



Reparations for Ukraine:

An international route map



Cover photo:

Young woman takes mobile phone pictures of destroyed Retroville shopping centre after a Russian attack in which at least six people were killed, Kyiv, Ukraine, 29 March 2022.

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June 2022

Ceasefire Centre for Civilian Rights

The Ceasefire Centre for Civilian Rights is an international initiative to develop civilian-led monitoring of violations of international humanitarian law or human rights in armed conflict; to secure accountability and reparation for violations; and to develop the practice of civilian rights.

Ceasefire is registered as a charity and a company limited by guarantee under English law; charity no. 1160083; company no. 9069133.

Acknowledgements

Ceasefire would like to thank those civil society organisations and individuals who commented on a draft of this report.

Report design: Kavita Graphics

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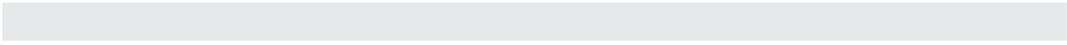
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Published June 2022. Printed in the UK on recycled paper.



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Executive summary

Following the Russian invasion of Ukraine on 24 February 2022, rapid progress has been made with instituting war crimes investigations and the establishment of international mechanisms to support prosecutions. Planning for the delivery of reparations to civilians, however, is lagging. Yet a state responsible for an internationally wrongful act must make full reparation for the injury caused. A party to conflict which violates the Geneva Conventions is further liable to pay compensation and is responsible for all acts committed by persons forming part of its armed forces.

The delivery of criminal justice is a necessary response to the offences committed against the Ukrainian people, but it is not sufficient. To bring justice to the vast majority of Ukrainian civilians and enable them to rebuild their lives will require reparations. In order to establish an effective reparations process for Ukraine, it is imperative that the international community avoids further delay. Given the extensive preparatory work which needs to be done, civilians who have suffered harm cannot afford to wait for a resolution to the conflict or until all the necessary funds have been identified and secured.

Reparations mechanisms

The obligation to make reparations is clearly established under the law of state responsibility, as well as under international humanitarian law and the law of human rights. Comparative practice exhibits a rich variety of cases where mechanisms have been established under which reparations can be administered in relation to an international armed conflict.

Judicial bodies, including the ICJ, the ICC and the ECtHR, have differing but important mandates in relation to reparative justice. However, they are not in a position to award reparations any time soon with the scope and scale required by the conflict in Ukraine. Even less would they be able to enforce them. Russia's veto-wielding power also means that the UN Security Council – and with it the UN system – is effectively prevented from taking enforcement action against Russia.

This does not prevent the creation of a non-judicial mechanism for making recommendations on, or effectively administering, reparations for those who have suffered harm in the conflict. Such a mechanism could be established by *inter alia*:

- the government of Ukraine
- a resolution of the UN General Assembly
- a multilateral agreement between participating states, or a European regional organisation and the Ukrainian government.

Funding for reparations

The international community has already demonstrated considerable political will both in producing resources to come to the aid of Ukraine and also in taking punitive

financial measures against Russian aggression. Yet most international aid currently destined for Ukraine is for military support or stabilization, not to support reparations for civilian harm.

It remains a matter of speculation as to whether Russia is ever likely to be in a position where it will agree to pay for substantial reparations under a peace agreement. The key to unlocking such concessions may be whether an agreement on the payment of reparations could leave the Russian Federation in a better economic position than it finds itself in at the moment under the pressure of sanctions. Previous experience has shown that it may be preferable, both to encourage compliance and to support international rule of law, for the payment of reparations to be founded on state consent – albeit consent obtained in the shadow of financial sanctions.

Frozen Russian assets – either belonging to the state or to wealthy Russian individuals – also present a very large pool of resources potentially available for re-purposing to reparations. To do so would require overcoming a number of legal obstacles, both at international level and in terms of the national laws of states, including G7 members, where most of the assets are currently held. While state immunity protects foreign assets in which the foreign state has an interest from domestic *judicial* proceedings, there does not appear to exist an unambiguous rule of international law preventing the *executive* seizure of Russian assets as a proportionate countermeasure aimed at halting Russian violations in Ukraine.

A route map to reparations

Separating the complex task of making recommendations on reparation awards from the means of their financing helps clarify the legal obstacles to be overcome and to understand the possible route(s) to achieving fair reparations of the scope and scale required to bring justice to Ukraine. It also contributes to ensuring that reparation does not depend on the capacity of individual victims and other injured parties to engage in lengthy and costly litigation.

It should be for the government and people of Ukraine to decide on the terms of any future agreement with the Russian Federation. But extensive preparations are required now to ensure that the interests of civilians harmed in the conflict are properly safeguarded and effectively represented in international negotiations. The following principles will help to maximise the chance of achieving the goals of reparative justice:

1. Civilians first

Any reparations mechanism established for Ukraine should admit claims submitted by individuals, families and communities and should prioritise such claims from natural persons over those made by state entities or legal persons. Civil society organisations and other victims' representatives should be able to participate at all stages in the planning, implementation and evaluation of reparations mechanisms.

2. Reparation should be holistic

In addition to the provision of compensation, the other heads of reparation – restitution, rehabilitation, satisfaction and guarantees of non-repetition – may be as important if not

more important for repairing the harm caused to individuals, families and communities and will require the leadership of, or close cooperation with, Ukrainian authorities.

3. A victim-oriented approach

Reparations should be prompt, accessible and commensurate with the harm suffered. A low burden of proof should be placed on individual claimants, proper assistance provided to victims and safeguarding mechanisms should be put in place to protect the safety and interests of vulnerable victims, including those who have been subjected to sexual or gender-based violence.

4. Inclusive and non-discriminatory

The right to reparation for those who have suffered harm as a result of violations should be fulfilled without discrimination of any kind or on any ground. Reparations should be made available to all those who have suffered violations of IHL or human rights law in the Ukraine conflict, including Ukrainian nationals, Russian nationals and foreign nationals, dating from the start of the conflict in 2014 and including victims of violations by Ukrainian forces as well as by Russian or Russian-backed forces.

5. The perpetrator should pay

It is the state responsible for the violations and – in the case of crimes under international law – the individuals responsible who should pay. In the circumstances of the Russian invasion of Ukraine that means that, overwhelmingly, the Russian Federation and Russian leadership should be held responsible.

1

Introduction

Eight days into the Russian invasion of his country, Ukrainian President Volodymyr Zelensky declared: ‘We will restore every house, every street, every city. We tell Russia: learn the words “reparations” and “contributions”. You will repay us everything. Everything you did against our state, against every Ukrainian. In full. And we will not forget those who died.’¹ President Zelensky’s words constituted at one and the same time an appeal to natural justice and a very specific claim under international law.

A state responsible for an internationally wrongful act must make full reparation for the injury caused. As far as possible, this entails wiping out the consequences of the illegal act and re-establishing the situation which would, in all probability, have existed if that act had not been committed.² A party to conflict which violates the Geneva Conventions is further liable to pay compensation and is responsible for all acts committed by persons forming part of its armed forces.³

Discussions about ensuring accountability for Russian actions in Ukraine have to date heavily focused on criminal justice. There have been numerous reports of war crimes, such as the targeting of civilian objects, including educational and medical facilities, indiscriminate artillery shelling, rape and outrages on personal dignity, and the killing of prisoners. In an unprecedented move, 43 states have referred the situation in Ukraine to the International Criminal Court (ICC). The Ukraine Prosecutor-General’s office stated in April that it has already identified 3780 victims of alleged Russian war crimes and 3429 witnesses. Memoranda of cooperation have been signed with authorities from other European states, including the UK, and with the European Chief Prosecutor and a ‘joint investigation team’ established. Meanwhile a number of international NGOs have begun compiling and publishing mainly open source intelligence (‘OSINT’) relevant to war crimes.

Furthermore, support has been building for a proposal to establish a special tribunal for the crime of aggression. Such a tribunal, established by members of the international community in cooperation with the government of Ukraine, would be empowered to try senior Russian leaders, including potentially President Vladimir Putin, for the crime of waging aggressive war against Ukraine.

