



INSIGHT

THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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SEIZING RUSSIAN ASSETS TO COMPENSATE FOR HUMAN RIGHTS VIOLATIONS IN UKRAINE: NAVIGATING THE LEGAL LABYRINTH

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ABSTRACT: This *Insight* explores the legal terrain surrounding constraints on repurposing of state-affiliated property (both state-owned and private assets affiliated with the state) to compensate for human rights violations caused by Russia's invasion of Ukraine. It briefly examines evolving norms regarding sovereign immunity, third-party countermeasures, and their impact on international human rights law. Key issues include the role of *jus cogens* norms and obligations *erga omnes* in potentially waiving state immunity, the legality and reversibility of third-party countermeasures, and the potential clash between sovereign immunity and human rights law. The *Insight* also discusses the relevance of investment treaty law and international humanitarian law to property constraints. Recent developments, such as establishing a compensation mechanism for Ukraine's damages, are outlined, underscoring the need for adequate funding for these mechanisms to be effective. The author proposes potential approaches to asset confiscation, including transferring frozen assets to a dedicated fund or providing financial assistance while retaining the right to reclaim assets upon reparations. Acknowledging the intricacies involved, it calls for further research to address the multifaceted issues arising in this evolving area of international law.

KEYWORDS: Ukraine – immunity – countermeasures – state-affiliated assets – human rights – compensation.

I. INTRODUCTION

Hobbes, like his predecessor Grotius, acknowledged the existence of rules governing warfare,¹ notably asserting that the deliberate targeting of civilians lacked justifiable

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¹ L May, 'A Hobbesian Approach to Cruelty and the Rules of War' (2013) LJIL 294.



grounds.² Four centuries later, contemporary events pose a challenging puzzle to comprehend. The aftermath of the full-scale invasion of Ukraine has brought enduring consequences upon Ukraine's infrastructure, resulting in a minimum of USD 143.8 billion in direct damages.³ A significant portion of this devastation is concentrated in the housing sector alone, with direct damages amounting to USD 54.4 billion, equivalent to the destruction of 158,000 residential buildings or 83.1 million square meters (8.2 per cent of the entire national inventory).⁴ Furthermore, the immense task of rebuilding and reconstructing Ukraine is estimated to be between USD 411⁵ and 750⁶ billion. These figures have been increasing daily. For instance, in June 2023, the Kakhovka Dam in Ukraine was breached, causing extensive flooding and subsequent significant damages.⁷

The full-scale aggression in Ukraine has prompted numerous countries to respond by freezing Russian assets worldwide. However, the amount of frozen assets, whether owned by or affiliated with Russia, varies across different sources. The most authoritative, if not the only, reference for the central bank assets is derived from Russia's central bank report.⁸ While frequently used as a point of reference, this report contains numbers of foreign currency holdings abroad as of January 2022 and, thus, may not necessarily reflect the precise count of frozen assets afterwards.

The lack of clarity on exact figures becomes even more evident when it comes to the frozen private assets. A recent figure was circulated by the G7 "Russian Elites, Proxies, and Oligarchs Task Force" (REPOTF), stating that they had blocked or frozen more than USD 58 billion of sanctioned Russians' assets in financial accounts and economic resources.⁹ Another source suggests that USD 116 billion in private assets were frozen worldwide, with a significant portion, USD 61.5 billion, frozen in Belgium.¹⁰ Additionally,

² *Ibid.* 304.

³ Kyiv School of Economics, *During the year of the full-scale war, the total amount of damages caused Russia to Ukraine's infrastructure has reached almost \$143.8 billion* kse.ua.

⁴ *Ibid.*

⁵ World Bank, *Updated Ukraine Recovery and Reconstruction Needs Assessment* worldbank.org.

⁶ International Working Group on Russian Sanctions, *Why and How the West Should Seize Russia's Sovereign Assets to Help Rebuild Ukraine* fsi.stanford.edu.

⁷ BBC, *Ukraine dam: What we know about Nova Kakhovka incident* www.bbc.co.uk.

⁸ Bank of Russia, *Annual Report 2021* www.cbr.ru. The report explicitly delineates the total valuation of foreign currency assets at USD 612.9 billion as of January 1, 2022. A dissection of these assets reveals their allocation as follows: 1) gold holdings within the Central Bank: USD 131.52 billion (21.5 per cent); 2) in China: USD 103.11 billion (16.8 per cent); in Germany: USD 96.58 billion (15.7 per cent); in France: USD 60.65 billion (9.9 per cent); in Japan: USD 77.72 billion (12.7 per cent); in the United States: USD 39.01 billion (6.4 per cent); in the United Kingdom: USD 30.48 billion (5.0 per cent); in international organisations: USD 30.65 billion (5.0 per cent); in Canada: USD 16.55 billion (2.7 per cent); in Austria: USD 15.32 billion (2.5 per cent); across other countries: USD 35.62 billion (5.8 per cent).

