

The Legal Basis for Confiscation of Russian Sovereign Assets

Introduction

On 24th February 2022, when Russia began illegally attacking Ukraine, circa €300 billion of its Central Bank's foreign reserves were left in countries supporting the defence of Ukraine, of which about €200bn are in Euroclear, in Brussels. This significant amount has been 'immobilised' since that date, as sanctions and other measures were imposed on Russia by allied nations endeavouring to persuade it to stop the invasion. As 20th January 2025 and President Trump's much advertised potential 'resolution' of this conflict approaches, the status of these funds, and what the countries where they are being held will do with them, has never been more pressing.

International responsibility

Russia's invasion of Ukraine violates fundamental principles of international law: Jus Cogens, the UN Charter¹, the International Court of Justice's and the European Court of Human Rights' jurisprudence, United Nations General Assembly resolutions, and many other resolutions and decisions issued by several other international organisations and structures, including of humanitarian law and human rights law.

The United Nations General Assembly has on several occasions adopted Resolutions condemning the Russian Federation's aggression against Ukraine (2nd March 2022); asking Russia to cease attacking civilians and abusing human rights (24th March 2022); demanding that Russia "withdraw all of its military forces from the territory of Ukraine", and emphasising "the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine" (14th November 2022).

The International Court of Justice, on 16th March 2022, unequivocally ordered Russia to "immediately suspend the military operations that it commenced on 24th February", reiterating "that it "must be held accountable for its [...] violations of international law" which "engage its international responsibility" for "the losses and damage suffered by Ukraine as a result of Russia's violations of international law" thus "require[ing] full and urgent reparation by Russia" for its unprovoked aggression.

According to the Permanent Court of International Justice "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation". Furthermore, the Articles on State Responsibility for Internationally Wrongful Acts of the UN International Law Commission dictate that "the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act" and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

Multiple legal and political sanctions have been imposed on Russia, including expulsion from the Council of Europe, from the UN Human Rights Council, and immobilisation of Russian sovereign wealth in several countries. Russia has failed to respond to international pressure to cease the attacks, much less to provide reparation.

¹ Article 1 of the UN Charter sets out as a purpose of the UN the "suppression of acts of aggression or other breaches of the peace." The prohibition on the use of force is enshrined in Article 2(4) of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Russian sovereign assets

At the start of the invasion, Western countries moved in unison to impose sanctions to compel Russia to cease its unlawful actions. They took steps to isolate Russia and impair its ability to stabilise the Ruble and access foreign exchange to support its economy; including through the removal of key Russian banks and financial institutions from the SWIFT financial system restricting their ability to access international markets and transact globally.

Consequently, the conflation of multilateral sanctions, legal measures, and international coordination has meant that Russian Central Bank's foreign reserves held in western jurisdictions became 'immobilised'. The c.€300billion is blocked, parked in depositories and banks with little or no relation to the nationality of the underlying cash and securities. At present, nearly three years on, most securities have matured into cash: the principal remains untouched, yielding profit. This anomalous situation does not alter the fundamental principle: when the conflict ends, the money will either go back to Russia or be used to fulfil Russia's obligation to provide reparations to Ukraine.

Countermeasures and State immunity

Under international law, Russia is undoubtedly responsible for reparations and restitution for all the damage, human, physical and moral it has caused Ukraine to suffer. One year ago, on December 31st 2023, the World Bank, in collaboration with the Government of Ukraine, the European Commission, and the United Nations, estimated that Ukraine's reconstruction and recovery needs amounted to \$486 billion.

The logical action is to use the c.€300billion to structure something akin to a 'Marshal Plan' to restore Ukraine to its pre-war situation. This would require states, other than Ukraine, to confiscate the currently immobilised Russian sovereign wealth in their territories.

However, international law dictates that state-owned assets situated on foreign territory is immune both from jurisdiction and from enforcement (including immunity from execution), given that it is presumed they are held for non-commercial purposes. Legal confiscation of the c.€300billion Russian sovereign property is defensible only as a third-party countermeasure.