The delivery of criminal justice is a necessary response to the offences committed against the Ukrainian people. It is, however, not sufficient. The experience of over two decades of international criminal justice indicates that it does not have the capacity to bring justice to the vast majority of Ukrainian civilians any time soon, if at all. For example, since the Rome Statute of the ICC came into force 20 years ago, 30 cases have been brought before the court, so far resulting in 10 convictions for war crimes and crimes against humanity,

1 UKRINFORM, ‘Zelensky calls on Russia to get ready to pay reparations and contributions’, 3 March 2022.

2 Permanent Court of International Justice, *Factory at Chorzów* (Jurisdiction), 1927, PCIJ, Series A, No. 9, p. 21.

3 Geneva Conventions, Additional Protocol I (API), Art. 91.

and four acquittals. Thirteen indicted suspects remain at large. Even if a new tribunal was established to try the crime of aggression, and even if Ukrainians one day saw their aggressors apprehended and prosecuted before such a tribunal, that in itself would not go very far to repairing the harm they have suffered.

President Zelensky's words constitute at one and the same time an appeal to natural justice and a very specific claim under international law

Ukrainians need their land back, their houses rebuilt. They need rehabilitation for what they have suffered. They need to know how and why their loved ones died, to have them honoured and to ensure their families are provided for. They need reparations.

But what form should such reparations take? To whom would they be made and on what authority? What sort of mechanism could be entrusted to take on the task of awarding and administering reparations on such a scale? Where will the money come from? While the concept of reparations has been invoked rhetorically by a number of actors in recent weeks, very little discussion has taken place on such questions and on how a fair and effective reparations policy could be put into practice. This briefing considers these questions, assessing the options for delivering reparations for Ukraine, and proposes a number of principles which should guide them.

2

Legal authority

Historically, war reparations were paid by the defeated party to the victor. For example, Carthage was made to pay large indemnities after the Punic wars, France after the Napoleonic wars, and Germany after World War I. In the intervening period, the concept of reparations has developed significantly. In contemporary international law, the obligation to make reparation is a legal consequence of a violation of international law. In the context of armed conflict, reparations may therefore fall due against a victorious party as well as against a losing party, or against multiple parties including in situations where there is no decisive military outcome. In addition, emerging practice indicates that a right to a remedy and reparation may be held by individuals who have been harmed as well as by an injured state.

Law of state responsibility

The Articles on the Responsibility of States, which codify customary international law, confirm in Article 31 that a state responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused, including any damage, whether material or moral. In its commentary on the Articles, the International Law Commission notes that “Moral” damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life.⁵

Reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination.⁶ The obligation entails making restitution, that is re-establishing the situation that existed before the wrongful act was committed, and insofar as that is not possible, paying compensation for the damage caused.⁷ Compensation shall cover any financially assessable damage including loss of profits insofar as it is established. Examples of satisfaction include acknowledgement of the breach, expression of regret or a formal apology.⁸ The Articles also confirm the obligation on a responsible state ‘to offer appropriate assurances and guarantees of non-repetition [of the wrongful act], if circumstances so require.’⁹

Geneva Conventions

International humanitarian law (IHL), anchored in the Geneva Conventions, regulates the conduct of hostilities and the protection of civilians and others *hors de combat*. Violations of IHL rules, including but not limited to the commission of war crimes, trigger an obligation to pay compensation. The responsibility of a party to conflict extends to all

4 International Law Commission, Articles on the [Responsibility of States for Internationally Wrongful Acts](#) (‘ARS’), 2001.

5 *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p92.

6 ARS, Art. 34.

7 *Ibid*, Arts. 35-6.

8 *Ibid*, Art. 37.

9 *Ibid*, Art. 30.

violations committed by its armed forces. Thus, unlike the prohibition on the crime of aggression, where the liability falls on the aggressor, the obligation to pay compensation for IHL violations may fall on any party whose armed forces have committed violations.¹⁰ This obligation, first codified in the 1907 Hague Convention IV on land warfare, now appears as Article 91 of Additional Protocol I to the Geneva Conventions and is considered by the International Committee of the Red Cross as forming part of customary international law.¹¹

The framers of the Geneva Conventions, aware of the huge pressures in play at the culmination of armed conflicts and during the signing of peace agreements, included a provision common to the four conventions making it impossible to sign away this liability, at least in respect of grave breaches: ‘No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches...’¹²

Corresponding safeguards exist to safeguard the rights of individuals. Article 7 of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War stipulates that ‘No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.’ Article 8 further provides that ‘Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.’¹³

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Human rights law

The right to an effective remedy is a human right and takes its place in human rights treaties beside other substantive rights. Thus the European Convention on Human Rights (ECHR) provides in Article 13 that ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

The International Covenant on Civil and Political Rights similarly provides in Article 2 that ‘...any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’ and goes on to stipulate that persons claiming such a remedy should have their right thereto determined by competent judicial, administrative or

10 See ICRC [Commentary of 1987 to AP1 Art. 91](#), at 3652: ‘...no distinction is made between the victor and the vanquished, nor between a Party which is presumed to have resorted to force unlawfully and a Party which is believed only to have exercised its right of self-defence.’

11 ICRC, Customary IHL Database, [Rule 150](#), ‘A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.’

12 See eg Geneva Convention IV, Art. 148.

13 Similar provisions exist in the other Geneva Conventions protecting wounded, sick and shipwrecked armed forces and prisoners of war.

Reparations awards at the ICJ: *the DRC v Uganda*

On 27 February 2022 the International Court of Justice issued its reparations judgment in the case *Armed Activities on the Territory of the Congo* brought by the Democratic Republic of Congo (DRC) against Uganda. The judgment followed the failure of the parties to agree on reparations as part of court-ordered negotiations as a result of the ICJ finding in its merit judgment over 16 years earlier that Uganda had violated the principle of non-use of force in international relations and the principle of non-intervention, had violated its obligations under international humanitarian law and human rights law, and by its plundering of natural resources had violated further obligations owed to the DRC.

The ICJ reiterated that a state responsible for an internationally wrongful act is under an obligation to make full reparation for the injury or damage, confirming that Article 31 of the Articles on the Responsibility of States reflected customary international law.¹⁴ It notably made a distinction between damage in territory occupied by Uganda, in respect of which 'it is for Uganda to establish that a particular injury suffered by the DRC in Ituri was not caused by its failure to meet its obligations as an occupying Power' and damage that occurred outside the zone of occupation, where the burden of proof fell on the DRC to provide evidence of a causal nexus with Uganda's conduct.¹⁵ The court did not accept the evidence presented by the DRC for the scale of *inter alia* civilian deaths, sexual violence, child recruitment or displacement but instead included these forms of harm in a 'global sum' awarded for compensation.

The total compensation awarded to the DRC comprised USD 225 million for damage to persons, USD 40 million for damage to property and USD 60 million for damage related to natural resources. At the end of the judgment, the ICJ noted that:

*'the reparation awarded to the DRC for damage to persons and to property reflects the harm suffered by individuals and communities as a result of Uganda's breach of its international obligations. In this regard, the Court takes full cognizance of, and welcomes, the undertaking given by the Agent of the DRC during the oral proceedings regarding the fund that has been established by the Government of the DRC, according to which the compensation to be paid by Uganda will be fairly and effectively distributed to victims of the harm, under the supervision of organs whose members include representatives of victims and civil society and whose operation is supported by international experts. In distributing the sums awarded, the fund is encouraged to consider also the possibility of adopting measures for the benefit of the affected communities as a whole.'*¹⁶

legislative authorities of the state party and that the competent authorities shall enforce such remedies when granted. While, during an armed conflict, a state is able to derogate from some of its human rights obligations, the duty to guarantee an effective remedy cannot be suspended, as the UN Human Rights Committee has stated: 'Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation ... to provide a remedy that is effective.'¹⁷

14 ICJ, *Armed Activities on the Territory of the Congo (DRC v Uganda) (Reparations)*, Judgment, 9 February 2022, para. 70.