⁹ HM Treasury, *Russian Elites, Proxies and Oligarchs Task Force joint statement* www.gov.uk.

¹⁰ Institute of Legislative Ideas, *Confiscation Tracker* confiscation.com.ua.

there is the suggestion that the estimated total of oligarch assets, which encompasses assets in sanctioning and non-sanctioning jurisdictions, amounts to USD 1000 billion.¹¹

Despite hundreds of billions in frozen or blocked state-owned and private assets, the funds recovered from the seized Russian assets worldwide fall short. While it is alleged that the total amount of seized assets is less than USD 1 billion,¹² the only known case to the author entails confiscation of USD 5.4 million,¹³ representing a minuscule 0.00072 per cent of the funds required for reconstruction.¹⁴

This shortfall is primarily due to the lack of clarity on how to step from freezing to seizing. UN General Assembly Resolution on remedy and reparations for aggression against Ukraine¹⁵ kept the pressing issue of whether countermeasures and sanctions can take the form of constraints on state-owned and affiliated private property unsolved. The evidence indicates that while many jurisdictions have decided to freeze Russian assets, only a few, including the United Kingdom, Poland, and Estonia, have taken steps toward developing mechanisms for asset confiscation.¹⁶ To this end, states face complicated questions. Does and, if so, upon which conditions international law allow State(s) to constrain the property affiliated with another State (both state-owned and affiliated private assets)? To what extent are these conditions (and should) be human rights-based? And, how could and/or should it be done? In other words, the question arises as to whether states in violation of fundamental norms of the international community can be subjected to proportionate (counter) measures. These measures, in exceptional circumstances, may encompass the non-reversible confiscation of state-owned or affiliated assets. Such actions would be sanctioned by the international community but would be executed in the interests of the victim state. This could, for example, involve compensation for the documented thousands of civilian casualties and the destruction of hundreds of thousands of residential buildings.

Considering the constraints of this paper and the intricacy of the issues under examination, this publication does not assert the provision of conclusive answers to these questions. Its primary objective is to comprehensively present the questions and, second, to offer a general framework for potential pathways forward. In the meantime, a crucial clarification is to be made. Within this paper, State-owned property encompasses

¹¹ Atlantic Council, *Global Sanctions Dashboard* atlanticcouncil.org.

¹² Institute of Legislative Ideas, *Confiscation Tracker* cit.

¹³ EU Sanctions, *US court grants forfeiture of \$5.4 million owned by Konstantin Malofeyev* europeansanctions.com.

¹⁴ International Working Group on Russian Sanctions, *Why and How the West Should Seize Russia's Sovereign Assets to Help Rebuild Ukraine* cit.

¹⁵ General Assembly, Resolution on furtherance of remedy and reparation for aggression against Ukraine, 14 November 2022, UN Doc A/Res/ES-11/5.

¹⁶ In February 2023, the British Parliament registered a bill to confiscate Russian state assets and support Ukraine; In January 2023, the Estonian Ministry of Foreign Affairs officially announced that it was working on a bill allowing to confiscate Russian assets; In June 2023, Polish Sejm presented a draft law on amendments to the country's Constitution, which would allow the confiscation of frozen Russian assets on legal grounds.

tangible and intangible assets, whether movable or immovable, that are owned, possessed, or controlled by a foreign State. This definition covers assets held by both central bank and State-owned enterprises.¹⁷ In the meantime, the paper alludes to State-affiliated private property that encompasses private assets owned by individuals affiliated with the respective State. As delineated below, the distinction between state-owned and state-affiliated private assets gives rise to distinct legal issues.

II. LABYRINTH OF LEGAL ISSUES

II.1. STATE-OWNED ASSETS

At least three critical issues come to light when it comes to the seizure of state-owned property. The first issue pertains to sovereign immunity, potential exemption from it, and the interplay between these exemptions and international human rights law. The second issue revolves around the necessity for countermeasures to be *reversible*. The third issue is connected to the complexities of the investment protection regime, where state-owned enterprises appear to be investors, and their assets are considered investments. These issues are outlined below.

