

MISSION IS POSSIBLE? LEGAL AND INSTITUTIONAL CHALLENGES OF COMPENSATION MECHANISM FOR UKRAINE

Ivan Horodyskyi[†]

Markiyan Bem^{††}

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INTRODUCTION

Russian aggression against Ukraine was an unprecedented breach of the fundamentals of international legal order and the principles of international law after World War II. This tragedy has not only come as a stress but has made the international community face a number of challenges: how to prevent a repetition of such situations in the future, how to bring the state aggressor and those guilty of committing

[†] Associate Professor of Law, Ukrainian Catholic University School of Public Management. Ivan was a Founding Director of the Ukrainian Catholic University School of Law and now is Director of the Stanislav Dnistrianskyi Center for Law and Politics (Lviv, Ukraine)

^{††} Senior Research Fellow at the Stanislav Dnistrianskyi Center for Law and Politics (Lviv, Ukraine). Markiyan worked as a lawyer at the European Court of Human Rights, office of the Ukrainian Ombudsperson and Ministry of Justice of Ukraine

international crimes to responsibility, and how to compensate the war losses.

Reparations of damages constitute one of the major challenges in the legal, political, and economic contexts. First of all, this process is a kind of crash test for the international community to prove the efficiency of the current international legal instruments that were developed since 1945. Secondly, provisions of reparations to Ukraine and those affected by the aggression of the Russian Federation will become a powerful signal for other states concerning the efficiency of international cooperation. And third, even according to conservative assessments, the damages incurred by Ukraine are assessed as \$350 billion, which is equal to the total amount of the satisfied reparation claims resulting from Iraq's aggression against Kuwait in 1990-1991.¹

International law does not contain any universal mechanisms for the compensation of war damages, though international law does acknowledge the rights of the affected parties (such as the state, legal entities, or individuals) to get the compensation and the offender's duty to provide it. But previous cases of compensation occurred either in the form of implementation of the "right of a winner", or with the voluntary consent of the guilty party in the form of *ad hoc* mechanisms (for example, the United Nations Compensation Commission).² If Russia does not acknowledge the commitment to repair the losses incurred due to the aggression, a number of new challenges related to its provision will arise, in particular, the problem of overcoming sovereign immunity.

Besides that, considerable difficulties with compensation of war damages arise at the national level. In spite of the aggression of the Russian Federation against Ukraine that started with the occupation of the Crimea and hostilities in Donbas, that has been going on since 2014, by February 24, 2022, no adequate tools for restoring the rights of victims were developed. After the outbreak of the full-scale war the situation was aggravated, in particular, due to the need to consider international initiatives related to reparations for Ukraine, that is why

1. Andrea Shalal, *Rebuilding Ukraine After Russian Invasion May Cost \$350 bln, Experts Say*, REUTERS (Sep. 9, 2022), <https://www.reuters.com/world/europe/russian-invasion-ukraine-caused-over-97-bln-damages-report-2022-09-09/>; *Iraq Makes Final Reparation Payment to Kuwait for 1990 Invasion*, U.N. NEWS (Feb. 9, 2022), <https://news.un.org/en/story/2022/02/1111632>.

2. *See UNCC at a Glance*, U.N. COMP. COMM'N, <https://uncc.ch/uncc-glance> (last visited Mar. 16, 2023).

proposals expressed over the period since February 24 are often hasty, partial, and controversial.

I. THE COMPLEXITY OF THE APPROACHES TO THE WAR REPARATIONS MECHANISMS IN INTERNATIONAL LAW

The development of new institutional mechanisms is always a dramatic process in the practice of international law and causes tectonic changes in its structure. This process is always related to the reconsideration of current available tools and the search for new approaches to solving the challenges.

In the case of war reparations, this task is particularly complicated since there are no universal approaches to the development of compensation mechanisms as well as the principles of their operation. There is a low probability that respective solutions are going to be implemented in the course of the nearest decades.

Most illustrative in this respect is the fate of Draft articles on Responsibility of States for Internationally Wrongful Acts of 2001.³ This document was also supposed to regulate the issues of reparations resulting from the armed conflict has not come into effect, does not have any chances to be accepted on the whole, and the customary nature of its provisions is controversial.

That is why, in each specific case of an armed conflict, there arises the need for the development of new institutional mechanisms for repairing the damages incurred as a result of it. And in this historical context, one should retrace the evolution of the notion of damage reparations in the period before the end of World War II and in modern international law.

Thus, before 1945 damage reparations were mainly a political phenomenon drawn up in the legal wordings of peace agreements after the end of the war. Its terms were mainly imposed by the winner party, following the Old Roman maxim *vae victus*. The reparations aimed to cover the winners' costs in the amount established through negotiations after the end of the war and were fairly limited by the interests of just one of the parties.

The approaches changed over the next decades. The fact of victory of one or other party is still of importance for the practical implementation of decisions on reparations. But these decisions themselves

3. U.N. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts* (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

are primarily passed not due to the fact of victory or defeat, but as compensation for the consequences of the violations committed during the armed conflict.

This vision corresponds to the principle stated in the decision of the Permanent Court of International Justice in *The Chorzów Factory case* of 1927 (Germany v. Poland).⁴ This famous case states: “[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation in an adequate form”.⁵ However, it is, most probably, difficult to find any other field where this principle would be more difficult to bring to life than post-war settlement.