15 Ibid. paras. 118-119.

16 Ibid. para. 408.

17 UN Human Rights Committee, *General Comment 29, States of Emergency*, 31 August 2001, CCRP/C/21/Rev.1/Add.11.

Notably the UN Human Rights Committee has also stated that: ‘States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant.’¹⁸ The implication of this statement is that every killing pursuant to an act of aggression, including those that comply with IHL, constitutes a violation of the right to life under international human rights law.

UN Basic Principles on the Right to a Remedy and Reparation

Although they do not in themselves form binding international law like the other authorities quoted in this section, the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ‘identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations.’¹⁹

Notably, the Basic Principles confirm that the scope of the obligation includes the duty to provide those who claim to be victims with equal and effective access to justice irrespective of who may ultimately be the bearer of responsibility for the violation and provide effective remedies for victims, including reparation.²⁰ Furthermore, the status of victim does not depend on the prosecution and conviction of the perpetrator(s) or even their identification.²¹ The Basic Principles state that in addition to individual access to justice, states ‘should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.’²²

Beside restitution, compensation, satisfaction and guarantees of non-repetition as forms of reparation, the Basic Principles add rehabilitation, including medical and psychological care, as well as legal and social services.²³ As regards compensation, this should be provided for any ‘economically assessable damage’, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.²⁴

18 UN Human Rights Committee, [General Comment 36, Article 6: Right to Life](#), 3 September 2019, CCPR/C/GC/36, para. 70.

19 UN General Assembly, [Resolution 60/147](#), 16 December 2005, Preamble.

20 Ibid, para. 3.

21 Ibid, para. 9.

22 Ibid, para. 13.

23 Ibid, para. 21.

24 Ibid, para. 20.

3

Mechanisms

While the obligation to make reparations is clearly established under the law of state responsibility, as well as under international humanitarian law and the law of human rights, the mechanism under which reparations can be awarded and administered in relation to an international armed conflict is not self-evident. Comparative practice nonetheless exhibits a rich variety of cases where reparations have been successfully awarded after conflict.

International Court of Justice

President Zelensky's call for reparations on 3 March was made in the context of Ukraine's application to the International Court of Justice (ICJ). Sometimes referred to as the World Court, the ICJ hears disputes between states that have consented to its jurisdiction. The ICJ has previously made major reparations awards in a case of violations of IHL and human rights law and violations of the principles of non-intervention and non-use of force in international relations (see box on p10).

As neither the Russian Federation nor Ukraine have accepted the compulsory jurisdiction of the Court, Ukraine could only drag Russia before the ICJ by raising a dispute under a treaty, to which they are both party, containing a suitable compromissory clause giving jurisdiction over disputes to the ICJ. On 26 February Ukraine instituted proceedings against the Russian Federation concerning a dispute related to the Convention on the Prevention and Punishment of the Crime of Genocide.²⁵ Ukraine argued that Russia had made false claims of genocide in Luhansk and Donetsk and then implemented a 'special military operation' with the express purpose of preventing and punishing purported acts of genocide that had no basis in fact. This argument enabled Ukraine to place the whole of Russia's invasion under ICJ scrutiny, while not having to rely on showing that Russia was itself committing genocide in Ukraine. On 16 March the ICJ ordered provisional measures, requiring Russia to suspend immediately military operations on Ukrainian territory and to ensure that military or irregular units which may be directed or supported by it take no steps in furtherance of those operations.

While the breadth and strength of the provisional measures awarded by the ICJ may instil hope in Ukraine for the outcome of the case, a note of caution is necessary. Although Russian leaders have made many allegations of genocide against Ukraine, Russia formally sought to justify its military operations as self-defence under Article 51 of the UN Charter. As the Court itself has pointed out, the ongoing conflict has been addressed in the framework of several international institutions, including the UN General Assembly, while the present case before the Court 'is limited in scope, as Ukraine has instituted these proceedings only under the Genocide Convention'. Given this limited jurisdiction, the ICJ

²⁵ Ukraine had previously brought proceedings under the International Convention for the Elimination of Racial Discrimination (in respect of the Russian invasion of Crimea) and under the International Convention for the Suppression of the Financing of Terrorism (in respect of Russian activities in eastern Ukraine). See ICJ, *Ukraine v. Russian Federation*, Application 10 January 2017. This case is still pending.

is unlikely to allow proceedings to turn into a full-blown trial for aggression. Any reparation awarded on a finding that false accusations of genocide constituted a violation of the Convention would similarly be limited in scope.²⁶

Although the ICJ is currently seized with two cases related to Russian invasion(s) of Ukraine, final judgments will take years and, given treaty limitations on jurisdiction, are unlikely to result in reparations with the scope and scale required to bring justice to civilians. In any case, there is no indication that Russia would comply with an adverse judgment – its record of non-compliance to date with the provisional measures order does not bode well.

Reparations at the ICC or other international criminal tribunal

Although their primary function is to hear criminal prosecutions against individuals, international criminal tribunals may also be empowered to award reparations to victims. The rules of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, established in the 1990s, just referred victims to national mechanisms.²⁷ The Rome Statute of the International Criminal Court (ICC) marked a major advance, however. In addition to enabling victims to participate and be represented in the proceedings, the ICC may make an order directly against a convicted person specifying appropriate reparations, including restitution, compensation and rehabilitation²⁸ It is noteworthy that the original draft of the Rome Statute drawn up by the International Law Commission did not include the reparations provisions, which were only inserted during negotiations due to pressure from civil society.²⁹

In addition to implementing court-ordered reparations following a conviction, the ICC Trust Fund for Victims also has an assistance mandate, funding ‘projects and initiatives that are of a reparative quality’. These latter take place in an ICC situation country but do not require a conviction or even ongoing judicial proceedings. Generally of a collective nature, they include physical and psychological rehabilitation and material support to victims, their families and their communities.

In the case of any special criminal tribunal established for Ukraine, the ability to award reparations will depend on the powers included in the statute of the tribunal. With respect to a special tribunal for the crime of aggression, this presents both an opportunity and a challenge. Aggression is a leadership crime by definition. If in future potential defendants were brought before such a tribunal, they would likely be in possession of far greater

26 Cf. *Bosnia and Herzegovina v Serbia*, where the ICJ found that Serbia had failed to prevent genocide but declined to award compensation based on the lack of a sufficient nexus between the wrongful act and the damage resulting from the Srebrenica genocide. *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para. 462.

27 ‘Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.’ ICTY Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 49, 22 May 2013, Rule 106B.

28 *Rome Statute of the International Criminal Court*, 1998, UNTS 2187/38544, Art. 75.

29 Evans, Christine, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge, CUP, 2012), pp 99-100.

resources than most defendants at international criminal trials, creating a significant fund for reparations following conviction. However, as a crime against the sovereignty, territorial integrity or political independence of another state, aggression does not identify a class of natural persons as victim in the same way that war crimes, crimes against humanity and genocide do. It has been argued that individuals can be victims of the crime of aggression, at least for the purposes of the Rome Statute, to the extent that they suffer harm as a result of crimes within the court's jurisdiction.³⁰ But it would be important for the statute of a special tribunal for aggression explicitly to include natural persons suffering harm as victims of the crime and to empower the tribunal to make consequent awards of reparation.

Both the ICC and any future international criminal tribunal provide important avenues for reparation for those suffering harm in Ukraine. However, the inevitable delays in instituting proceedings, apprehending suspects and obtaining convictions to the criminal standard of proof – as well as, in the case of aggression, establishing jurisdiction in the first place – mean that reparative justice will be both heavily delayed and substantially limited in scope.

European Court of Human Rights

The European Court of Human Rights (ECtHR) granted urgent interim measures on 1 March following the filing of an application by Ukraine citing 'massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine'. Measures indicated required Russia 'to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops'.³¹ As with the ICJ, however, the ECtHR typically takes years to come to a judgment.

