

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

It is axiomatic that a State should be entitled to recover reparations from aggressor states who have caused destruction and loss on their soil. This is a long-established principle of international law, paralleled in domestic legal systems throughout the world with the goal of effecting both restorative and retributive justice. It was recognised by the ICJ in 1927 in the oft-cited *Chorzow Factory*: “Reparation... is the indispensable complement of a failure to apply a convention”, such as article 2(4) of the UN Charter.

In the case of Russian aggression in Ukraine, the EU Commission President has estimated the current damage to stand at 600 billion euros. The IMF has estimated that Ukraine will need at least \$3 billion per month in 2023 for reconstruction, as suggestions of a Modern Marshall Plan have gained ground among Western states. This forces reflection on post-WW2 conduct, including Stalin’s insistence at Potsdam that reparations are a moral right of a country which has suffered war and occupation. Although Ukraine could be reconstructed with the assistance of a Marshall Plan, there is a role to be played by the principles of retributive justice. They would demand that Ukraine’s entitlement to recover reparations from Russia is enforced.

These principles would similarly require that private parties are able to recover reparations from aggressor states. However, international law refuses to formally recognise any such entitlement by granting states immunity for claims by individuals, even in breach of a *jus cogens* norm (*Jurisdictional Immunities of the State (Germany v Italy)*). Nevertheless,

there has been an increasing recognition of a right to an effective remedy for victims of gross violations of international human rights law and serious violations of international humanitarian law. The UN Basic Principles on this subject call on states to provide these victims with reparations. In the context of Ukraine, support for a specialist international tribunal is growing; the European Commission is setting forth a plan for establishing a specialised court to investigate and prosecute Russian war crimes. Reparations may be administered by such a tribunal, or it could act in conjunction with an internationally managed structure where compensation claims by individuals could be adjudicated. This format would be akin to the UN Compensation Commission, set up after Iraq's invasion of Kuwait. Even if not through established international legal mechanisms, the principles of retributive justice can be enforced in this way.

Indeed, retributive justice permeates the statements of the EU Commission, the Canadian government, the Estonian Prime Minister, and most resoundingly a UN resolution: Russia "must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts". Yet, in an international community with such will to see that reparations are recovered, paralyzed international legal institutions are unable to respond. Russia does not recognize ICJ jurisdiction and has been able to neutralize the UN Security Council with its veto. The possibility of a peace agreement with the provision for reparations seems like an unlikely prospect. The Security Council cannot establish another UN Compensation Commission. The international legal system is plagued with a familiar problem: the inability to enforce its laws.

With international legal institutions incapacitated, the international community must generate a multilateral response, coordinated within the framework of the UN. To be effective in reconstructing Ukraine, this response should: (i) document damage caused to both Ukraine and private parties by Russian aggression; (ii) adjudicate on the merit of claims by private parties; (iii) distribute funds to the Ukrainian state and meritorious private parties; (iv) establish a source for funds. If the principles of retributive justice and those of the law on state responsibility require funds to come from the Russian state, how can we put these principles into practice?

Ukraine and Western States have cast their gaze to the Russian assets frozen by economic sanctions. Nearly €320 billion of Russian state and oligarch owned assets has been frozen by the EU alone. The Western world faces three options for using these assets to recover reparations, each progressively bolder than the last. First, as the EU Justice Commissioner has suggested, retain the assets 'as a guarantee until Russia voluntarily participates in the reconstruction of Ukraine'. Use the assets alongside the current regime of economic sanctions as a bargaining chip for a peace agreement which would include provision for reparations paid by Russia. Second, an EU Commission proposal has suggested moving the liquid assets into an internationally supervised fund which could generate a 'stable and fair net return' given to Ukraine as reparations. This suggestion would have the advantage of retaining bargaining power over the frozen assets, whilst reparations being generated from them at the same time.

The third suggestion is that of the head of the European Council; we should not only freeze assets, 'but also... make it possible to confiscate them, to make them available for

rebuilding Ukraine'. States would follow the example set by Canada and enact laws that enable the permanent seizure of the assets so that they may be given as reparations. Whilst the Financial Times has noted the 'poetic justice' of such a move, the Western World must be reminded of the proper application of retributive justice in this context. Although it demands that Russia pays reparations, it also establishes a precondition for enacting punishment: each wrongdoer must be proven guilty of the crime for which punishment is imposed. In this context, Russian oligarchs must themselves have committed a crime, and assets must be linked to criminality. Western states should not risk arbitrary seizure and ignore concerns of due process to enforce Russia's duty to pay reparations.

Accounting for these concerns may require patience for a peace agreement, or the hybrid solution of an internationally supervised fund. However, for the international legal system to truly prevail, the principles of retributive justice cannot be swept aside in favour of a perceived 'poetic justice'.