It should be acknowledged that there has been no precedent of ideal implementation of this approach as based on the outcomes of the armed conflict so far. But the transition of the international legal practice from the approach focusing on meeting the winner’s interests to the approach focusing on the restoration of victims’ rights is obvious.

But even in this case international law does not always suggest effective practical mechanisms. Particularly brightly this is illustrated by the practice of two most important international courts. Thus, the International Court of Justice passed a decision on reparations for damages in the case *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) on February 9, 2022, almost 23 years after the case consideration had been launched.⁶ Uganda stated the next day that the decision was not fair and the decision’s further enforcement evokes some doubts.⁷

Similar are the problems with the decisions of the International Criminal Court (ICC), which are passed at a quicker pace, but their practical implementation is problematic. For instance, in the Reparations Order in the case *The Prosecutor v. Bosco Ntaganda*, the ICC acknowledged that the accused, a former field commander, is

4. See *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9. (July 26).

5. *Id.* at 21.

6. See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. ¶ 409 (Feb. 9).

7. See Elias Biryabarema, *Uganda Says ICJ Ruling Awarding DR Congo Reparations is Unfair*, REUTERS (Feb. 10, 2022, 5:39 AM), <https://www.reuters.com/world/africa/uganda-says-icj-ruling-awarding-dr-congo-325-mln-reparations-unfair-wrong-2022-02-10/>.

“financially incapable” of fulfilling the decision on payment of reparations in the amount of \$30 million to his victims.⁸

That is why the most significant and relatively successful institutional mechanisms of war damage reparations use the approach focusing on the restoration of the rights of victims —the United Nations Compensation Commission and The Eritrea-Ethiopia Claims Commission (EECC) and were established *ad hoc*. They are most frequently mentioned when we speak about the institutional tools for future reparations for Ukraine.⁹

Both of the mechanisms are rather substantially described in the respective studies.¹⁰ Convergences of both tools are as follows:

- *Administrative Nature*: The objective of their establishment and operation was not the judicial goals, but to consider administrative decisions on the justification of the requirement to pay damage reparations, on their amounts and on the enforcement of the reparations.
- *Interstate Nature*: The victims could raise claims for reparations not personally, but only via the governments that represented the interests of all those affected. Similarly, the government of the guilty party was responsible for all the facts of violations, regardless of the persons who had committed them.
- *Cooperation of All the Parties*: Both the states guilty of starting the aggression and those that were victims of the aggression, the citizens and legal entities which had been affected, international organizations, etc. participated in the activities of those bodies.

8. See Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Reparations Order, 93, 95 (Mar. 8, 2021), available at <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf>.

9. Quite often a third case is mentioned: The Iran-United States Claims Tribunal, but it does not hit the ground quite well since it was not related to the reparations of damages incurred due to an armed conflict, though, definitely, constitutes an important precedent for interstate dispute regulation.

10. See e.g., Agnieszka Szpak, *The Eritrea-Ethiopia Claims Commission and Customary International Humanitarian Law*, 4 J. INT'L L. STUDS. 296 (2013); Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?*, 7 EUR. J. INT'L L. 699 (2006); David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL'Y 1 (1994); see also, John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT'L L. & FOREIGN AFF. 141 (2005).

Though the level of success of both mechanisms was different (while in the case of the UN Compensation Commission, it can be acknowledged to be fully a success but as fully unsatisfactory in the case of the Eritrea-Ethiopia Claims Commission), they became important institutional precedents. But it will be difficult to automatically reproduce this experience while developing reparations mechanisms for Ukraine.

This is primarily related to a very low probability that Russia will voluntarily agree to participate in future compensation mechanisms and will recognize its legitimacy. The second related reason is the enforcement of reparations decisions, inter alia the issue of the sources from which reparations can actually be paid. The latter is critical since, as international law experts working with the topic of damages reparations state: “[a]lthough every international claims commission has various conflict-resolution functions, no international claims commission can be considered entirely successful without appropriate funding for paying awards”.¹¹

And the third circumstance stems from these two—this is the readiness of the international community to create respective mechanisms with due account of these factors, in spite of the will of a permanent member of the UN Security Council. In this case, the task of establishing institutional reparations mechanisms becomes an even more complicated thing to do, while the level of drama mentioned above becomes even more challenging.

II. THE VISIONS OF THE FUTURE INSTITUTIONAL REPARATIONS MECHANISM FOR UKRAINE

A year after the outbreak of the full-scale Russian aggression, there is still no clear understanding of the future format of the institutional mechanism of compensating war damages to Ukraine. At the level of experts and international organizations, only proposals have been developed and discussed. Among concepts published over 2022 are the concept developed in the position document prepared under the auspices of the International Claims and Reparations Project of Columbia Law School (ICRP), the vision prepared by the Polish diplomat and expert on war damages reparations Professor Jan Barcz, as well as proposals available in the Resolution of the UN General Assembly

11. Chiara Giorgetti et al., *Launching an International Claims Commission for Ukraine*, JUST SEC. (May 20, 2022), <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>.

