UKRAINE, ROGUE STATES AND IMPUNITY – POSSIBLE ROUTES FOR RECOVERY[1]

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As the war in Ukraine comes to the end of its first year, legal and media attention is beginning to move towards reconstruction and how it can be funded.[2] Due to the indiscriminate way in which Russia has waged war in Ukraine, there has been massive civilian infrastructure damage. Reconstruction will be lengthy and expensive. Unsurprisingly, given the global reach of Russian capital before the war, the debate has begun to focus on how Russian assets held outside of Russia, in particular sanctioned assets, could be used to fund reconstruction. This article considers that issue – not only in the sanctions context but also in the context of other legal methods of recovery: it also considers the linked issue of the threat posed by rogue states to the international legal order.

Discussions on the recovery of assets, whether sanctioned or not, usually focus on arbitration or litigation and most usually arbitration (whether private or investment treaty). It is trite that arbitration is consensual. As arbitrators and practitioners, we have tended always to mean that arbitration is consensual as *between the parties* and not, absent unusual cases, to look at the wider underpinning of arbitral law and practice, namely the relevant framework of international law, treaties and conventions.[3] True it is that there have always been difficulties over enforcement but those have tended to be seen as sui generis. It is only recently, we would suggest, that more fundamental doubts have begun to arise about the international consensus supposedly underlying international arbitration.

A pertinent and recent example of state practice that gives rise to such doubts is to be found in Russia. In 2020 Federal Law 171-FZ came into force in Russia amending the Arbitrazh Procedure Code of the Russian Federation. 171-FZ, in crude terms, removes the ability to arbitrate against sanctioned Russian persons located outside Russia: to do so attracts the possibility of an injunction; damages equal to the sum claimed plus costs and an inability to enforce any Award. In *Uraltransmesh v PESA*,[4] the Russian Supreme Court declared 171-FZ to be valid and that any sanctioned person could invoke it as against an arbitral proceeding brought against them outside Russia.

With the invasion of Ukraine on 24 February 2022, 171-FZ and *Uraltransmesh* may have to be viewed in a different context.

On 21 February 2022, the Security Council of the Russian Federation ("SCRF") recognised the independence of the Donetsk and Luhansk People's Republics. From reporting and speeches made, the decision of the SCRF was at the instigation of the President of the Russian Federation, Vladimir Putin. In any event, the SCRF has a defined legal status as a constitutional consultative body concerned with formulation and implementation of decisions by the President in the fields of *inter alia* "defence and national security".

On 24 February 2022, the SCRF authorised the invasion of Ukraine and on the same day as a result, Russia invaded Ukraine under purported cover of a "special operation" allegedly under the right of self-defence under Article 51 of the UN Charter. Again, from reporting and speeches made, in crude terms, the rationale for the invasion was a denial of Ukrainian statehood, an appeal to *Velikorossiya* (or irridentism) and allegations that Ukraine was a fascist state. All of these purported justifications fail to meet the criteria under Article 51 which underscores the consensus among public international law specialists that the "special military operation" amounts to a war of aggression in international law.

This is obviously not the first occasion on which Russia has acted against Ukraine – there is the annexation of Crimea in 2014. This earlier incursion did trigger investment treaty arbitrations which were successful in law – finding assets had been expropriated in violation of the Russia – Ukraine Bilateral Investment Treaty.[5] Russia, however, did not cooperate with the arbitral proceedings and it must be presumed that no recovery was made – highlighting the very rogue state problem at issue here. Thus, the question arises as to whether there can be alternate means of recovery and restitution to finance the post-war reconstruction of Ukraine.

There has been extensive reporting of Russia's actions since the invasion including allegations of war crimes including the targeting, torture and execution of civilians and the use of thermobaric weapons. There has also been reporting of widespread damage to infrastructure and Ukrainian property which from past Russian actions (Aleppo and Grozny for example) appears to be part of the Russian military strategy (indeed those in overall command – Putin, Gerasimov, Shoigu and Surovikin – are the same as were in command in Syria). Finally, there has been reporting of widespread pillaging – particularly of grain stocks.

Thus, there is extensive reporting not only of the waging of aggressive war but also of other breaches of the laws of war and of the *ius* cogens. So far there has been little denial of the allegations by the Russian Federation.