Where it does find a violation of the ECHR, the ECtHR is empowered to afford 'just satisfaction' to the injured party 'if the internal law of the High Contracting Party concerned allows only partial reparation to be made'.³² Russia's record of paying compensation to successful litigants had been relatively positive over many years, although its compliance with other individual and general measures of reparation less so.³³

However, the 2021 judgment of the ECtHR in *Georgia v. Russia (II)* raised serious doubt as to whether the court would exercise jurisdiction over much of Russia's conduct in Ukraine during the current armed conflict. In that case the court ruled that extraterritorial military operations during the active phase of hostilities in the context of an international armed conflict did not meet the conditions for establishing jurisdiction under the ECHR.³⁴ Broadly speaking, that meant that whereas Russia could be held responsible for violations against persons in detention, it could not be held responsible under European human

30 Pobjie, Erin, 'Victims of the Crime of Aggression' in Claus Kress and Stefan Barriga, *The Crime of Aggression: A Commentary* (Cambridge, CUP, 2016), pp 816-860.

31 European Court of Human Rights, [Press Release](#), ECHR 068 (2022), 31 March 2022.

32 ECHR, Art. 41.

33 Council of Europe, Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights*, Annual Reports at <https://www.coe.int/en/web/execution/annual-reports>

34 ECtHR, *Georgia v Russia (II)*, para. 138.

rights law for ‘armed attacks, bombing or shelling’ in the course of an international armed conflict outside its own territory.³⁵

Following its expulsion from the Council of Europe on 16 March, Russia will cease to be a party to the ECHR on 22 September 2022. Although the ECtHR will deal with applications against Russia in relation to alleged violations that occurred until that date, Russia will not participate in proceedings and there appears little prospect of effective reparations being implemented in the foreseeable future.

International reparations commission

In recent decades there have been a number of bodies established at the international level, often under the terms of a peace agreement, in order to administer reparations following conflict. Perhaps the best known is the UN Compensation Commission (UNCC), set up in 1991 to process claims and pay compensation for loss and damage suffered as a direct result of Iraq’s invasion and occupation of Kuwait (see box on p15). Notably the UNCC awarded compensation not just to states (and corporations) but to individuals, whose cases were fast-tracked.

Under the 2000 Algiers Agreement which brought an end to the border conflict between Ethiopia and Eritrea, a Claims Commission was established to ‘decide through binding arbitration all claims for loss, damage or injury by one government against the other’ resulting from violations of IHL, including the 1949 Geneva Conventions, or other violations of international law. Unlike the UN Compensation Commission, then, the Eritrea-Ethiopia Claims Commission had an explicit focus on IHL violations, and a judicial function rather than a purely administrative one. In the event, however, the fact that the commission was mandated to decide government claims ended up seeing individuals and communities who had suffered harm sidelined in the process.

Reparative mechanisms established following the wars in the former Yugoslavia provide a rich source of precedent, particularly with regard to property restitution and compensation. Under the 1995 Dayton Agreement which ended the conflict in Bosnia and Herzegovina, a Commission for Real Property Claims of Displaced Persons and Refugees was set up to decide on the return of property or just compensation.³⁶ International support was required to ensure the implementation of decisions but by 2004, 93 per cent of property claims lodged by pre-war owners had been resolved.³⁷ An analogous mechanism after the Kosovo conflict was established, in contrast, by the UN mission under the authority of the Security Council. Resolution 1244 reaffirmed the right to return of all refugees and displaced persons and established an international interim administration in Kosovo whose functions included ‘Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.’³⁸ The UN Interim Administration Mission in Kosovo (UNMIK) consequently set up institutions to facilitate

35 Ibid, para. 126.

36 [General Framework Agreement for Peace in Bosnia and Herzegovina](#) (‘Dayton Agreement’), Annex 7. Originally entitled Commission for Displaced Persons and Refugees.

37 UN Commission on Human Rights, [Report of the Representative of the Secretary-General on IDPs](#), E/CN.4/2006/71/Add.4, 29 December 2005, para. 16.

38 UN Security Council, [Resolution 1244/1999](#), Deployment of international civil and security presences in Kosovo, 10 June 1999, para. 11(k).

The UN Compensation Commission

The United Nations Compensation Commission (UNCC) was created in 1991 by the UN Security Council to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991.³⁹ As Iraq's liability under international law had been established, the UNCC mainly had a fact-finding task and was therefore structured as a commission for administering claims rather than an international court or tribunal.

The UNCC granted priority to individual claimants in both the processing and the payment of claims. Urgent treatment was accorded for the resolution of claims of individuals who were forced to leave Iraq or Kuwait; the claims of those who suffered serious personal injuries or whose spouse, child or parent died; and the claims of those who suffered personal losses of up to USD 100,000. The UNCC has stated that: 'Given the traditional emphasis in previous proceedings on the losses suffered by Governments and corporations, this humanitarian decision to focus first on urgent individual claims marked a significant step in the evolution of international claims practice.'⁴⁰

In categories with large numbers of individual claimants and relatively small amounts of compensation claimed, the UNCC employed computerized matching of claims and verification information, sampling and statistical modelling to assist it in dealing with the volume of claims. The Commission had processed some 2.7 million claims by 2005, and the total compensation awarded was USD 52.4 billion to approximately 1.5 million successful claimants.

Despite its relative success, the role of the UNCC was not without controversy. Paid for by a percentage of the proceeds of export sales of Iraq petroleum and petroleum products, the funding mechanism was part of the wider programme of sanctions on Iraq which was criticised for contributing to widespread humanitarian suffering among Iraq's population. Although the largest number of compensation awards by the UNCC were made to individual claimants, by far the larger amount by value was paid to corporations and states (over USD 40 billion).⁴¹ This saw Iraq having to continue to pay compensation even after it was itself invaded by the US in 2003.

the restitution of homes and other property and to resolve property claims. Despite challenges, over 70,000 claims were resolved by 2020.⁴²

The fact that such international mechanisms were established by agreement between the conflict parties and/or by the UN Security Council raises an obvious challenge in relation to Russia's participation in reparations for Ukraine. Russia's veto on the UN Security Council, the only UN body with the power to agree legally-binding action over the consent of a member state, has led commentators to dismiss the possibility of establishing another UN compensation commission.

In recent years, however, the UN General Assembly and its subsidiary organs have used their own powers under the UN Charter to establish bodies in the field of conflict-related justice. In 2016 the General Assembly, for example, set up the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic ('IIIM'). Its mandate, worth quoting in full, is

39 UN Security Council, [Resolution 687 \(1991\)](#), S/RES/687, 8 April 1991.

40 UNCC, [Claims processing](#), UNCC website, February 2022.

41 UNCC, [Summary of awards and current status of payments](#), UNCC website, February 2022.

42 OSCE, [Property Rights Mass Claim Mechanism: Kosovo Experience](#), June 2020, p33.

*‘to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law’.*⁴³

In creating the IIIM for Syria – over the objections of the Russian Federation – the General Assembly was relying on its Charter powers *inter alia* to ‘initiate studies and make recommendations for the purpose ... of assisting in the realization of human rights and fundamental freedoms for all without distinction’, to ‘establish such subsidiary organs as it deems necessary for the performance of its functions’ and to ‘recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter’.⁴⁴ The GA is able to use these powers under the UN Charter provided that the Security Council is not exercising its own functions in respect of any dispute or situation.⁴⁵

In fact, the Ukraine crisis has already seen the GA flexing its muscles in this regard. Following Russia’s use of a veto at the Security Council, an emergency special session of the GA on 2 March overwhelmingly adopted a resolution demanding the Russian Federation immediately end its invasion of Ukraine and unconditionally withdraw all its military forces, with 141 member states voting in favour.⁴⁶ Then on 26 April the GA passed without a vote a landmark resolution to adopt a standing mandate to hold a GA debate whenever a veto is cast in the Security Council.⁴⁷

Following the precedent of the resolution creating the IIIM, the General Assembly could establish an international mechanism to collect, assess and make recommendations on claims for reparation arising from violations of international humanitarian law, human rights violations and other violations of international law on the territory of Ukraine, in order to facilitate and expedite awards of reparation, in accordance with international standards, by national, regional or international authorities that are or may in the future be legally empowered so to do, to those who have suffered loss or damage.

Nor do the particular constraints on decision-making within the UN system prevent states from forming other multilateral agreements, so long as they do not conflict with obligations under the UN Charter. The ICC, for example, was not established by the Security Council but by its own multilateral treaty, the Rome Statute – despite the hostility of some veto powers on the Council.