“Furtherance of remedy and reparation for aggression against Ukraine” of November 14, 2022, should be pointed out.¹²

The position document *Launching an International Claims Commission for Ukraine* was published on May 20, 2022. All its three co-authors—Chiara Giorgetti, Markiyani Kliuchkovsky, and Patrick Pearsall—were included on May 18, 2022 to the Task Force on the Development and Implementation of International Legal Mechanisms of Repairing the Damages Incurred by Ukraine as the Result of Armed Aggression of the Russian Federation by the Order of the Ukrainian President Volodymyr Zelenskyy.¹³ This allows consideration that the ideas expressed in it have become the basis for the Task Force’s work.

The authors of the document express their vision concerning establishing a special international reparations commission for Ukraine on the basis of “a short, flexible, and definite” international agreement.¹⁴ And they recognize that it is not possible to repeat the precedent of establishing the UN Compensation Commission via adoption of the Resolution of the UN Security Council due to possible veto applied by the Russian Federation.

The tasks of the commission as mentioned in this document should be as follows: “(i) adjudicating claims for compensation; (ii) preserving or collecting Russian assets for paying awards; and (iii) providing a means of enforcing awards on compensation.”¹⁵

Operation of the future commission should be based on the experience of the UN Compensation Commission in many respects, in particular, as to the division of claims into categories, sub-categories, or classes to ensure more effective consideration. Similar approaches are also suggested for those who can address the commission: the same as in the case of reparations for Iraq these could be states, individuals, legal entities, etc.

To ensure reparations funding it is suggested to establish a special fund (the Fund) that will be financed in two principal ways: “(i) assets

12. See *id.*; *International Claims and Reparations Project*, COLUMBIA LAW SCHOOL <https://icrp.law.columbia.edu/> (last visited Mar. 16, 2023); see also, G.A. Res. E.S.-11/L.6 (Nov. 7, 2022); Jan Barcz, *Russia’s Aggression Against Ukraine: How to Ensure the Effective Pursuit of Reparation Claims from Russia*, DNISTRIANSKYI CTR., <https://dc.org.ua/en/news/jan-barcz> (last visited Mar. 16, 2023).

13. See Order of the President of Ukraine No. 346/2022 (May 18, 2022).

14. Giorgetti et al., *supra* note 11.

15. *Id.*

of Russia and related entities and individuals that are frozen/seized by States and/or (ii) direct contributions by Russia and other entities.”¹⁶

The Fund would be to finance both enforcement of the commission’s decisions, and decisions of other international bodies in connection with Russia’s invasion of Ukraine (e.g., decisions of the International Court of Justice (ICJ), ICC, European Court of Human Rights, or a possible special tribunal for the crime of aggression). In case the Fund’s resources do not cover the amount of awards under the commission’s decisions, it is assumed that “successful claimants could potentially enforce the Commission’s awards in courts of the contracting States.”¹⁷

Professor Barcz argues the pursuit of reparation claims from Russia for the aggression against Ukraine should be “a comprehensive international undertaking involving the countries that imposed sanctions on Russia, with the participation of international organizations and international financial institutions.”¹⁸ He suggests a vision that, simultaneously with the development of the respective institutional reparations’ mechanisms, would envisage using the assets of the Russian Federation frozen abroad for paying reparations to Ukraine.¹⁹

This vision presupposes the conclusion of a complex international agreement on that matter that would address two major objectives: (i) include “an obligation to freeze and confiscate the reserves of the Russian central bank and Russian citizens (oligarchs)”, and (ii) to “regulate a common mechanism for transferring funds to Ukraine and individual victims of Russian crimes.”²⁰

Unlike the concept suggested by the ICRP experts, Professor Barcz’s vision focuses not on the structure and operation of the special commission but on the disposal of Russia’s assets. With this in view, he suggests the establishment of the special reparation fund for Ukraine in the form of an international financial institution. Reparations from the Fund should cover two main claim categories: state claims of Ukraine and individual claims.²¹

In Professor Barcz’s opinion, the European Union could act as the holder of this fund, and fulfilling the requirements related to

16. *Id.*

17. *See Id.*

18. Barcz, *supra* note 12.

19. *See id.*

20. *See id.*

21. *Id.*

Ukraine's accession to the European Union (EU) could be one of the goals for reparations payment and reconstruction of Ukraine.²² Besides that, he allows for the establishment of a national fund in Ukraine that would, in its turn, make direct payments to applicants.²³

Finally, the only official vision of the elements of the potential institutional mechanisms of reparations payment to Ukraine is available in the Resolution of the UN General Assembly of November 14, 2022.²⁴ Though this document is not binding, its political relevance cannot be underestimated. For example, the ICRP, while suggesting the establishment of a special commission for reparations payment to Ukraine, stresses the importance of the resolutions of international organizations, "recognizing Russia's breaches of international law and supporting the creation of the Commission" in principle.²⁵

In this Resolution, the General Assembly unambiguously acknowledges "the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss, and injury arising from the internationally wrongful acts of the Russian Federation in or against Ukraine."²⁶ This provision does not establish any reparation mechanism *per se*, does not stipulate its format (commission as in the cases of Iraq or Kuwait, tribunal, etc.), and does not allow for any automatic transfer of frozen Russian assets to Ukraine. But it does pave the way for further steps in this direction by determining their legitimacy.