Countermeasures are unilateral measures adopted by an 'injured State' in response to the breach of its rights by the wrongful act of another State, to induce the latter to cease its unlawful action or provide reparations to the former. These measures would be unlawful were it not for the fact that they are taken in response to a pre-existing violation of international law. It is not in doubt that the injured state may adopt countermeasures.

A pivotal, and much debated, issue in international law is whether third-party states, i.e. countries other than the injured state, can legally implement countermeasures in support of, and for the same purposes as, the injured state.

European Union member states, most of them countries of civil law tradition, are reluctant to accept their right to impose 'collective' or 'third-party' countermeasures on Russia and, consequently, are reluctant to proceed with seizure. Thus, according to the EU, these assets have not been frozen, which, like seizure and confiscation, is a countermeasure; they remain untouched, and are merely immobilised.

Conversely, countries with legal systems structured in the common law tradition, such as the UK, Canada and the USA, more readily accept the "Specially-Affected States Doctrine", grounded in the International Court of Justice 1969 North Sea Continental Shelf judgement. Much has been written about this Doctrine, as practice leading to the emergence of a customary rule must include that of states "whose interests were specially affected". This could support third countries particularly impacted by the unlawful behaviour of

the aggressor state to acquire ‘specially-affected status’, allowing them legally to impose collective countermeasures.

The USA and Canada have passed specific legislation which will allow them to proceed with seizure. The UK parliament is debating the Financial Assistance to Ukraine Bill to provide an “Extraordinary Revenue Acceleration” loan as agreed by the G7 in June; a cross-party amendment would permit the use of the principal held in the UK (c.£27bn). All G7 countries want to act in unison and, therefore, none of them have yet moved ahead with seizure.

Providing reparations to Ukraine

Prohibitions on transactions with Russian sovereign assets are lawful under international law, regardless of what governments chose to label them. Russia has not challenged any of the orders, in an appropriate court, to demand compensation for the value of the loss of control over this portion of its sovereign funds’ use. Even if it could find an internationally recognised competent court, it would likely be obstructed by a myriad possible counterclaims, and encounter difficulties in prevailing on the merits.

In June 2024², G7 leaders agreed a deal to use the profits of frozen Russian assets to fund an “Extraordinary Revenue Acceleration” \$50 billion loan to Ukraine. "These loans will be serviced and repaid by future flows of extraordinary revenues stemming from the immobilisation of Russian sovereign assets, in line with G7 respective legal systems and international law," leaders agreed.

This loan is not designed to make Russia pay. Quite the opposite: it is a way to avoid touching Russia’s sovereign wealth. G7 countries are borrowing money on international capital markets in order to provide Ukraine with funds as soon as possible. This loan will be repaid by future profits yielded by the immobilised assets, without touching the principal.

Under current rules, the EU must renew its approval to immobilise the c. €200billion held in Euroclear every six months, which may raise questions relating to the pledged profit yield. And that is without even talking about interest rates and other financial issues which may impact it.

If sanctions are lifted and the immobilised assets are returned to the Kremlin, or Russia does not pay sufficient reparations, Ukraine would strain to repay this loan, on top of many other loans it has already taken out, and could potentially be bankrupted.

Conclusion

International law governing peaceful relations between sovereign states requires them to respect territorial integrity, equality and the sovereignty of all their peers. Egregious violation of these fundamental principles should require all to take at least non-military steps in defence of those who are unlawfully attacked.

This is ultimately a political decision. Without delving into further financial and economic arguments, Ukraine has suffered immensely from Russia’s unlawful invasion. Reparations already far exceed the value of the immobilised assets. Given that under international law Russia is responsible for compensating Ukraine, we should be using its sovereign wealth to do so.

² In February 2024 the European Union created a structure to use the windfall profits resulting from the immobilised Russian sovereign assets, which has been superseded by the G7 deal.