The fact that such mechanisms have been successfully established outside the Security Council in the arguably more controversial field of international *criminal* justice indicates

43 UN General Assembly, [A/Res/71/248](#), 21 December 2016.

44 UN Charter, Arts. 13, 22 and 14 respectively. See also functions and powers of the UN Economic and Social Council, Arts. 62-66, including coordinating activities of the specialized agencies and performing services with the approval of the GA.

45 Ibid, Art. 12.

46 UN Press release [GA/12407](#), 2 March 2022.

47 UN Press release [GA/12417](#), 26 April 2022.

that setting up an international mechanism concerned with *civil* or reparative justice for civilians is certainly possible.

National reparations scheme

Perhaps the most extensive practice in implementing reparations for those who have suffered harm in armed conflict has occurred at the national level. Local knowledge, access to official documentation including civil status and property registers, understanding of the domestic context and ease of access for claimants all mean that national authorities may be the most appropriate for administering reparations.

In Colombia, following a number of earlier partial reparations initiatives, Law 1448 of 2011 enacted comprehensive measures of reparation and land restitution for victims of the armed conflict. In its first five years of operation, over 8 million victims were registered and over 90,000 restitution claims received. The law provides for a wide range of forms of reparation, with restitution preferred when possible over compensation. The law defines victims broadly as ‘persons who individually or collectively suffered harm as a result of violations’ that occurred during the conflict, regardless of whether the perpetrator is identified, apprehended or prosecuted (and regardless of any family relationship between perpetrator and victim).⁴⁸ Notably, only summary evidence is required to register as a victim, and the burden of proof lies with the state.⁴⁹

In Iraq, Law 20 of 2009 established a compensation programme for victims of ‘military operations, military mistakes and terrorist actions’ from 2003 onwards. As the title indicates, compensation is not just provided to those who suffered harm from attacks by ISIS and other non-state armed groups, but also to those harmed by Iraqi Security Forces’ operations (and indeed by members of the international coalition against ISIS). In the event of death, disability or missing persons, compensation is awarded according to a scale, with a monthly allowance awarded in some cases. In cases of property damage, compensation is made at 50 per cent of the damages evaluated.⁵⁰ With committees

operating at provincial level, it is estimated that over 200,000 claims have been processed and over USD 400 million awarded in compensation.

In Ukraine itself, a public debate on transitional justice has taken place in the context of the Russian occupations in Crimea and the Donbas. In March 2021 Ukrainian civil society organisations called for

‘all victims of war and occupation need to be provided with an effective compensation mechanism and the state must start the immediate implementation of this mechanism’

Appeal of 14 Ukrainian NGOs to the President of Ukraine, 17 March 2021

48 Colombia, Law 1448 of 2011, Art. 3.

49 Ibid. Art. 158.

50 See Sandoval, Clara, and Miriam Puttick, *Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice*, Ceasefire Centre for Civilian Rights, 2017, and *Mosul After the Battle: Reparations for civilian harm and the future of Ninewa*, Ceasefire Centre for Civilian Rights, 2020.

a coherent state policy ‘to overcome the negative consequences of an armed conflict and introduce a holistic and systemic approach to transitional justice at all levels’. In addition to the investigation and prosecution of war crimes and crimes against humanity, ‘all victims of war and occupation need to be provided with an effective compensation mechanism and the state must start the immediate implementation of this mechanism.’⁵¹ A draft law on the Principles of State Policy of the Transition Period, which included some outline provisions on transitional justice, was introduced into the Verkhovna Rada (Ukrainian parliament) in August 2021 but withdrawn on 25 January 2022 following Russian threats and international pressure.⁵²

Feasibility

In conclusion, judicial bodies, including the ICJ, the ICC and the ECtHR, have differing but important mandates in relation to reparative justice. However, they are not in a position to award reparations any time soon with the scope and scale required by the conflict in Ukraine. Even less would they be able to enforce them. Russia’s veto-wielding power also means that the UN Security Council – and with it the UN system – is effectively prevented from taking enforcement action against Russia.

This does not prevent the creation of a non-judicial mechanism for making recommendations on, or effectively administering, reparations for those who have suffered harm in the conflict. Such a mechanism could be established by *inter alia*:

- the government of Ukraine
- a resolution of the UN General Assembly
- a multilateral agreement between participating states, or a European regional organisation and the Ukrainian government.

How the reparations recommended or assessed by that mechanism could then be financed, including by participation from Russia, is considered in the next section.

51 Appeal of non-governmental organizations to the President of Ukraine regarding the policy of the transitional period, 17 March 2021.

52 Ukraine, Draft Law on the Principles of State Policy of the Transition Period, 4 August 2021. See also Mallinder, Lousie, *The Role of Transitional Justice in Ukraine*, 4 April 2022.

4

Financing

The question of which mechanism(s) could be used to administer reparations for Ukraine is distinct from, but inevitably linked with, the question of how such a project could be financed. The total cost for the reconstruction of Ukraine was already variously estimated in mid-April at USD 220 billion to USD 565 billion and above.⁵³

The obligation to pay ‘full’ reparation for violations of international law envisages *restitutio in integrum*, restoring the injured party to the same position it would have been in had the wrongful act(s) not occurred. It should be noted, however, that the cost of the individual component, that part of reparations due to individual civilians and their families who have suffered harm, has typically proved much smaller than the cost of reparations paid to the state and corporate entities.

A ‘Marshall Plan’ for Ukraine and the role of voluntary contributions

Leading voices in the global economy, including the President of the World Economic Forum at Davos, the US Secretary to the Treasury and the President of the European Council have all called for an international ‘Marshall Plan’ for Ukraine, referencing the huge US programme to promote the recovery of Europe following World War II. With American support mostly in the form of direct grants, the Marshall Plan enabled western European economies to restore and develop industry, resume agricultural production and expand trade.

Given the massive level of destruction, substantial foreign aid will clearly be required in order for Ukraine to recover. The EU Commission President has already indicated that the Commission is proposing macro-financial assistance for Ukraine of up to EUR 9 billion in 2022, albeit mostly in the form of loans.⁵⁴ Voluntary contributions from other donor countries are being sought.

Such assistance should however be distinguished from reparations, both with regard to objectives and sources of finance. Reparations are fundamentally concerned with righting a wrong. Unlike foreign aid, reparations are due specifically to those who have suffered a wrong – and they are required to be made by those who were responsible for that wrong.

This is not to say that international assistance cannot support the objective of reparations.⁵⁵ Voluntary contributions could be made to either an international commission or a Ukrainian national scheme tasked with assessing claims and providing reparations to victims. Voluntary contributions could also be made to the ICC Trust Fund

⁵³ *Investment Monitor*, ‘How much will it cost to rebuild Ukraine?’, 14 April 2022.

⁵⁴ European Commission, *Press release*, 18 May 2022.

⁵⁵ For eg. the work of the Kosovo agencies in the field of property reparations was paid for by voluntary contributions from other states.

for Victims, to support its programmes of reparations and assistance to communities who have suffered harm as a result of international crimes in Ukraine or other country situations before the ICC.

Contributions under terms of a peace agreement

As noted above, war reparations have on multiple occasions in history been made at the end of a conflict, governed by an agreement between the warring parties.

A future requirement for Russia to pay reparations under the terms of a peace agreement has already drawn some unfavourable comment by comparison with the 1919 Treaty of Versailles.⁵⁶ The treaty placed a crippling financial burden on a defeated Germany after World War I and is sometimes claimed to have contributed to the conditions for the popular rise of National Socialism.

However, under contemporary international law reparations arising from armed conflict are not a winner-takes-all affair. They are a direct consequence of a violation and compensation and other reparation should be commensurate with the damage caused by that violation. Punitive or exemplary damages are excluded. As the International Law Commission explains, 'Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.'⁵⁷

The more immediate question is whether Russia is ever likely to be in a position where it will agree to pay for substantial reparations under a peace agreement. Russian territory is not under threat and, even if it gains nothing from its aggression in Ukraine, it is difficult to see the balance of military power alone extracting concessions on reparations.