Of importance also is the recommendation of the UN General Assembly on the establishment of an International Register of Damage which would record evidence and information for reparations of the damages incurred by Ukraine, legal entities, and individuals as the result of international illegal actions of the Russian Federation.²⁷

This Resolution constitutes an important step towards guaranteeing reparations of the damages to Ukraine, Ukrainians, and foreigners who were affected by the Russian aggression in Ukraine. This is the recognition of the right of Ukraine to get reparations and Russia's obligation to pay it.

22. *See id.*

23. *See id.*

24. G.A. Res. ES-11/5, ¶ 2, 3 (Nov. 14, 2022).

25. Giorgetti et al., *supra* note 11.

26. G.A. Res. ES-11/5, *supra* note 24, ¶ 3.

27. *Id.* at ¶ 4.

Certainly, all further decisions at the international and national level concerning development of the mechanisms of compensation to Ukraine will be passed with reference to this Resolution. By its nature, however, the document does not and cannot contain any legally binding norms related to its development and enforcement.

The views of Officials of the Government of Ukraine align with the above proposals in many respects. For example, Deputy Minister of Justice of Ukraine, Iryna Mudra, who deals with the issues of reparations payment, voiced the vision of a similar concept during a hearing at the meeting of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) in Paris on December 12, 2022.²⁸ Such mechanism, which according to her will be the International Compensation Mechanism, will be based on a multilateral international agreement and will provide for the establishment of a Compensation Commission especially dedicated to considering compensation claims, the Compensation Fund from which the compensation shall be paid, and an effective procedure of enforcement of the Commission's decisions.²⁹

These proposals are not the only concepts as there are number of others expressed by think-tanks, task forces, international lawyers, etc. But the review of these three allows for development of the grounds of the future special international compensation mechanism for Ukraine in general as the one that should be based on the following principles:

(i) An international agreement as the legal ground for its establishment and the legitimacy of functioning.

(ii) The establishment of a special commission as a body to consider claims and award reparations.

(iii) The establishment of the Fund from which reparations will be paid and which will be replenished from Russia's frozen assets or in some other forms.

(iv) The launch of the International Register of Damage in which the evidence base for the incurred damages will be gathered to be taken into account while establishing the fact and the amount of damages.

28. Ministry of Justice of Ukraine, *How Ukraine Sees the Process of Establishment of Compensation Mechanism: Iryna Mudra Addressed the Participants of PACE Hearings*, GOV'T OF UKR. (Dec. 13, 2022), <https://www.kmu.gov.ua/en/news/yak-ukraina-bachyt-protses-stvorennia-mekhanizmu-kompensatsii-iryna-mudra-vystupyla-na-slukhanniakh-u-parie>.

29. *Id.*

Obviously, the list of these principles is not comprehensive. Work on the mechanism development is ongoing, and it can be supplemented and changed. However, currently, they allow for a preliminary evaluation of the proposed format, which may be entirely new and occasionally unconventional regarding contemporary international law.

A. International Agreement as the Ground for the Development of the Reparations Mechanism for Ukraine

The establishment of an international compensation mechanism for Ukraine via conclusion of a multilateral international agreement will probably be the most innovative and, at the same time, risky parameter. Such development will create a precedent for international law, and it is on the provisions of this agreement that further international legal and political stability will depend.

It should primarily be mentioned that in the practice of the international agreement, there have already been cases of establishment of international compensation mechanisms under an international agreement. In particular, the abovementioned Eritrea-Ethiopia Claims Commission was established under Art. 5 of the Algiers Agreement between Eritrea and Ethiopia on December 12, 2000, which envisaged that “[c]onsistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established.”³⁰

In the case of war damages reparations for Ukraine, the creation of an international agreement in the same format as the EECC does not seem to be possible due to Russia’s standpoint. Voluntary consent of the Russian Federation even to participate in the process of claim regulation seems impossible, let alone independent recognition of fault and reparations payment.

Therefore, the compensation mechanism for Ukraine will need to be created under the international agreement without the Russian Federation. In the proposals considered above, a specific vision on the format of the international agreement was expressed by Professor Barcz. In his opinion, the mechanism should be created between

30. Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia art. 5, ¶ 1, Dec. 12, 2000, 2138 U.N.T.S. 97.

“states, including primarily the states in which Russia has located its resources and in which the resources of Russian oligarchs are located.”³¹

So far, as of January 2023, there have been no specific official initiatives to create such an international agreement. However, one may predict that it, as suggested by Professor Barcz, will be concluded between Ukraine, the states controlling frozen assets of the Russian Federation, primarily G-7 countries and the EU Member States, and it will be open for signing by other parties.

Critically important is the participation of Switzerland in the agreement, as the state controlling quite an amount of frozen Russian assets and historically being an important international financial center. Swiss involvement would enable confirmation of the legitimacy of the compensation mechanism, at least in the political sense. But taking into account the historical neutrality of this state that causes its highly careful approach to the possibility of seizing Russian assets, such development appears to be a difficult thing to achieve.

Also, important in the process of creating concluding the international agreement to establish the compensation mechanism for Ukraine, is international organization engagement. As was mentioned above, development of such mechanism seems not possible directly under the decision of the international organization. But it is possible to discuss specific formats that would envisage the conclusion of the above international agreement on the basis of an international organization directive and with its participation.

