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

In 1946, the International Military Tribunal at Nuremberg declared that initiating a war of aggression was not only an international crime, but "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[1] This sentiment remains popular. In March 2022, a consortium of politicians and academics, including Baroness Helena Kennedy KC and Professor Philippe Sands KC, proposed the creation of a special tribunal to punish Russia's crime of aggression against Ukraine and "signal our resolve that the crime of aggression will not be tolerated".[2]

Reparations are an important response to political violence. As well as providing a system of redress for physical damage, they represent a wider socio-political objective of reinforcing the rule of law and setting normative standards as states recover from catastrophic loss. Alongside material compensation, financial reparations are an acknowledgment of wrong and therefore an essential part of the rehabilitative process. Under customary international law,[3] states subjected to material or moral injury by 'internationally wrongful acts' are *entitled* to full reparations from the aggressor state. Quite clearly, however, many existing reparation mechanisms are left wanting in the wider field of transitional justice.

Following Russia's invasion of Ukraine, commentators have suggested the seizure of frozen Russian assets to provide reparations for Ukraine's reconstruction – a precedent that might be set for other states who violate the principles of *jus ad bellum* and *jus in bello*. Such an outcome would presumably be achieved by a form of involuntary trust whereby title in frozen property vested in an agency deemed appropriate by the seizing state. Whilst such a step would appear seductive, it would represent a marked departure from the rule of law and be problematic for several reasons.

[1] International Military Tribunal (Nuremberg), Judgment and Sentences (1 October 1946) reprinted in (1947) 41(1) AJIL 172, p.186
[2] See joint statement: https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf (accessed online 5/1/23)
[3] Art. 31 of the Articles on Responsibility of States for Internationally Wrongful Acts

First, many countries have insurmountable legal and constitutional restrictions on the confiscation of assets,[4] and in any case, state-owned property and central bank assets are typically protected by state immunity rules.[5] Secondly, legislation governing asset seizure tends to require proof of criminality,[6] which carries a high evidential burden and the prospect of lengthy investigations. It also follows the difficulty in identifying private property in the first place, which can be obscured by complex ownership structures and the use of special-purpose vehicles. Thirdly, and perhaps most importantly, appropriating foreign assets reduces the chance of conflict resolution by removing crucial bargaining chips from the negotiation table. Freezing assets should rather be viewed exclusively as a type of equitable remedy that enforces performance of post-conflict obligations and commitments; otherwise, it risks encouraging dangerous 'tit for tat' behaviour that undermines the security of overseas assets and the wider international political economy.

The solution lies in international law.

An obvious starting point is the United Nations (UN). As is well-documented, the existing institutional frameworks of the UN are hampered by the ineffectiveness of the Security Council and the consistent use of politicised tactics by member states. International criminal tribunals like the International Criminal Court (ICC) are an alternative route for reparations but rely on convictions of high-ranking perpetrators before victims can claim eligibility for compensation. Victims are only able to recover symbolic reparation after protracted court processes that regularly take years to resolve. This represents an unattractive and unwieldy process that prioritises criminal prosecution over real and actionable justice.

A reparation mechanism that pays regard to both the interests of the state and private parties is the international mass claims commission (IMCC). IMCCs are ad-hoc adjudicative bodies or quasi-judicial commissions that

[4] See Paul Stephan's commentary in Lawfare Blog: https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing (accessed online 5/1/23)
[5] (Wuerth) Brunk, Ingrid. 'Immunity from Execution of Central Bank Assets' (February 16, 2018). *The Cambridge Handbook of Immunities and International Law* (Tom Ruys, Nicolas Angelet, Luca Ferro, eds.), p.5-16. Available at SSRN: https://ssrn.com/abstract=3125048 (accessed online 5/1/23)
[6] See, for example, Proceeds of Crime Act 2002 (UK); 18 U.S.C. § 981 (U.S.)

resolve financial claims "when a large number of parties have suffered damages arising from the same diplomatic, historic or other event".[7] They do not determine criminal liability, which is generally concluded in a parallel process through a criminal tribunal. Notably, as they are designed to adjudicate legally and factually diverse disputes, flexibility is their cornerstone: they can be created by a variety of international instruments, funded using different models, and are *retrospective* institutions that dissolve after they have achieved their purpose. This distinguishes them from standing international courts like the International Court of Justice (ICJ), which operate *prospectively* and face significant challenges to their legitimacy as a result.

IMCCs are not without their challenges. The lifespan of an IMCC is defined by the ambitions of the parties involved in its creation. Its funding is largely based on the availability of resources and willingness of aggressor states (and third parties) to commit capital to the process. Even with paperless technological advances, the administrative process can be slow and cumbersome.

Notwithstanding, IMCCs have enjoyed relative success. The Iran-US Claims Tribunal, established as part of the Algiers Accords 1981, awarded over $2.5 billion to US nationals and companies[8] despite turbulent foreign relations between the two states. The Iraq-Kuwait UNCC awarded compensation of approximately $52.4 billion to 1.5 million successful claimants.[9] The Eritrea-Ethiopia Claims Commission was able to address a broad spectrum of claims relating to civilian property, treatment of prisoners of war, and the conduct of military operations, awarding approximately $174 million to Ethiopia and $161.5 million to Eritrea.[10] Monetary sums aside, the reparative function of these IMCCs was reflected in their ability to expand the range of remedies available to affected individuals and private parties, which included the restitution of property and the psychological legitimisation of claims.[11]

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[7] Holtzmann, HM. 'Mass Claims' in *Max Planck Encyclopaedia of Public International Law.* Available at http://www.mpepil.com (accessed online 5/1/23)
[8] See U.S. Department of State Iran-U.S. Claims Tribunal Archive: https://www.state.gov/iran-u-s-claims-tribunal/ (accessed online 5/1/23)
[9] See United Nations Compensation Commission: https://uncc.ch/home (accessed online 5/1/23)
[10] See Eritrea-Ethiopia Claims Commission: https://pca-cpa.org/en/cases/71/ (accessed online 5/1/23)
[11] Crook, JR. 'Mass Claims Processes: Lessons Learned Over Twenty-Five Years' in *Permanent Court of Arbitration (ed) Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (OUP 2006) 41, p.46

Perhaps this success reflects a broader normative shift where states value the benefit in adjudicating claims post-conflict. It is more likely that aggressor states will actively participate in processes that remove the requirement to publicly admit violations of the laws of war.

Reparations are fundamentally about justice. They do not just equate to financial compensation but also encompass important political and human dimensions. The international community should more readily embrace the eclectic and ad-hoc nature of IMCCs to ensure that states and private parties subjected to crimes of aggression have access to the full spectrum of restorative justice they deserve.

**Word Count**: [970]