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Expropriation for reconstruction?

*On the legal limits of financing
the reconstruction of Ukraine
through expropriation*

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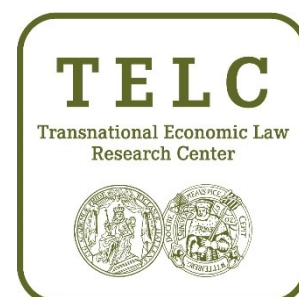
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Every day, the war in Ukraine perpetuates unbearable and unimaginable human suffering. Many find it difficult to be confronted daily with the terrible news from Ukraine. It is therefore quickly overlooked that this sense of despair in states that support Ukraine's fight of self-defense is likely the result of precise political calculations by Russian President Vladimir Putin. Against this background, evaluating pushback against the Russian aggressor in the time after the hostilities in Ukraine end in an earnest and even-handed manner is difficult. However, such consideration seems necessary in order to weigh the moralization of politics against the necessary rationality of the rule of law. Specifically, the question at hand is whether it is possible to expropriate state and/or private Russian assets without compensation in order to finance the reconstruction of Ukraine. The grounds for this consideration is rooted in the realization that the damage caused by Russian aggression in Ukraine is already [estimated at over one trillion U.S. dollars.](#)

While there are already some opinions circulating on the legal problem of expropriations without compensation for reparation purposes (see in

particular Kokott, UKuR 2022, 438 ff. and 509 ff.), there are few, if any, coherent analyses on the relevant aspects of international law. This brief contribution is intended to summarize the key factors that inform the legal framework of such a discussion. A review of these key factors shows that there are considerable legal limits to financing the reconstruction of Ukraine through expropriation.

Reparation Obligations under International Law in Modern International Law

For scholars of the 16th and 17th centuries, the legality of reparation obligations under international law was clear. Samuel Pufendorf, for example, argued that he who goes to war instead of settling disputes peacefully takes a risk. The risk, said Pufendorf, was accepting reparation obligations in the event of a lost war, as unilaterally imposed by the victor. De Vattel, Gentili, and other scholars of the time argued similarly ([Sullo/Wyatt, War Reparations, MPEPIL](#)). However, the legal framework in which reparations obligations are discussed has changed radically since then. Unlike in the days of Pufendorf, there is no longer a free right to wage war. In fact, the term "war" no longer exists in the sense of international law. There is instead, under Article 2(4) of the United Nations Charter, an absolute prohibition of the use of force in international relations. This, in turn, has a direct impact on the

question of reparations. Today, reparation obligations cannot be imposed unilaterally by a war's "winner." Rather, reparations in the wake of war are integrated into the international law regime through state responsibility. The [ILC Articles on State Responsibility](#), which reflect customary international law, state clearly and unambiguously in Article 31: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Yet, the obligation to make reparations for damage caused by a violation of international law is further embedded in the norms of the international legal order as a whole.

Target central bank assets

Considering that frozen Russian foreign exchange reserves, which are held primarily by central banks in the U.S. and Europe, are likely worth more than 300 billion U.S. dollars, confiscation, i.e. expropriation without compensation, of these Russian state assets seems like an obvious way to finance the reconstruction of Ukraine. However, as has been pointed out repeatedly in discussions surrounding this issue, the foreign exchange reserves are state assets for sovereign purposes, and are therefore protected by immunity under international law. As a temporary measure, the seizure (freezing) of these state assets is justifiable as a permissible countermeasure under international law. However, permanent expropriation of these assets without

compensation may not fall within the scope of the relevant rules of the law of state responsibility.

Immunity for central bank assets?