For example, in the proposals on the development of a special international tribunal on crimes of aggression, prepared by the experts of the Global Accountability Network (GAN) under the supervision of the founding Chief Prosecutor of the Special Court for Sierra Leone David Crane, the possible relevance of the resolutions of the UN General Assembly (UNGA) is considered.³² They give the example of the Extraordinary Chambers in the Courts of Cambodia (ECCC), in the case of which the UNGA approved resolution 57/228 of May 13, 2003, recommending the UN Secretary-General to enter into a

31. Barcz, *supra* note 12.

32. UKR. TASK FORCE OF THE GLOB. ACCOUNTABILITY NETWORK, CONSIDERATIONS FOR THE SETTING UP OF THE SPECIAL TRIBUNAL FOR UKRAINE ON THE CRIME OF AGGRESSION 27 (2022).

bilateral agreement with the Government of Cambodia for establishing a criminal tribunal.³³

The experts of GAN and American lawyer Jennifer Trahan assume that the same approach can be applied to the special tribunal to punish those guilty of the crime of aggression against Ukraine, provided that the government of Ukraine participates and grants consent to the agreement.³⁴ It is absolutely possible that similar proposals will also be expressed in relation to the compensation mechanism for Ukraine, inspired, among other things, by the Resolution of the UN General Assembly of November 14, 2022.³⁵

However, there should be no reliance on the likelihood of this scenario (both in the case of a special tribunal for aggression, and the compensation mechanism for Ukraine). The voting on the abovementioned Resolution “Furtherance of remedy and reparation for aggression against Ukraine”, supported by less than 100 UN Member States, shows that the document with more radical proposals can be rejected on the whole.³⁶ Besides that, regular attempts of the UN Secretary-General António Guterres to act as a mediator between Ukraine and the Russian Federation may, in principle, close even a theoretical chance for performing this role.

However, the role of international organizations in the process of development and conclusion of such international agreement is extremely important. Even political support of the content of such an agreement, its conclusion and suggested compensation mechanism for Ukraine will be an important contribution to the recognition of the legitimacy of those steps and further decisions passed within the mechanism.

The role of international organizations may also be important in the course of the practical functioning of the compensation mechanism for Ukraine. For instance, Professor Barcz speaks about reparations of war damages for Ukraine as a comprehensive international undertaking involving the countries that imposed sanctions on Russia, with the participation of international organizations and international financial

33. G.A. Res. 57/228, art. 1 (May 22, 2003).

34. Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremburg Is Not the Model*, JUST SEC. (Mar. 7, 2022), <https://www.justsecurity.org/80545/u-ngeneral-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremburg-is-not-themodel/>.

35. *Id.*

36. G.A. Res. ES-11/5 (Nov. 15, 2022).

institutions. In particular, he suggests giving a role in the administration of the Ukraine Compensation Funds to international financial institutions.³⁷

If we consider the content of the agreement, we may disagree with the suggestions made by the ICRP experts saying that it should be short, flexible, and definite.³⁸ All the complexity and multi-aspect nature of the issue of war damages reparations to Ukraine and the need to apply special approaches to its development and operation predetermine the fact that this agreement should probably be comprehensive at least in relation to some issues it is designed to settle, though it will not set the record of being the longest or shortest one.

It can be stated that three basic tasks must be settled through it. First, the decision on the development of the mechanism should be passed. It should not be limited to the statement of the fact, but should contain the substantiation of the uniqueness of the situation causing the need for its development beyond the framework of international organizations and with no involvement of Russia.

Secondly, it is important to envisage specific parameters of the mechanism and the principles of its operation. These things must be prescribed in detail in the agreement, it may also contain references to other documents that must be developed additionally (for instance, the Charter of the Claims Commission, the Charter of the Fund, the Rules of Procedure and Evidence, etc.). However, the core principles should be determined in it.

And, third, it should contain a decision on the use of frozen Russian assets (sovereign and private) for paying reparations to Ukraine. The same as is the case for the mechanism's launch, in this case, such a step should additionally be justified as well as its exceptionality and the need for it.

When it is mentioned that such international agreement must contain justification of exceptionality, that does not mean that its content should be similar to the ICJ Advisory Opinion. However, enshrining the legal and humanitarian arguments on the exceptionality of those decisions in the contractual form is of critical importance to prevent their arbitrary repetition and further chaos in international law and order.

37. Barcz *supra* note 12

38. Giorgetti, *supra* note 11.

B. Claims Commission for Ukraine

A special Commission should become a central body in the compensation mechanism for Ukraine. The actual wording of the name will have to be specified, but it is obvious that in this case it will be based on the models of the previous precedents of damage reparations between Iraq and Kuwait as well as Ethiopia and Eritrea.

Specific parameters of the Commission: quantitative composition, selection of members (experts), consideration procedure, etc., may have different configurations, and it is too early to analyze the opportunities within this study since this will largely depend on the provisions of the international agreement under which the Commission will be established. It seems to be more expedient to focus on whether this Commission should have only an administrative, or a judicial mandate as well.

