

## Reconstruction of Ukraine with Russian money? It's possible!

**To free up Russian money for Ukraine, the Netherlands can pass a law that focuses on countries that have committed war crimes, write Tobias Cohen Jehoram and Eelco Meerdink.**

Using Russian funds for the reconstruction of Ukraine. It sounds simple and fair. And the House of Representatives can make it possible with a relatively simple amendment to the law.

The House of Representatives passed by an overwhelming majority of 138 votes a motion requesting the government *"to take the initiative to set up a trust fund in which the frozen assets of Russia, Belarus and oligarchs from those countries will be placed, in order to make funds available for the reconstruction of Ukraine"*. Minister Hoekstra (Foreign Affairs, CDA) has announced that he cannot carry out this motion because it would not be legally possible.

He is right in that it is not easy to carry out that motion. After all, freezing funds does not yet make them available for other purposes. To do this, those assets would first have to be confiscated or expropriated. The confiscation of assets is not a realistic option: criminal law is not equipped for this. It would also require complex and lengthy procedures, which could easily take more than ten years. It is also not possible to expropriate just like that: it would expose the Netherlands to liability and many legal proceedings, for example in the context of investment treaties.

Is there no possibility at all? We think there is. There are many private creditors worldwide who, often after years of proceedings, have been awarded claims against Russia. These often involve substantial claims, for example related to the annexation of Crimea or unlawful expropriations in Russia. We act as lawyers for one of those creditors.

Creditors may seize assets of the Russian Federation in order to enforce their claim against Russia. However, they are confronted with the fact that Russia can invoke so-called sovereign state immunity in the Netherlands for almost all of its assets. This is based on the assumption that a foreign state – such as Russia – uses its assets for a public purpose. A creditor cannot put a claim against those assets. Even states that commit war crimes or crimes against humanity can hide behind this immunity, and their victims are left out in the cold.

That legal flaw gave us an idea. The House of Representatives can pass a law that states that countries designated by the government as perpetrators of serious, internationally recognized crimes, such as genocide, state terrorism, war crimes and crimes against humanity, can no longer invoke state immunity for all of their assets. A limited number of specific assets and assets of the designated state — such as historical cultural heritage or assets and assets related to the embassy and diplomatic mission — must remain immune under pre-existing international treaties and customary law.

Such a law would already have one desirable outcome: fewer resources for Russia to finance its war against Ukraine. This motivation lies at the heart of the many sanctions that have been imposed on Russia already. For that reason alone, Dutch legislators would do well to take such

## Op-Ed NRC

May 18th, 2022 – Translated from the original Dutch text

an initiative. Moreover, the proposed legislation is in line with international developments in the field of immunity, and underlines that such crimes should not pay in a constitutional state such as the Netherlands.

An extra element can be added to that law that fulfills a clear wish of the House. The new law could provide that a private creditor who takes advantage of the law must pay a levy in return that benefits the victims of the criminal state to which the law applies. This makes it easier for private creditors to recover their claims against Russia, because Russia can be referred to as a state that commits war crimes or crimes against humanity. In return, those creditors may be expected to contribute to a fund for the reconstruction of Ukraine.

That fund could be managed by an international organization or by the Dutch state. The levy can, for example, be a certain percentage of the money that is actually obtained by invoking this law. That percentage should be high enough to ensure a significant contribution to the fund, but not too high to ensure it's an attractive option for creditors for part of their claim.

In essence, the amendment amounts to the use of private claims to serve the public good. Will private parties make use of an arrangement whereby they are asked to relinquish a significant part of their claim against Russia – to which they themselves are fully entitled – for Ukraine? Our impression is they will. Parties that have claims on Russia generally have a special affinity for those who stand up to the criminal Putin regime. There are many private parties that could get justice faster as a result and contribute to the reconstruction of Ukraine at the same time.

We cannot speak for all those parties, but the clients we assist are enthusiastic about this idea. They are the former shareholders of Yukos Oil, once Russia's largest and most successful oil company, which was illegally expropriated by Putin in 2003. After lengthy litigation, the Russian state has been ordered to pay them more than \$50 billion.

The House of Representatives can ensure that Russia no longer escapes justice: creditors of the Russian Federation can more easily receive part of their legitimate claims while at the same time making a significant contribution to the victims of the atrocities committed by Russia in Ukraine.

*Tobias Cohen Jehoram and Eelco Meerdink are lawyers at De Brauw Blackstone Westbroek.*

Translated from the original Dutch Op-Ed that appeared in The Netherlands' print daily NRC on Thursday, May 19<sup>th</sup>, 2022.

Original article in Dutch: <https://www.nrc.nl/nieuws/2022/05/18/wederopbouw-van-ouekraïne-met-russisch-geld-dat-is-mogelijk-a4124782>