States usually enjoy immunity for acts *jure imperii*.¹⁸ However, while state immunity remains necessary to “play a pacifying and stabilising role” between States, its exact scope is not clear.¹⁹ One may argue that States violating fundamental norms that protect values of paramount importance (*jus cogens* norms) or/and obligations owed to the international community as a whole (*erga omnes*) must be deemed to have implicitly waived their immunity as they do not deserve to benefit from the immunity rights. It is frequently the case when not only an injured State but also third States react to the mentioned-above violations by so-called third-party countermeasures. Nevertheless, exemptions to sovereign immunity remain controversial. There is a concern that third-party countermeasures are “open to abuse by powerful States against a weaker State that they might particularly dislike for other reasons”.²⁰

This controversy goes beyond the law of state responsibility. Some scholars state that it is time to revisit sovereign immunities to interpret and apply them in a manner that complies with international human rights law.²¹ The question is, therefore, whether human rights violations should constitute an exemption to sovereign immunity and, if so,

¹⁷ J Thouvenin and V Grandaubert, 'The Material Scope of State Immunity from Execution' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 247.

¹⁸ P d'Argent and P Lesaffre, 'Immunities and Jus Cogens Violations' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 617.

¹⁹ J Thouvenin and V Grandaubert, 'The Material Scope of State Immunity from Execution' cit. 250

²⁰ General Assembly, Fifty-fifth Session Official Record, 13 November 2022, UN Doc A/C.6/55/SR.15, para. 63.

²¹ R Freedman and N Lemay-Hébert, 'Between a Rock and a Hard Place – Immunities of the United Nations and Human Rights' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 579.

how it should interplay *with jus cogens* or/and *erga omnes* exemptions. Indeed, one may reasonably doubt the legitimacy of the sovereign immunity rule as far as it prevents compensation for serious human rights violations such as thousands of recorded civilian casualties and hundreds of thousands of destroyed residential buildings. It is important to note that discussions surrounding state immunity arise within the context of judicial constraint mechanisms. Conversely, when it comes to executive and parliamentary mechanisms, the application of state immunity is less conventional, unless there is a consideration that these mechanisms could potentially be subject to judicial review. This aspect warrants further analysis but falls outside the scope of the present *Insight*.

In turn, the arguably more complex issue lies in the legal nature of third-party countermeasures or sanctions, specifically their reversibility requirement. In the *Gabčíkovo Nagymaros Project* case, the International Court of Justice (ICJ) introduced an essential requirement for a countermeasure to be considered lawful.²² Essentially, the Court established that the countermeasure must possess the attribute of reversibility. Article 49 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) reflects this position.²³ The assurance of reversibility is evident when assets are frozen as a temporary measure. However, the complexity arises when this principle is applied to assets that are subject to seizure.

Moreover, one could also look at the constraint of State-owned property through the lens of investment treaty law. It might be the case where a bilateral investment treaty is in place, a State-owned enterprise appears to be a foreign investor, frozen or confiscated assets are recognised as an investment, and the adopted measures appear to be an expropriation or any other breach of the investment treaty law. An emblematic case is that of the Central Bank of Iran as the subject of a number of enforcement proceedings promoted against Iran for supporting international terrorism²⁴ in which the Central Bank of Iran threatens investment treaty claims against South Korea and takes one on Bahrain.²⁵ This concern also extends to affiliated private assets.

II.2. PRIVATE ASSETS

As far as seizing of private assets is concerned, aside from potential challenges within the investment protection regime, several complex issues become apparent. First and foremost, determining the legal basis for the confiscation of private assets poses a significant

²² ICJ, *Gabčíkovo Nagymaros Project case (Hungary v. Slovakia)* [25 September 1997] para. 7 at 56–57, para. 87.

²³ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc A/RES/56/83, Annex I, art. 49(1).

²⁴ P Salvati, 'Foreign Central Banks and Immunity from Execution: Too Sovereign to Be Attached?' in R Bismuth, V Rusinova, V Starzhenetskiy and G Ulfstein (eds), *Sovereign Immunity Under Pressure* (Springer Cham 2022) 418.