The key to unlocking such concessions is whether an agreement on the payment of reparations could leave the Russian Federation in a better economic position than it finds itself in at the moment under the pressure of sanctions. Dedicating a proportion of its oil revenues to compensation – as Iraq was required to do to fund the UN Compensation Commission – might for example prove more advantageous to Russia than being forced to sell its oil at a discount. As the combined effect of sanctions produces severe economic contraction and, according to predictions by the Bank of Russia, 'years of reverse industrialisation',⁵⁸ the incentives to come to the negotiating table could well intensify.

While Russia is clearly responsible for the far greater part of loss and damage, an agreement on reparations might also be more palatable for Russian negotiators if it included provision for Russian nationals too who have suffered violations of IHL or human rights in the current conflict.

56 See eg. Luce, Edward, 'Biden, Putin and the danger of Versailles', *Financial Times*, 31 March 2022.

57 *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p99. See also ARS, Art. 37(3): 'Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.'

58 Bloomberg News, 'Russia Faces "Reverse Industrialization" in Sanctions Squeeze', 22 April 2022.

Frozen assets: Russian Federation

Following the invasion of Ukraine on 24 February, a series of multiple sanctions regimes were established or strengthened, led by Western states, freezing Russian assets around the world. By far the largest types of frozen asset are those belonging to the Russian Federation itself, including Russian central bank foreign currency reserves. Russia's finance minister has stated that USD 300 billion of central bank reserves held abroad have been frozen. The largest amounts are held in the US, Japan and EU countries, although the EU Justice Commissioner has indicated that the EU figures may not be as high as initially reported.⁵⁹

Senior Polish and German officials as well as the EU High Representative for Foreign Policy have all indicated their support for going a step further and seizing the frozen Russian foreign exchange reserves to cover the costs of rebuilding Ukraine after the war. In response, Russia's deputy foreign minister has denounced the proposal as 'total lawlessness' and 'destruction of the very foundations of international relations'.⁶⁰

State property is protected abroad under the doctrine of state immunity, which provides a foreign state with immunity from the jurisdiction of domestic courts, at least in respect of non-commercial activities. The UN Convention on Jurisdictional Immunities of States and their Property, which designates 'property of the central bank or other monetary authority of the State' for specific protection, prohibits measures of constraint 'such as attachment, arrest or execution, against property of a State... in connection with a proceeding before a court of another State'.⁶¹ It can be argued, however, that while this provides immunity from *judicial* proceedings, it does not protect a state from action by the *executive* or *legislative* branch in undertaking asset seizures.⁶²

As the prohibition of aggression and the basic rules of IHL are peremptory norms of international law they give rise to obligations owed to the international community as a whole

Under international law, conduct which is ordinarily unlawful may nonetheless be permitted if it is a countermeasure, that is, undertaken against a state which is responsible for an internationally wrongful act in order to induce that state to comply with its obligations.⁶³ Countermeasures must be proportionate and should be suspended once the wrongful

act has ceased.⁶⁴ As the prohibition of aggression and the basic rules of IHL are peremptory norms of international law they give rise to obligations owed to the

59 Reuters, 'Brussels says about \$24 bln of Russian central bank assets frozen in EU, less than expected', 25 May 2022.

60 Fleming, Sam, 'EU should seize Russian reserves to rebuild Ukraine, top diplomat says', *Financial Times*, 9 May 2022.

61 UN Convention on Jurisdictional Immunities of States and their Property, 2004, Arts. 21(c) and 19. Although the Convention is not in force it is believed to reflect the customary international law position on state immunity.

62 See also UK, *State Immunity Act 1978*, Art. 1, 'A State is immune from the jurisdiction of the courts of the United Kingdom...'

63 ARS, Arts. 22, 49.

64 Ibid. Arts. 51-2.

international community as a whole (*erga omnes*), in relation to which all states have a legal interest. It is therefore not just Ukraine which is entitled to take countermeasures, but also other states which may take measures to ensure cessation of the breach and reparation in the interest of injured parties.⁶⁵

While numerous states have taken action to freeze Russian state assets, indicating their belief that such action is lawful, there nonetheless appears to remain a reluctance to progress to seizure. Debates in the US and the EU have focused both on perceived legal obstacles in national or EU law and on strategic rule-of-law considerations.⁶⁶

A number of precedents do exist, not least in the US, for the seizure and repurposing of state assets, including those of Iraq, Iran, Venezuela and Afghanistan. Such cases can, however, be distinguished from the current situation in relation to Russian assets. The US is not at war with Russia (as it was against Iraq when it seized Iraqi state assets in 2003), nor has it designated Russia as a state sponsor of terrorism. US action in relation to the central bank reserves of Venezuela and Afghanistan relied, at least in part, on the need to safeguard those assets from governments the US perceived as illegitimate and redirect them for the benefit of the respective countries.⁶⁷ The decision of President Biden in

The Iran-US Claims Tribunal

The Iran-US Claims Tribunal was established under the 1981 Algiers Declarations which brought an end to the hostage crisis at the US embassy in Tehran, with the mediation of the government of Algeria. Upon the release of the 52 US nationals held at the embassy, the US committed to ensuring the mobility and free transfer of all Iranian assets within its jurisdiction, restoring the financial position of Iran, and with the creation of the Claims Tribunal, to terminating all legal proceedings in US courts against Iran and its state enterprises, putting such claims to binding arbitration.⁶⁸

The jurisdiction of the Tribunal included claims of US nationals against Iran and claims of Iranian nationals against the US, as well as official contractual claims of the US and Iran against each other and disputes over the return of family property of the former Shah of Iran. A 'security account' with a USD 1 billion deposit was held at the Dutch Central Bank to cover awards against Iran made by the Tribunal. Notably, Iran was furthermore obliged to replenish the account once it fell below USD 500 million, an obligation by which it repeatedly abided.⁶⁹

Nearly 4,000 cases were finalized by award, decision or order, including 2,388 'small claims' of less than USD 250,000 which were resolved by award on agreed terms in 1990 under which Iran accepted to pay the lump sum of USD 105 million. The total amount awarded to US parties, paid out of the security account, was USD 2.2 billion, and the total awarded to Iran and Iranian parties was over USD 1 billion.⁷⁰

65 Ibid. Arts. 48, 54.

66 For the US debate focusing on powers under the International Economic Emergency Powers Act see Tribe, Laurence H., 'Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?', *Lawfare*, 23 May 2022, and for a contrary view, Boyle, Andrew, 'Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets are Legally Unavailable', *Just Security*, 18 April 2022. For a view from the EU, see Kirschenbaum, Joshua, and Nicolas Veron, 'Now is not the time to confiscate Russia's central bank reserves', *Bruegel*, 16 May 2022.

67 US, 'Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan', *Executive Order 14064*, 11 February 2022.

68 Algeria, *General Declaration*, 19 January 1981.

69 Malanczuk, Peter, *Akehurst's Modern Introduction to International Law* (7th ed.), London, Routledge, 1997, p296.

70 Iran-US Claims Tribunal, *Communiqué 16/1*, 9 May 2016.

February 2022 to seize USD 7.1 billion placed by the former Afghan central bank in the New York Federal Reserve has attracted widespread criticism given the economic crisis facing Afghanistan. Half has been slated for humanitarian aid in Afghanistan, but a group of Afghan civil society organisations has opposed legal moves by 9/11 victims to use the other half to satisfy judgments against the Taliban, arguing state immunity.⁷¹

Perhaps the most interesting precedent is an older one. Following the Iranian revolution and the detention of US hostages at the American embassy in Tehran, the US froze some USD 8 billion in Iranian central bank assets. In addition to the release of the hostages and the return of Iran's assets, the crisis was resolved with the creation of an Iran-US Claims Tribunal to arbitrate claims by both parties and their nationals. Thousands of awards were made to both US and Iranian individuals who had suffered loss or damage (see box on previous page).