It has already been mentioned that experts consider this Commission to be an administrative body having no judicial functions or mandate to establish facts or guilt. This approach is shared both by the ICRP experts, and by the representatives of the Ukrainian authorities, in particular, Deputy Minister of Justice Iryna Mudra who has stated many times in her comments to mass media that the Commission will “not be a judicial body, but an administrative one.”³⁹

The administrative model of the type of compensation or claims commission corresponds to the previous international practice, but the situation with Ukraine differs from Kuwait and Ethiopia. One of the key special features of the Ukrainian situation is the unwillingness of Russia as the guilty party to voluntarily pay reparations for damages in any form (directly or, for example, in the form of a special energy carrier duty as was the case in Iraq).

Therefore, it seems that administrative or quasi-judicial functions alone will not be enough for such a mechanism, which is why it would be expedient to consider a Commission with judicial functions as well. Such an approach will ensure solving the problem of substantiation of the Russian Federation’s asset seizure and the legitimacy of the relevant procedure.

The activities of such a body would aim at the following:

39. Iryna Mudra, *Recognizing Russia as a Terrorist May Prevent Ukraine from Receiving Seized Property of the Russian Federation*, LIGA.NET (Aug. 16, 2022), https://biz.liga.net/ua/all/all/interview/hto-tormozit-konfiskatsiyu-imuschestva-rfi-kogda-ukraina-poluchit-k-nemu-dostup-intervyu_

(i) Establishment of the facts of violation of the international law by the Russian Federation that have led to damages resulting from the aggression against Ukraine.

(ii) Pass decisions on the seizure of Russian assets and their further use for the sake of financing war damage reimbursement.

(iii) Consideration and approval of decisions on damage reimbursement out of this money under specific claims.

(iv) Considerations in absentia of the respondent, since Russia will probably refuse to take part in it.

By its nature, the Commission should be a classical judicial body that of individuals whose reputation is impeccable. It is supposed to function in compliance with the principles of adversariness and impartiality, which presupposes that even if Russia refuses to cooperate with it, the Russian side must get, in particular, the opportunity: (i) to send its representatives to the composition; (ii) to take part and to express its own standpoint during each claim consideration; (iii) to send all procedural documents with the proposal to provide comments and express its own standpoint to it.

Of importance is the need for establishing an appellate body within this mechanism that would enable the revision of the adopted decisions. Procedural documents should envisage that, in case the decision is not appealed within a certain period (e.g., one year), it shall be enforceable, and this enforcement is irreversible.

Even if after the expiry of this period the appellate body, in case Russia submits a claim, may resolve and cancel the decision, the fact decision in favor of Russia by itself may be considered a due satisfaction and will not require the appearance of the victims to return the money. Such an approach corresponds to the practice of international courts and courts of arbitration concerning compensation. In particular, it was applied in the Award of the Arbitral Tribunal of the Permanent Court of Arbitration at the Hague in the Case of the French Mail Steamer "Carthage."⁴⁰

The operation of the claims commission as a judicial body creates a number of advantages for the future process that in particular will ensure publicity and transparency of the process of seizure of Russian assets, substantiate its legitimacy, stress the exceptional nature of this

40. *Award of the Arbitral Tribunal of the Permanent Court of Arbitration at the Hague in the Case of the French Mail Steamer "Carthage,"* 7 AM. J. INT'L L. 623, 623-29 (1913).

precedent that is going to be exceptional and difficult to replicate, as well as to legally protect the decision on reimbursement in the future.

Such an approach does not aim to create any advantages for Russia or to give it an opportunity to affect the reparations process. Just the opposite, it will allow rejecting the arguments on the illegitimacy of the seizure of Russian assets and further reimbursement made out of them, therefore guaranteeing the stability of the decisions passed on reimbursement and the impossibility of their revision in the future.

Either way, the application of this approach does not solve all the problems with reparations, in particular the issue of jurisdiction immunities of the assets of the Russian Central Bank. But, it can make reimbursement prospects more integral and realistic due to achieving overall balance in the whole process of seizing Russian assets and further payment of reparations to Ukraine.

C. Compensation Fund for Ukraine

The establishment of a special Compensation Fund (or Reparation Fund) is considered to be an integral element of the compensation mechanism for Ukraine. This idea is supported by experts (in particular, experts of the ICRP and Professor Jan Barcz) and the Government of Ukraine as its representatives have stated a number of times, as well as by the Parliamentary Assembly of the Council of Europe.

But the key issue is the performance of the core function of the Fund and the reparation mechanism for Ukraine, on the whole, is the payment of compensations to the victims and those affected by the Russian aggression. Thus, the Fund must possess the necessary financial resources.

It is the availability and lack of resources for practical reparations' payment that caused the success and failure of the previous special damage reparations mechanisms. In the case of reparations payment by Iraq, the UN Compensation Fund was replenished out of the special duty for the export of Iraqi oil. And the Eritrea-Ethiopia Claims Commission was dissolved without any actual payment of reparations by the parties in spite of the clear commitment undertaken by the parties under the 2000 Algiers Agreement, none of which fulfilled the Commission's decision and even tried to pay the awarded compensation.

That is why, to effectively repair the damages incurred as the result of the full-scale invasion of Ukraine by the Russian Federation, it is necessary to solve the issue of the availability of financial resources. It is pointless to expect that Russia will voluntarily pay the damages

incurred due to its aggression toward Ukraine. The most realistic scenario could be the seizure of Russian assets abroad (both private and public, for example, the assets of the Russian Central Bank), with their further use for paying reparations to Ukraine. That is why it is necessary to envisage a legally impeccable seizure of Russia's sovereign and private assets that are now kept frozen in different countries.

