Reiss Center on Law and Security
NYU School of Law
JUST SECURITY

What You Need to Know:
Unpacking the Law in Russia's War Against Ukraine

Asset Seizure in Russia's War in Ukraine

Chimène Keitner | April 3, 2023

Chimène Keitner is Alfred & Hanna Fromm Professor of International Law at UC Hastings College of the Law in San Francisco. Her expertise spans the fields of international law, international civil litigation, national security law, and emerging issues in cyberlaw. She served as the 27th Counselor on International Law at the U.S. Department of State, and serves as an Adviser on Sovereign Immunity for the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States. She has also served as a member of the Executive Council of the American Society of International Law and as founding co-chair of the International Law Association's Study Group on Individual Responsibility in International Law. Chimène holds an A.B. in History & Literature from Harvard, a D.Phil. in International Relations from Oxford, where she was a Rhodes Scholar, and a J.D. from Yale Law School, where she was a Paul & Daisy Soros Fellow.

Russia's intensified military campaign against Ukraine has now been going on for over a year. What should international lawyers be focusing on at this point in the conflict?

The most important question for lawyers and policymakers, in my view, is how to stop a veto-wielding member of the United Nations Security Council from destroying a neighboring country without triggering a global armed conflict or nuclear war. International legal regimes for individual and state responsibility have clearly failed to deter Russia's egregiously unlawful conduct. Nonetheless, they still provide an important basis for punishing individuals and enabling Ukraine to seek restitution, compensation, and satisfaction. For those lawyers and policymakers who are not directly involved in trying to bring about an end to the bloodshed, it makes sense to think about what comes next.

Over the past few weeks there have been renewed calls to use Russian assets held abroad as a source of reparation for the effects of Russia's unlawful aggression, or for other purposes. But seizing Russian assets raises complex international legal issues, most prominently when those assets are owned by the Russian state. What are the key legal issues that remain to be addressed and how should States proceed with respect to Russian assets in their jurisdiction that have been frozen?

As a matter of international law, Russia bears state responsibility for the damage caused by its invasion of Ukraine. That means Russia is liable under international law, as well as Ukrainian domestic law. (States that have aided and assisted Russia also bear state responsibility.) That said, voluntary restitution by Russia is unthinkable under the current regime, and would likely be politically unfeasible for a future regime. Recognizing this, states that have jurisdiction over Russian assets within their territory have sought to ensure that such assets will be available to help repair at least some of the damage caused by Russia's aggression. Some have even suggested that those assets should be made available to Ukraine to fund its self-defense.

As a threshold matter, foreign states themselves generally have immunity in other countries' courts for their non-commercial acts. Ukrainian courts have held that this rule does not apply in the circumstances of Russian aggression. In any event, Russian assets inside Ukraine are clearly inadequate to compensate victims and "re-establish the situation which existed before the wrongful act was committed," which is the goal of restitution. Hence the efforts to identify Russian assets located elsewhere that could be used for this purpose.

"As a matter of international law, Russia bears state responsibility for the damage caused by its invasion of Ukraine."

As Scott Anderson and I explained in a prior post, and as Paul Stephan further explored, there are different categories of Russia-related assets located in foreign jurisdictions. Each of these raises legal and policy questions that merit careful consideration. For example, foreign central bank assets enjoy strong immunity protections under international law, as documented by Ingrid (Wuerth) Brunk. Although there is some room for debate about whether merely freezing assets implicates immunity doctrines, it is much more difficult in my view to argue that seizing assets does not amount to an exercise of enforcement jurisdiction that would run afoul of foreign sovereign immunity (although some have taken the position that jurisdictional immunities only constrain actions by courts, whereas inviolability and other international law doctrines may constrain other governmental actors). Moreover, "de-dollarization" in response to U.S. sanctions—which Russia has pursued since 2014—arguably erodes U.S. global economic power and future leverage, suggesting that there may be policy downsides to freezing and seizing Russia's sovereign assets as well.

Seizing non-sovereign assets (like an oligarch's yacht) does not generally raise immunity concerns, but it must have a valid basis under domestic law. Countries that have enacted expedited procedures for seizing assets of Russian oligarchs must respect domestic constitutional protections for private property. As a practical matter, due process challenges brought by the owners of the seized assets in domestic courts can be time consuming and expensive to litigate. As a matter of principle, the rule of law prohibits governments from disregarding procedural and substantive protections for individual rights in the name of expediency.

Asset forfeiture (whether civil or criminal) is certainly a potential consequence of engaging in criminal activity. The U.S. Department of Justice has predicated some of its seizures on charges of sanctions evasion and money laundering, among other violations. Similar efforts have been pursued by Canadian authorities using a newly enacted asset forfeiture law. In addition to complying with domestic legal protections, seizure of foreign private assets must comply with the international law governing expropriation. International law generally requires that an expropriation of foreign private assets serve a public purpose and be non-discriminatory, and that the host government provide prompt, adequate, and effective compensation. Civil or criminal asset forfeiture in compliance with domestic law would not generally amount to an unlawful expropriation, but host countries need to be mindful of potential legal challenges—especially since they do not want to cede the ability to argue in favor of compensation for their own nationals whose assets might be located abroad.

Some have argued that oligarchs' wealth should not be treated as private property to begin with, because it is traceable to Putin's corrupt exploitation of Russia's public resources. Does that argument carry weight?

Corruption and authoritarianism often go hand in hand. The extreme wealth of many politically-connected Russian oligarchs is allegedly the product of financial crime whose concealment has been facilitated by permissive legal, auditing, and banking regimes in other countries. And as a matter of both law and fairness, the resources required to rebuild Ukraine should come from Russia, especially from those who have enriched themselves at the public's expense and enabled Vladimir Putin's destructive conduct. Effectuating this redistribution is, however, much more complicated than it might at first appear. As a legal matter, there isn't

currently a basis for treating privately held assets as public and therefore somehow beyond the reach of due process and expropriation protections. Moreover, while expropriation law generally protects private assets, sovereign immunity presumptively protects foreign state assets used for non-commercial purposes from execution.

"[T]he resources required to rebuild Ukraine should come from Russia, especially from those who have enriched themselves at the public's expense and enabled Vladimir Putin's destructive conduct. Effectuating this redistribution is, however, much more complicated than it might at first appear."

All of this is not to say that countries should give up on the possibility of seizing Russian assets. There are creative arguments to be made that seizure amounts to a permissible countermeasure designed to induce Russia to comply with its legal obligations, including the obligation to provide restitution. The U.N. General Assembly has recognized that, as a matter of international law, Russia must "bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury." (As readers will know, Russia holds a veto in the Security Council, meaning that the General Assembly has become the voice of the international community on issues arising from Russia's aggression in Ukraine.) It is also possible that an international tribunal will eventually award damages to Ukraine, for example in Ukraine's pending case against Russia in the International Court of Justice and its cases in the European Court of Human Rights. Using frozen assets to satisfy such a damages award could potentially alleviate some of the legal and policy concerns associated with unilateral seizures.

Under the current international legal framework, Russia's veto on the Security Council blocks the path envisioned by the U.N. Charter to enforce international law against recalcitrant states. The renewed impetus to find creative legal workarounds to induce permanent members of the Security Council to comply with their international legal obligations should be welcomed. That said, given the nature of international law and legal claims, we should expect that any justifications advanced to seize state or private property in these circumstances will be invoked in future situations. How lawyers, policymakers, and political leaders articulate the international legal justification for our actions today will shape the substantive legal rules surrounding asset seizure in the future, as well as creating new pathways for decentralized enforcement in the absence of an effective Security Council.