²⁵ S Moody, 'Iran's central bank prepares treaty claim against Korea' (1 August 2023) Global Arbitration Review globalarbitrationreview.com; 'Iran's Central Bank takes on Bahrain' (9 August 2021) Global Arbitration Review globalarbitrationreview.com.

question. In this context, establishing the proof of affiliation between specific individuals, legal entities, their assets, and Russia becomes crucial, along with defining the criteria or threshold for such affiliation. Second, there arises a concern about whether measures of constraint might infringe upon the right to peaceful enjoyment of possessions, as guaranteed, for example, by the European Convention on Human Rights.²⁶ Third, it is essential to consider the perspective of international humanitarian law. The issue is whether private persons whose property is to be frozen or confiscated appear as citizens or natives of a hostile country and, thus, an enemy, as those who constitute the hostile State or nation and, as such, are the subjects to the hardship of the war.²⁷

Outside of Ukraine, apart from criminal liability for sanctions circumvention, no other mechanism has resulted in the actual seizure of private assets associated with Russia so far. While such legislation is in place in some jurisdictions, it has not yet led to actual completed seizing. In contrast, Ukraine has adopted a few distinct avenues for asset confiscation. First, there is the confiscation mechanism established by the Law of Ukraine 'On Sanctions' in May 2022.²⁸ This mechanism entrusts the National Security and Defense Council with the authority to initiate asset confiscation through a presidential decree. The subsequent adjudication process involves the Higher Anticorruption Court, based on claims submitted by the Ministry of Justice.²⁹ The second mechanism, tailored specifically for banks in May 2023, empowers the National Bank of Ukraine to withdraw institutions from the market if owned by individuals meeting sanctions criteria.³⁰ The government can acquire these banks at a nominal price, and while potential compensation is considered, funding for such restitution is restricted to assets owned by aggressor states. Third, there are mechanisms of confiscation as provided by martial law.³¹ Fourth, a conventional confiscation process operates within the framework of criminal procedure as provided by the Criminal Code.³²

Before delving into an overview of the legal grounds for confiscation under these mechanisms, it is essential to highlight their outcomes. Concerning confiscation under the law on sanctions, as of the end of March 2023, the Higher Anticorruption Court of Ukraine had rendered 21 decisions regarding the confiscation of private assets. These assets were seized from Russian oligarchs, propaganda-promoting rectors, and state officials. The confiscated assets included residences, factories, quarries, non-residential

²⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art 46.

²⁷ E Benvenisti, 'Arbitrating the Laws of War' (23 June 2022) Arbitration Lab arbitrationlab.com.

²⁸ Law of Ukraine 'On Sanctions', 14 August 2014, n. 1644-VII.

²⁹ Law of Ukraine 'On the Basic Principles of the Compulsory Seizure of Property of the Russian Federation and its Residents in Ukraine', 3 March 2022, n. 2116-IX.

³⁰ Law of Ukraine 'On the introduction of changes to some legislative acts of Ukraine regarding the improvement of the procedure for withdrawing a bank from the market under martial law', 29 May 2023, n. 3111-IX.

³¹ Law of Ukraine 'On the Transfer, Compulsory Expropriation or Expropriation of Property under the Legal Regime of Martial Law or a State of Emergency', 17 May 2012, n. 4765-VI.

³² Criminal Code of Ukraine, 17 January 2002, n. 2953-III.

premises, automotive vehicles, machinery, ownership shares in companies, and luxury items. In total, private assets valued at over USD 70 million were confiscated.³³

Within the second type of confiscation mechanism to be executed by the President of Ukraine,³⁴ only one decision regarding the seizure of assets from two Russian banks was adopted. This decision is alleged to contribute approximately USD 1 billion in revenue to the state budget by mid-2023.³⁵

The law on sanctions defines the legal basis for confiscation as significant harm to Ukraine's national security, sovereignty, or territorial integrity.³⁶ This encompasses actions such as the adoption of decisions endorsing armed aggression against Ukraine, active participation in such decisions, involvement in formulating or endorsing related proposals, contributing to state financing for aggressive activities, participating in the planning and execution of aggression, personal involvement in acts of aggression, decisions regarding the establishment of occupation administrations, engagement in decisions related to the creation and support of self-proclaimed bodies within occupied territories, and organising illegal elections.³⁷

Moreover, two additional legal grounds exist for confiscating private affiliated assets under the sanctions regime. The first pertains to endorsing the policy of the aggressor state, which denies the right of the Ukrainian people to self-identify and determine their own destiny while distorting the perception of the unique identity of the Ukrainian people and their aspiration for independence. This is achieved through the dissemination of false ideological constructs, grounded in knowingly false and manipulative associations between Ukrainian patriotism and ideologies such as "Nazism" or other forms of xenophobia. The second legal ground involves inciting hatred against the Ukrainian people, their culture, state language, and national identity.³⁸

While the legal basis for the confiscation of private assets is well-defined in Ukraine, the question remains open to other countries. This is also because private property is a central value protected by human rights instruments. Due to the limits of the present paper, the analysis of this issue lies outside of its scope, although it remains crucial for the topic in question.