Though Russian assets are frozen at the level of specific states, the procedure for passing decisions on their seizure and use at the national level seems not to be the most efficient. At this level, the process may follow different principles, within different periods, and with different preconditions.

Specific states, in particular, Canada and the U.S., have already adopted national legislation that paves the way to the seizure of Russia's assets they control.⁴¹ However, other countries may just reject the procedure, being afraid of the consequences of creating a dangerous precedent of seizing the assets of a sovereign country like the Russian Federation.

That is why, as mentioned above, it would be expedient to solve the issue of seizure of the frozen Russian assets at the multilateral level, within the possible international agreement on the establishment of the compensation mechanism for Ukraine. A joint and unified approach will be a guarantee of legitimacy for all states that will perform seizures.

At the same time, other ways of getting resources for the Fund are also possible. In particular, that may be an obligatory special duty on the export of Russian energy products, the way the UN Compensation Fund was financed. The possibility of application of this approach is assumed by Professor Barcz in whose opinion the introduction of that duty is a realistic scenario related to the gradual increase in the sanctions against Russia. He assumes that this scenario may appear to be more interesting for the Russian authorities than oil sales in the embargo conditions and "price ceiling."⁴²

Finally, the third possible scenario may be the financing of the Fund out of the voluntary contributions made by third parties (governments, companies, private individuals, etc.). This is not an exceptional approach in international legal practice. For example, you may take

41. See SA 6596, 168 CONG. REC. 199 (Dec. 21, 2022); An Act to Implement Certain Provisions of the Budget Tabled in Parliament on April 7, 2022 and Other Measures, S.C. C-10 (June 23, 2022) (Can.).

42. Barcz, *supra* note 12.

the Trust Fund for Victims of the International Criminal Court from which reparations are paid to the victims of international crimes, including through voluntary contributions by states and other entities.

In this case, there is an obvious precaution that under such an approach, the money of international partners that may be used for the post-war recovery of Ukraine will be used for reparations of damages and cover the commitments Russia should bear. Another alternative is to fill the Fund out of the contributions of Russian oligarchs and even the Russian government in some cases, with no recognition of fault.

This scenario is also not unique to the international practice of war damage reparations. Previously, the government of Japan has transferred money to the private fund that paid compensation at their expense to the so-called “comfort women”—Korean women who were exploited by the Japanese army during World War II.⁴³ However the issue of whether such a format of damage reparations would be fair and would mean justice in relations to the criminals and their victims repairs open in this case.

The functioning of the Fund and ways of its financing will still be discussed, as well as possible different and combined variants. But it is important to remember that the process of its replenishment is not a fundraising campaign. It should serve as an important goal: restoration of breached rights and freedoms of the victims of the Russian aggression through reparations of damages incurred by them.

D. The International Register of Damage

As already analyzed above, the UNGA resolution “Furtherance of remedy and reparation for aggression against Ukraine” includes a recommendation for:

The creation by Member States, in cooperation with Ukraine, of an International Register of Damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the state of Ukraine, caused by Russian Federation’s internationally wrongful acts in or against Ukraine, as well as to promote and coordinate evidence gathering.⁴⁴

43. Yvonne Park Hsu, Comment, “*Comfort Women*” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparations, 2 PAC. RIM L. & POL’Y J. 97, 101 (1993).

44. G.A. Res. ES-11/5, *supra* note 24.

Creation of the International Register of Damage will enable the Claims Commission for Ukraine as well as national and, prospectively, international judicial institutions to use the evidence base available in it while considering the issues of responsibility of the Russian Federation (and, maybe, specific individuals) for violation of international law, the establishment of the fact of damages, and determination of their size. That will, no doubt, accelerate and make the process of damage reparations simpler.

Such an approach has already been applied in the UN practice related to ensuring reparation of damages by the state which committed the armed aggression. In particular, in the case of Iraq's invasion of Kuwait and its further occupation, the UN Security Council adopted Resolution No. 674 of October 29, 1990, where, side by side with recognition of Iraq's obligation to pay reparations, it suggested the idea "to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq, with a view to such arrangements as may be established in accordance with international law."⁴⁵

Another institutional example is the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD) established by the UNGA Resolution of December 15, 2006.⁴⁶ But in this case the UNRoD is connected to the United Nations system as the UNGA subsidiary organ which is not the case in Ukraine.

It seems that the recommendation of the UNGA Resolution of November 14, 2022, about the creation of the International Register of Damage is of a priority nature. It is important that this register be mentioned in the document in reference to bringing the Russian Federation to account for the aggression and other international and illegal acts, Russia's commitment to compensate the inflicted damages, and the creation of the mechanism for such damage compensation.⁴⁷ That obviously proves the fact that all the above problems are interrelated.

This register should be used within the framework of the compensation mechanism for determining the amount and establishing the fact of infliction. Hence, the moment such a mechanism starts

45. S.C. Res. 674, ¶ 9 (Oct. 29, 1990).

46. *See generally* G.A. Res. ES-10/17 (Dec. 17, 2006) (detailing the establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory).