Tritely, the waging of aggressive war can and has attracted sanctions – but absent further domestic action, sanctions merely prevent the current use of sanctioned property – they cannot be used for reparations or restitution of economic loss. Further, reparations claims whilst theoretically possible,[6] involve lengthy proceedings which even if successful, are unlikely to result in the recovery of damages against a rogue state. Actions before the International Court of Justice will face the difficulties that were encountered in *Monetary Gold* where recovery was not possible because the relevant state did not agree.[7] Finally, the ultimate irony of 171-FZ is that it puts, so far as arbitral proceedings are concerned, sanctioned persons beyond the reach of arbitral recovery and, of course, persons are only sanctioned if there is thought to be a reason – breach of international or domestic law – for so doing.

Similarly, much of what has happened in Ukraine violates the European Convention on Human Rights and claims have already been brought against Russia. If those claims are successful, which it is more than reasonable to expect they will be, no doubt Russia will adopt the same attitude as it has to other claims against the state – to ignore them.

1 This article is an expansion of a short talk to COMBAR in Edinburgh in September 2022.

2 See, for example, https://www.reuters.com/video/watch/idRCV00BQF7 which raises arguments against some of the points made in this article.

3 At least since 1945

4 A60-36897/2020

5 See eg *PJSC Ukmafta v The Russian Federation* PCA 2015-34. The Award has not been published but the precis can be found at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/658/ukrnafta-v-russia

6 See eg the Congo litigation – see https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf at [257 ff].

7 *Case of the Monetary Gold Removed From Rome in 1943 (Italy v France et al) (Preliminary Question)* [1954] ICJ Rep 19

Thus, there is something of an impasse with neither private nor public international law offering a remedy. This impasse is even more stark given the International Court of Justice's comments in *Ukraine v Russia*.[8] Put another way, there is now a broadening question of impunity – how can rogue states or rogue state actors be held financially accountable for their actions? Particularly so when we are concerned with the waging of aggressive war, the inflicting of economic damage and pillaging?

A possible answer may lie in recovery in private law. The starting point, paradoxically, however, is the well-established principles of international public law as set out in the Charter of the International Military Tribunal of 1945. That provides:

> *"the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participating in a common plan or conspiracy for the accomplishment of any of the foregoing are 'crimes against peace' entailing individual responsibility".*[9]

Thus, a rogue state's actions in waging a war of aggression becomes a question of individual responsibility. It was this individual responsibility that was debated and resolved at the first of the Nuremberg trials ("Nuremberg 1"). Crucially, at Nuremberg 1, some defendants were found guilty of both conspiracy to wage aggressive war and for ***economic*** acts which formed part of the waging of aggressive war.[10] At the follow-on *IG Farben* trial ("IG Farben"),[11] nine of the Defendants, who were in essence economic actors, were found guilty of plundering, spoilation and the seizure of industrial plants throughout Europe. It is this liability flowing from economic acts[12] on which I wish to focus – in particular elements of a civil as opposed to criminal law conspiracy.[13]

As before, there have been multiple, verifiable reports of the destruction of infrastructure as well as, for example, pillaging of food and goods (particularly grain) from Ukraine.[14] Thus, there is a clear overlap between the actions of Russian combatants and their commanders in Ukraine and the conduct imputed to the individual Defendants in IG Farben. Further, given that some of the meetings and decision making in relation to the war in Ukraine were televised, it is not difficult to prove that individuals knew of and were involved in decisions relating to the start and waging of war in Ukraine. Thus, for the purposes of this debate, I assume that both the elements of breaches of the *ius* cogens and conspiracy will be made out as against at least some putative defendants.

The question then becomes – what, if any, recovery there can be. As set out above, it is reasonable to assume (at least whilst the present administration is in control) that any attempt to recover in international investment treaty arbitration or at the state level will be blocked and ignored.[15] Therefore, it falls to consider possible claims against non-state actors – that is individuals and corporations involved in the war in Ukraine – either by ordering the destruction of infrastructure and aircraft or profiting from pillaging.

The financial route into such claims is via the extensive and well documented capital outflows from Russia before 2014 and then before February 2022. Due to the nature of the Presidential Administration, those responsible for the capital outflows are usually part of the Presidential inner circle[16] and are therefore likely to be close to key decisions – like the invasion of Ukraine.[17] These outflows have already produced US$300bn of sanctioned assets[18] which manifestly only represents part of the capital invested outside Russia. The question is whether there is a means to access those sums without having resort to sanctioned assets.