Frozen assets: private individuals or corporations

In addition to the freezing of Russian state property, sanctions against Russia have led to the freezing of assets belonging to private corporations or individuals, including the so-called oligarchs. A range of different legal regimes exist which further enable the confiscation of the proceeds of crime or property linked to terrorism and the imposition of fines on those responsible for breaking sanctions. The complexity of the legal arrangements, in a field prone to litigation, became very apparent to UK officials when they were faced with the task of transposing the EU sanctions regime into UK law as part of the Brexit process.⁷²

Assets may remain frozen for decades, but the proceeds of confiscation and fines or penalties provide potential income streams for re-application. The general trend, in cases of corruption, money-laundering or the proceeds of crime, has been to seek to return the assets to their rightful owner or country of origin or, in the case of fines, for the money to be retained by the state imposing the fine.

Switzerland, for example, has pursued a proactive policy with regard to the illicitly-acquired assets of foreign public officials. In the 20 years up to 2015 it had already managed to return approximately USD 2 billion to the states of origin concerned. This policy was strengthened with the passing of the Foreign Illicit Assets Act of 18 December 2015 which provided for the freezing, confiscation and restitution of assets held by foreign individuals entrusted with prominent public functions (including heads of state or government) or their close associates, 'where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or by other felonies'. Confiscation proceedings do not require a prior criminal conviction. The restitution of assets is intended 'to improve the living conditions of the local people and to strengthen the rule of law, thereby helping to combat impunity, in the state of origin'.⁷³

71 Center for Constitutional Rights, 'Afghan groups challenge effort to seize billions from Central Bank of Afghanistan', 22 April 2022. See also *US Statement of Interest*, US District Court, Southern District of New York, Case 1:03-cv-09848-GBD-SN, 11 February 2022

72 By the close of the Brexit transition period at the end of 2021, 99 pieces of secondary legislation had been made under the Sanctions and Anti-Money-Laundering Act 2018 and 1084 EU sanctions designations transitioned into UK law.

73 Switzerland, *Foreign Illicit Assets Act*, 18 December 2015.

But could confiscated assets be repurposed more widely to support reparations in a foreign state different to the state of origin?⁷⁴ Further national enabling legislation would generally be required as well as overcoming international law obstacles, including obligations under bilateral investment treaties and human rights obligations. At a minimum, any action taken would need to be regulated by law, not be arbitrary and be proportionate. These tests may be harder to meet where assets were frozen under powers which did not require evidence of a crime or other unlawful behaviour.⁷⁵

Some progress has nonetheless been made. Following the establishment of an international task force on ‘Russian elites, proxies and oligarchs’ in March,⁷⁶ the US President submitted to Congress on 28 April 2022 legislative proposals to establish a streamlined administrative authority ‘to seize and forfeit Oligarch assets’ connected to unlawful conduct and to enable the transfer of the proceeds of forfeited property to Ukraine ‘to remediate harms of Russian aggression.’⁷⁷ In an analogous manner, Canada’s draft Budget Implementation Act 2022 contains provisions for the forfeiture of seized foreign assets to Canada and powers to repurpose them to ‘(a) the reconstruction of a foreign state adversely affected by a grave breach of international peace and security; (b) the restoration of international peace and security; and (c) the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption.’⁷⁸

Feasibility

The international community has already demonstrated considerable political will both in producing resources to come to the aid of Ukraine and also in taking punitive financial measures against Russian aggression. Most international aid currently destined for Ukraine is for military support or stabilization. It remains to be seen whether reparations for civilian harm will also attract sufficient support.

Frozen Russian assets – either belonging to the state or to wealthy Russian individuals – present a very large pool of resources potentially available for re-purposing to reparations. To do so would require overcoming a number of legal obstacles, both at international level and in terms of the national laws of states, including G7 members, where most of the assets are currently held. While state immunity protects foreign assets in which the foreign state has an interest from domestic *judicial* proceedings, there does not appear to exist an unambiguous rule of international law preventing the *executive* seizure of Russian assets as a proportionate countermeasure aimed at halting Russian violations in Ukraine.

74 A proposal to use sanctions and terrorist financing legislation to fund reparations for victims of sexual violence in conflict has been advanced by Lotus Flower, a UK charity supporting Yazidi survivors, REDRESS, the Global Survivors Fund, and the law firm Hogan Lovells. See Hogan Lovells, [Finance for Restorative Justice](#), January 2020.

75 In the UK for example, under the Russia (Sanctions) (EU Exit) (Amendment) Russia Regulations 2020, designated persons may include not just those who are involved in destabilizing Ukraine or undermining or threatening its sovereignty but also those ‘obtaining a benefit from or supporting the Government of Russia’ or being ‘associated with’ such a person.

76 [Ministerial Joint Statement](#), 17 March 2022.

77 US, ‘[President Biden’s Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable](#)’, White House, Statement 28 April 2022.

78 Canada, ‘[Notice of Ways and Means Motion to introduce an Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures](#)’. The draft legislation includes measures from the earlier Bill S-217, the Frozen Assets Repurposing Act, introduced by Senator Ratna Omidvar.

Could such funds then be used to finance reparation awards made or recommended by one of the mechanisms identified in the previous section? Once a state has taken possession of frozen assets, transfers could arguably rely on the national authority of the state making the transfer. Alternatively, an international agreement could establish a suitable agency responsible for accepting transfers and using the funds to finance reparations payments. Previous experience has shown that it may be preferable, both to encourage compliance and to support international rule of law, for such a process to be founded on state consent – albeit consent obtained in the shadow of financial sanctions.

5

A route map to reparations

Which of the various reparation options discussed above are most likely to be realized will depend on several factors, not least the course of the war and the relative positions of the parties at any eventual peace agreement, but also the positions taken by the international community, the success or otherwise of resolutions passed by the UN, G7 or European institutions, and the outcome of legal proceedings, including criminal prosecutions and litigation over sanctioned assets.

Compared to the rapid progress made with instituting war crimes investigations and the establishment of international mechanisms to support prosecutions, planning for the delivery of reparations to civilians is lagging. Although the rapidly-growing evidence base on violations could in theory support both forms of justice, in practice little progress has been made either on international support for the preparation of reparations documentation or on the modalities for cooperation.

In order to establish an effective reparations process for Ukraine, it is imperative that the international community avoids further delay. Given the extensive preparatory work which needs to be done, civilians who have suffered harm cannot afford to wait for a resolution to the conflict or until all the necessary funds have been identified and secured. Going through a resolution of the UN General Assembly or other multilateral forum may also contribute to achieving the widest possible legitimacy for a reparations mechanism, even if its role was only advisory. The Ukrainian President has alternatively called for ‘partner countries to sign a multilateral agreement and create a mechanism through which each and every one who has suffered from Russia’s actions will be able to receive compensation for all losses’.⁷⁹

Separating the complex task of making recommendations on reparation awards from the means of their financing helps clarify the legal obstacles to be overcome and to understand the possible route(s) to achieving fair reparations of the scope and scale required to bring justice to Ukraine. It also contributes to ensuring that reparation does not depend on the capacity of individual victims and other injured parties to engage in lengthy and costly litigation.

It should be for the government and people of Ukraine to decide on the terms of any future agreement with the Russian Federation. But extensive reparations are required now to ensure that the interests of civilians harmed in the conflict are properly safeguarded and effectively represented in international negotiations.

reparation should not depend on the capacity of individual victims and other injured parties to engage in lengthy and costly litigation

⁷⁹ Address by the President of Ukraine, 20 May 2022.

Principles

To guide discussion, a number of principles should be borne in mind to maximise the chance of achieving the goals of reparative justice.

1. Civilians first

The moral as well as legal case for supporting Ukraine in the conflict has depended heavily on the threats to, and suffering of, the civilian population.

Experience has shown, however, that once a conflict is over civilians who have suffered harm can be quickly forgotten. The formation of the global coalition against ISIS was spurred by international revulsion at crimes committed against civilians in Iraq and Syria, in particular against the Yazidi community. Yet today, some eight years after the worst of the atrocities, hundreds of thousands of Yazidis remain displaced, thousands are still missing and female survivors of sexual violence and slavery still remain effectively excluded from reparations mechanisms. A cautionary tale is also provided by the experience of the Eritrea-Ethiopia Claims Commission. Despite the Commission making a large number of multi-million-dollar awards to both Eritrea and Ethiopia for IHL violations, and ‘reiterat[ing] its recurring concern that proceeds accruing from the damages proceedings be used by the Parties to assist civilian victims of the conflict’, in the event no procedure was implemented to ensure that civilian victims actually received any compensation.⁸⁰

Any reparations mechanism established for Ukraine should admit claims submitted by individuals, families and communities and should prioritise such claims from natural persons over those made by state entities or legal persons. Civil society organisations and other victims’ representatives should be able to participate at all stages in the planning, implementation and evaluation of reparations mechanisms.

