron of global conflict and unscalable loss, reparations still remain as the most articulate attempt to offer clarity and a way forward for states and private parties.