Here, it is necessary to determine whether there is immunity for Russia's central bank assets located abroad are immune as state assets under international law. Under the general immunity principles of international law, this is doubtful. While the relevant source of law for immunity, the United Nations Convention on Jurisdictional Immunities of States and their Property, has not entered into force, it is widely considered to be customary international law. The commentary of the UN Convention on Jurisdictional Immunities of States and their Property confirms what the very title of the Convention expresses: immunity for state property is provided for only in relation to judicial proceedings. Though 'judicial proceedings' is not clearly defined in the Convention, the ILC has made it clear that a very broad understanding of the term must be applied (for a detailed discussion of the problem see [Ruys, Immunity, Inviolability and Countermeasures - A Closer Look at Non-UN Targeted Sanctions](#)). It is therefore questionable whether legislative expropriation of Russian state assets by, for example, by an EU legal act or a national German law, would be subject to immunity; to fall within the scope of the Convention, one could argue, concrete expropriation would first have to be effectuated by

a corresponding administrative act, which would, in turn, trigger a guarantee of judicial protection later on. However, this line of argumentation is doubtful in view of the rationale of the immunity protection convention. The rationale of jurisdictional immunity is based on the classical idea of *par in parem non habet imperium*. However, legislative expropriation is not about this.

The different arguments on the scope of judicial immunity were detailed in the dispute between Timor-Leste and Australia in the *Questions relating to the Seizure and Detention of Certain Documents and Data* proceedings before the International Court of Justice. However, the case was dismissed without a ruling (see also [Ruys, Immunity, Inviolability and Countermeasures - A Closer Look at Non-UN Targeted Sanctions](#)). The argument that, irrespective of the scope of state immunity, Russia cannot invoke immunity due to its well-documented crimes against humanity, is not very helpful at this point. The International Court of Justice explicitly stated in *Germany v. Italy*, in paragraph 100 of its [judgment of February 3, 2012](#), that "[w]hether a state is entitled to immunity before the courts of another state is a question entirely separate from whether the international responsibility of that state is engaged and whether it has an obligation to make reparation."

This leaves the question of whether

there exists overriding, general immunity for foreign state assets that also applies independently of court proceedings. This could be justified generally under the sovereign equality of states under Art 2 (1) UN Charter. However, it is difficult to argue that there must be special immunity in court proceedings under international law, if general immunity follows directly from Art. 2 (1) UN Charter. It is instead more convincing to focus not on immunity for, but rather on the inviolability of, state assets. The inviolability of assets is regularly stipulated for in the statutes or conventions of international organizations, e.g. Art. 1 Protocol No. 7 TFEU on the Protection of the Property of the European Union, Art. 39 Protocol No. 4 TFEU on the Statute of the European System of Central Banks and of the ECB, Art. 26 (2) Protocol No. 5 TFEU on the Statute of the European Investment Bank or Art. II, Section 3, Convention on Privileges and Immunities of the United Nations. In this respect, the protection of property against expropriation without compensation under customary international law arguably also applies to state property. Jennings/Watts, for example, emphasize this point in their "Oppenheim's International Law" (9th edition, Vol. 1, Part 1, p. 364), stating that the general protection of property under international law also applies to state property and, therefore, compensation must be paid in the event of expropriation.

Expropriation without compensation as a countermeasure?

If the expropriation of state assets is impermissible for reasons of immunity, or at least can only be carried out in accordance with compensation to be paid, the question arises as to whether expropriation without compensation as a countermeasure is permissible under international law. The legal basis for countermeasures, formerly known as reprisals, is laid out in Article 49 of the ILC Articles on State Responsibility. According to paragraph 2, countermeasures may only constitute the non-performance, for the time being, of international obligations of the State taking the measures towards the responsible State. This is in line with the idea expressed in Article 49 ILC Articles on State Responsibility overall that the purpose of countermeasures is exclusively to compel a State responsible for internationally wrongful acts to cease its violating behavior and comply again with international law. The temporary seizure of central bank assets can therefore be justified under this provision. Permanent expropriation without compensation, however, cannot. Expropriation of state assets without compensation, with the aim of using those assets for the reconstruction of Ukraine, would be characterized precisely by its permanency. It would no longer be a question of a temporary compulsion on Russia to fulfill its reparation obligations to Ukraine. Further, it is highly disputed whether third countries, such

as the Member States of the European Union or the EU itself, may take countermeasures if another State - in this case Ukraine - is affected by a violation of international law.