2. Reparation should be holistic

There is a tendency, particularly at international level, to conceive of reparation solely in terms of compensation, as it is more easily quantifiable. However, the other heads of reparations – restitution, rehabilitation, satisfaction and guarantees of non-repetition – may be as important if not more important for repairing the harm caused to individuals, families and communities.

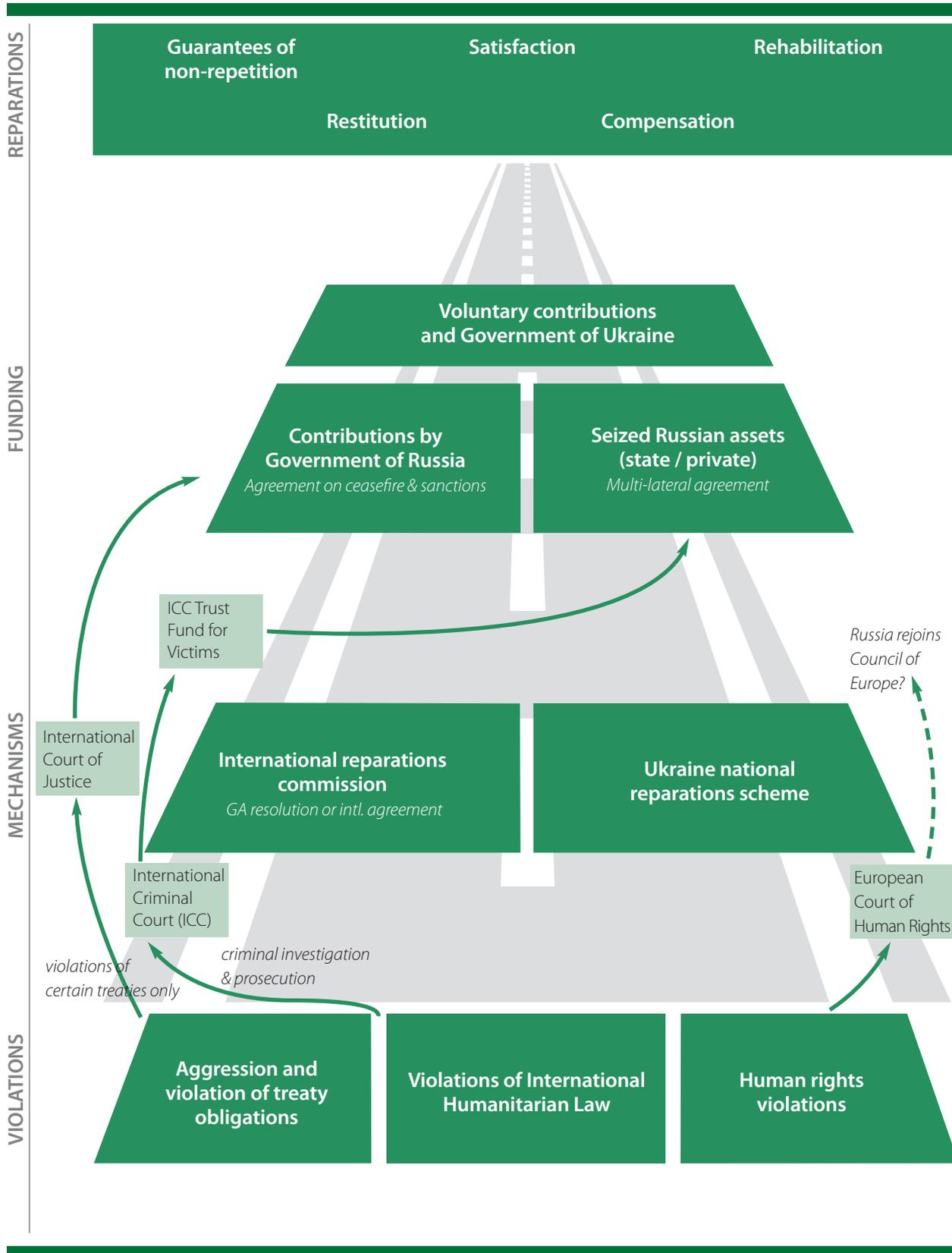
The effective implementation of such a holistic approach to reparation is not just a matter of concluding a suitable agreement but a process that will take years. Property restitution for displaced Ukrainians and those whose homes have been destroyed, long-term medical and psycho-social services for rehabilitation, appropriate acts of memorialization: all these will require the leadership of, or close cooperation with, Ukrainian authorities.

3. A victim-oriented approach

Reparations should be prompt, accessible and commensurate with the harm suffered. Information concerning reparations mechanisms should be accessible and disseminated

⁸⁰ Dybnis, Ari, ‘Was the Eritrea-Ethiopia Claims Commission merely a zero-sum game?’, 33 *Loyola of Los Angeles International and Comparative Law Review* 2, Winter 2011.

International route map to reparations for Ukraine



widely, and a low burden of proof placed on individual claimants. In line with the UN Basic Principles on reparations, proper assistance should be provided to victims and measures taken to minimise the inconvenience to them and their representatives.

Safeguarding mechanisms should be put in place to protect the safety and interests of vulnerable victims, including those who have been subjected to sexual or gender-based violence. Victims should be treated with humanity and respect for their dignity and human rights, and a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.⁸¹

4. Inclusive and non-discriminatory

The right to reparation for those who have suffered harm as a result of violations should be fulfilled without discrimination of any kind or on any ground. Measures, including those related to eligibility and assessment, should be taken to ensure an effective right to reparation for civilians who are often overlooked or under-served in compensation schemes, including survivors of sexual or gender-based violence, persons with disabilities and members of ethnic or religious minorities.

Reparations should be made available to all those who have suffered violations of IHL or human rights law in the Ukraine conflict, including Ukrainian nationals, Russian nationals and foreign nationals, dating from the start of the conflict in 2014 and including victims of violations by Ukrainian forces as well as by Russian or Russian-backed forces. Where Russian assets are seized to meet the bill for reparations, consideration should also be given to others who have suffered harm as a result of serious violations of international law by Russia, including Syrian civilians as well as Ukrainians.

5. The perpetrator should pay

Although the implementation of reparations will require the commitment of the international community and the government of Ukraine, it is the state responsible for the violations and – in the case of crimes under international law – the individuals responsible who should pay. In the circumstances of the Russian invasion of Ukraine that means that, overwhelmingly, the Russian Federation and Russian leadership should be held responsible. Arrangements to finance reparations should be in accordance with international law including, where seizures of individuals' assets are concerned, international human rights law.

81 See UN Basic Principles, nos. VI and VIII.



Reparations for Ukraine:

An international route map

In brief

While firm progress has been made on instituting war crimes investigations following the Russian invasion of Ukraine, planning for the delivery of reparations has lagged behind. But full reparation will be needed to bring justice to Ukraine's civilians and enable them to rebuild their lives.

What form should reparations take? To whom would they be made and on what authority? What sort of mechanism could be entrusted to take on the task of awarding and administering reparations on the scale required? Where will the money come from? Outlining the international legal position on the obligation to make reparations, this briefing considers these

questions in the light of international precedents and what has worked in other conflict and post-conflict situations. It constructs an international route map for delivering reparations for Ukraine and proposes a number of principles which should guide the process.

Ukrainian civil society organisations have long called for the implementation of an effective compensation mechanism for the victims of war and occupation. Given the extensive preparatory work which needs to be done, civilians who have suffered harm cannot afford to wait for a resolution to the conflict. In order to establish an effective reparations process for Ukraine, it is imperative that the international community avoids further delay.

Other Ceasefire reports on the issue of reparations include:

Reparations for civilian harm from military operations: Towards a UK policy

Mosul after the Battle: Reparations and the future of Ninewa

Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice

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