Under the law of England and Wales,[19] the most obvious route to some form of recovery would be the law of tort. Thus, the deliberate destruction or removal of a chattel is conversion.[20] Although there is evidence of pillaging (grain for example), all that is needed is the destruction or removal of the chattel. Thus, conversion was the initial cause of action asserted in respect of aircraft taken by Iraq in the *Kuwait Airways Corporation* litigation after the first Gulf War.

Similarly:

> *where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage*[21]

there is a conspiracy to injure by unlawful means. In such cases, it is worth bearing in mind that:

> *"it is no defence for [the Defendants] to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful"; in such cases "an intention to injure the claimant", rather than a predominant purpose to injure, is enough*[22]

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8 On 16 March 2022, the ICJ issued an Order on Preliminary Measures in *Ukraine v Russia*. Russia was ordered to cease the invasion and comments were made as to the legitimacy of Russia's conduct at [74 – 77].

9 Under Art 6(a) of the Charter of the International Military Tribunal, Annexed to the London Agreement for the Establishment of an International Military Tribunal 1945.

10 See eg Frick and Funk

11 *United States of America v Carl Krauch et al* 30/7/48 at http://werle.rewi.hu-berlin.de/IGFarbenCase.pdf

12 That is in no way to dismiss the liability for other war crimes such as attacks on civilians, torture and murder. Those war crimes and any prosecution for lie outwith the scope of this article.

13 For a discussion of the criminal law of conspiracy in this context see eg Yanev *A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise* Criminal Law Forum (2015) 26:419–456. Under the modern approach to conspiracy, the crime is now confined to genocide only. Reliance is instead placed on Joint Criminal Enterprise – see eg *Prosecutor v Tadic* IT-94-1 at [185 – 225].

14 See eg https://apnews.com/article/russia-ukraine-putin-business-lebanon-syria-87c3b6fea3f4c326003123b21aa78099

15 This is quite apart from the fact that the Russian State would rely on state immunity at the public international law level – see *Germany v Italy* ICJ Reports 2012 p 99 at [92 – 97]. Whether a *Germany v Italy* type argument would succeed under current public international law is an open question but one which will no doubt be considered in the next round of Germany v Italy commenced before the ICJ in May 2022.

16 See discussions in Aslund *Russia's Crony Capitalism* Yale UP 2019; see also Burgis *Kletopia* William Collins 2020.

17 See, by way of example, the Putin – oligarch meeting on 24 February 2022.

18 See eg the Reuters article above.

19 Other jurisdictions may more easily permit recovery but this article unsurprisingly focuses on England and Wales.

20 Clerk & Lindsell on Torts at 16-30; *Insurance Corp. of British Columbia v Alexander 2016 BCSC 1108* [destruction of a car during a riot is conversion].

21 Clerk & Lindsell at 23-105 citing *Baxendale-Walker v Middleton [2011] EWHC 998* at [60]; cf. *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45; [2011] 1 W.L.R. 2370* at [55].

22 Clerk & Lindsell at 23-106 citing *Lonhro Plc v Fayed* [1992] 1 AC 448 at 466; 468

it follows that the protective rationale advanced by Russia, even if credible (which the ICJ Preliminary Order suggests not) would not suffice once it was established that there was an intention to injure the putative Claimant. Further, Russian claims of ignorance that the means were unlawful – again on the doubtful assumption that such claims were credible – would not currently be a defence.[23]

Given the above, it is therefore possible to see analogues between civil causes of action and the violations of public international law. It is therefore also possible to see how a civil cause of action under English law could be used to fill the gaps in recovery under international law and overcome at least some of the challenges posed by rogue states to the international legal order. There would be obvious, but not insurmountable difficulties with such a claim – jurisdiction, service and immunity to name but three. That said, however, given a legitimate Claimant or Claimants and Defendants who were directly involved in the torts being committed, a claim could certainly be made. Further, a claim before the Courts would have the following undeniable advantages: a successful claim before independent courts cannot be expropriation; there would be no violation of the temporary nature of sanctions and it would target the assets of those directly and immediately responsible for what has happened in Ukraine.

23 See *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [144; 171]