47. G.A. Res. ES-11/5, *supra* note 24, ¶¶ 2–3.

operating, the register should already be functioning and should already contain some data. Due to this, the creation of this register should evidently precede the creation of the compensation mechanism. And it seems that so far there are no serious obstacles in the way to beginning the work aimed at its creation.

Implementation of the recommendation on the creation of the register, despite the wording of the Resolution saying that this should be done by the "Member States, in cooperation with Ukraine," will largely depend on Ukraine's efforts.⁴⁸ It is in the Ukrainian jurisdiction that all information and evidence base on the damages inflicted due to Russian aggression is available. Hence, in practice, the main part of the work, likely filling data and documents with the register, will have to be performed by Ukraine. Besides that, it is Ukraine that is the most interested in the availability of reliable and complete information on the amount of damages Ukraine has suffered.

In general, Ukraine could independently begin the creation and maintenance of this register. But the engagement of international partners in the process will contribute to the correspondence of the information available in the register to the acceptability criteria not just for Ukrainian use but for foreign and international institutions.

That is why the possibility of creating the register under an international agreement of Ukraine with other states condemning Russian aggression should be considered. This document should establish the key requirements concerning the following:

- (i) Creation of the register and its maintenance.
- (ii) Nature of information available in it.
- (iii) Reliability criteria for such information and its verification.
- (iv) Sources of data for the register.
- (v) Protection of its information and procedures for accessing it.

However, the process of creating such a register in the format of international cooperation may require more time than expected. Hence, regardless of the course of this process, Ukraine may start creating a centralized database on the damages incurred due to illegal actions of the Russian Federation now. It will be expedient to consider the possibility of developing and approving special legislation that would regulate the parameters of this database. For example, this database should contain the data on the following:

48. *Id.* at ¶ 4.

(i) Subjects (individuals and entities) affected by the Russian Federation's illegal actions.

(ii) Nature of damages (for instance, loss of life, torture, deprivation of liberty, property destruction, etc.).

(iii) Damage assessment.

(iv) Data on the subject guilty of the damage inflicted (depending on the level of identification, more or less specific information should be provided).

(v) Documents confirming the indicated conclusions, etc.

Special attention should be paid to the process of verification of the information included in the register. It seems that the tools and ways of verification that will ensure the inclusion of only reliable and verified information in the register should be envisaged, to the extent possible.

It is also important to regulate the issue of the sources for replenishment of this database. In this respect, one should take into account Ukrainian reality. It seems that the violations committed by the Russian Federation are mostly within the field of criminal law, and the collection of relevant information is primarily performed by law-enforcement authorities within criminal proceedings. Hence, it is information and documents from the materials of criminal proceedings that should become the basis for filling the database. One should not exclude the possibility of filling the register from other sources either. However, in this case, more attention should be paid to the analysis and verification of such information.

Under any circumstances, the creation and operation of this register will be of high legal and political relevance for ensuring the payment of reparations to Ukraine. Its launch will prove the seriousness of the intention to make the Russian Federation fulfill its obligation of paying reparations to Ukraine. Besides that, Ukraine is highly interested in its immediate launching and filling to enable it to clearly document the inflicted damages as well as to verify the respective facts at the stage when these processes are undoubted and obvious.

CONCLUSION

Reparations to Ukraine and its further reconstruction constitute a critical objective for international law. It should be proven that the sacrifice in the name of freedom and justice was not in vain. For the whole world, this situation is not just one more unity test, but a chance

to prove that the international rule of law is not just an attractive idea, but that it is a solution to the most serious challenges.

When we speak about Russia's responsibility to Ukraine, it should be kept in mind that it is globally responsible. Violation of international humanitarian law in Syria, aggression against Georgia in 2008, use of the energy industry as a weapon in relations with the EU, Ukraine, Moldova, and terrorist acts via application of chemical weapons in the United Kingdom, etc. are just a part of its illegal international actions for which responsibility in the form of damage reparations is possible.

That is why the international community, primarily international lawyers, should not perceive ensuring reparations for Ukraine for Russia's actions as a local case settlement that aims just to solve the challenges Ukrainians are now facing. The situation with Russian aggression shows not just that large-scale armed conflicts are possible in the 21st century, but that humanitarian catastrophes of a scope unprecedented since the period of the world wars are possible.

The precedent with reparations for Ukraine should become an incentive for the development of universal, and not just *ad hoc* mechanisms of war damages reparations. Here we may not speak much about the establishment of new international institutions like the Claims Commission with a permanent mandate or approval of Draft articles on Responsibility of States for Internationally Wrongful Acts of 2001.⁴⁹ Revision of currently available approaches should be assumed, in particular, within the International Court of Justice. Consideration of the issues of damages reparations should be quick, decisions should be clear, and their enforcement should be provided for, not just by the goodwill of the guilty party.

Ukrainians are fighting for a rules-based society, but they cannot be left helpless in the case of gross violations of those rules as only can be imagined. And the provision of war damages reparations to the victims of the Russian aggression should become one of the dimensions of justice in relation to them, equal to bringing those guilty of the international crimes committed in the territory of Ukraine to account.

49. G.A. Res. 56/83, ¶ 3 (Jan. 28, 2002).