III. A WAY FORWARD

In May 2022, the President of Ukraine established a Working Group responsible for developing and implementing international legal mechanisms to compensate Ukraine for

³³ Institute of Legislative Ideas, *Confiscation Tracker* cit.

³⁴ Law of Ukraine 'On the Basic Principles of the Compulsory Seizure of Property of the Russian Federation and its Residents in Ukraine' cit.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

damages resulting from the armed aggression of Russia. Subsequently, the group members developed a concept comprising four key components: a) an international commission for compensation claims; b) a compensation fund; c) a register of damage; d) an international agreement to establish the procedure.³⁹

In May 2023, the Council of Europe Summit took a significant stride forward by establishing a register of damages for Ukraine, serving as an initial measure toward implementing an international compensation mechanism for victims affected by Russian aggression.⁴⁰ The register has garnered participation from 44 countries, including the European Union, with other nations indicating their intention to become part of this initiative.⁴¹ In September 2023, the Justice Ministers of Council of Europe member and observer states adopted a declaration outlining a set of guiding principles aimed at achieving comprehensive accountability for the Russian Federation's aggression against Ukraine and ensuring redress for all victims of the war.⁴²

Undoubtedly, this represents a substantial milestone. However, even the most meticulously devised procedures would prove ineffective without mobilising funds. Henceforth, considerable emphasis should be placed on securing adequate sources for establishing the compensation fund.

As logically deduced from the analysis above, one funding source should be the confiscated state assets, primarily those of central banks. At the same time, the other should comprise the seized private assets affiliated with the State. Evidently, these two categories would necessitate different instruments and, consequently, involve distinct approaches moving forward.

In the case of state assets, particularly those held by central banks, states face a binary choice: they can either take proactive measures to provide redress for the countless victims of human rights violations or abstain from seizing the assets, waiting for the conflict to conclude, and hoping for eventual reparations from Russia, should they materialise at all. The former option entails navigating the intricate complexities of the legal landscape. In contrast, the latter option condemns the victims and the entire nation to prolonged suffering in their pursuit of justice.

The aforementioned human rights violations must serve as exceptions to sovereign immunity concerning judicial confiscation mechanisms. Meanwhile, the reversibility of countermeasures can be achieved through the following means. Confiscation of frozen

³⁹ C Giorgetti, M Kliuchkovskiy, and P Pearsall, 'Launching an International Claims Commission for Ukraine' (20 May 2022) EJIL: Talk www.ejiltalk.org.

⁴⁰ Committee of Ministers of the Council of Europe, Resolution CM/Res (2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine of 16 May 2023.

⁴¹ Council of Europe, *The Conference of Participants of the Register of damage for Ukraine holds its second meeting* www.coe.int.

⁴² *Ibid.*

assets may technically be feasible through a few approaches. First, the concerned third State, or a group of third states, could seize the assets and transfer them to a dedicated fund under the guarantee of repayment when Russia becomes prepared to make reparations. A set-off mechanism could be implemented to facilitate this, where the amount of reparations is reduced by the sum transferred to Ukraine. Second, the concerned third State, or a group of third states, could provide financial assistance to the special fund but retain the right to reclaim these assets when Russia fulfils its reparations obligations.⁴³ Both methods are bold and, to some extent, unprecedented. Likewise, the aggression witnessed in Europe since the Second World War. Both approaches give rise to the issues discussed above and numerous other considerations.

Consequently, it becomes evident that a more comprehensive analysis is imperative to tackle these concerns effectively. However, in the interim, ensuring that the gravity of these challenges does not impede the relentless pursuit of justice for the countless victims enduring severe human rights violations is crucial.

Regarding confiscating private assets, one might propose exporting Ukrainian models, except for the one established by martial law, for consideration in other jurisdictions. This exportation should be carried out with careful regard for international human rights law, particularly the European Convention on Human Rights, and should incorporate lessons learned from Ukraine. Due to the constraints of this paper, a comprehensive analysis of the latter is beyond its scope.

To conclude, while navigating through a complex labyrinth of legal challenges emerging from various frameworks, the pursuit of rectifying wrongfulness resembles the proverbial Theseus' ball of thread. In the meantime, failing to address the impunity and restore justice could bring us closer to a state of *Bellum omnium contra omnes*,⁴⁴ as articulated by Hobbes.

⁴³ T Nesterchuk, Panel Discussion 'How to make Russia pay for the damages caused in Ukraine?', Goodenough College, 6 June 2023.

⁴⁴ Natural state of war of all against all. See L May, 'A Hobbesian Approach to Cruelty and the Rules of War' cit. 294.