No expropriation of state property without compensation for reparation purposes

In terms of Russian state assets, there is thus no possibility of unilateral confiscation without compensation, if the confiscation is for financing the reconstruction of Ukraine. There is no doubt that Russia is obligated to make reparations for the damage it has caused, and continues to cause, in Ukraine. However, how these reparations are made must be governed by a detailed and orderly procedure. There are historical models for this; the mechanism agreed upon in the [Algiers Declaration of January 19, 1981](#), included an agreement between the United States and Iran to make temporarily frozen state assets available for compensation of property damage as reparations. More recently, the establishment of an international damage registry, as decided by the EU and the UN General Assembly in a [resolution of November 15, 2022](#), provides for a more formulaic procedure for making reparations.

Expropriation of Russian private property for reparation purposes?

This still leaves the question of

whether Russian oligarchs, whose private assets have already been frozen under relevant EU sanctions law, can be expropriated without compensation if the assets are to be used for the reconstruction of Ukraine. It should first be noted that confiscation of such assets always constitutes direct expropriation. Accordingly, the discussion in international investment protection law as to whether, and if so, to what extent, expropriation without compensation is permissible on the basis of the "sole effects" or "proportionality" test, or the "police powers" exception (see Reinisch/Schreuer, *International Protection of Investments, The Substantive Standards*, paras. 389 et seq., paras. 470 et seq., para. 705 et seq.) is not relevant. The question would then be whether expropriating the private assets of Russian oligarchs without compensation is indirect expropriation. However, as previously mentioned, the confiscation of private assets always constitutes direct expropriation. Therefore, under international investment protection law, there is no clear answer for whether Russian private property can be expropriated for reparation purposes.

This is different in the area of general human rights protection. Insofar as a possible confiscation takes place through an EU legal act or through corresponding implementation measures by the EU Member States, the EU Charter of Fundamental Rights would be relevant. Art. 17 (1) Charter of Fundamental Rights

clearly and unambiguously provides that expropriation is only possible if adequate compensation is provided. The European Convention on Human Rights is not so clear: Article 1 of the first additional protocol to the ECHR does not contain an explicit obligation to pay compensation in the event of expropriation. The European Court of Human Rights has clarified, e.g. in the [Lithgow](#) (para. 116) and [Holy Monasteries](#) (para. 71) cases, that expropriation without compensation can only be considered in exceptional circumstances. Whether such exceptional circumstances exist in the case of Russian private property that is located in an EU Member State, or another Council of Europe Member State, is unlikely. It is important to note that the obligation to pay reparations as a duty under international law applies to the Russian state, but not to individuals. The international law basis of reparations for the reconstruction of Ukraine its state-to-state relationship with the Russian Federation. Private property of Russian citizens can therefore only be used if a very close relationship of the respective private person to the Russian state can be proven, if at all. In this respect, there must be a functional connection to establish that a private individual can also be held responsible for the Russian state's violation of international law in the form of the aggression against Ukraine. It will hardly be possible to prove this connection in individual cases. Independent of this, and not further illuminated here is the

confiscation of private assets in connection with criminal acts (on this, Kokott, loc. cit., and Rath/Ruff, EuZW 2022, 692 ff.).

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Outlook

Armed conflicts lead to unspeakable human suffering, and to exceptional ethical and moral situations. Ethical and moral dilemmas arise not just during ongoing conflict, but also in discussions about the aftermath of war. The understandable desire to punish an aggressor and hold that aggressor accountable often pushes conventional standards of evaluation into the background. Principles of the rule of law often struggle amidst the pressure created by armed conflict. This is evident in the political demand for expropriating Russian assets without compensation to fund the reconstruction of Ukraine. As reasonable as this demand may seem, sober reflection reveals that it is limited by clear limits from international law and European law. The established standards of the rule of law, which must be observed here, must not be hastily thrown overboard - especially when it is precisely the goal of the aggressor to shatter those very standards.

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