

# Reparation Options for the War in Ukraine

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## **Executive Summary**

The Russian invasion of Ukraine has caused widespread harm, massive loss of human life and extensive destruction of infrastructure. This briefing paper proposes four options to inform approaches to reparations for the war in Ukraine. The four options weight up the practical realities and challenges faced by different mechanisms arbitrating and adjudicating on such large-scale damage and loss. Any reparation programme or commission to be established for the war in Ukraine needs to be locally owned and allow victims to effectively participate in the design, process and monitoring of implementation to make it effective and sustainable. This paper does not intend to stipulate a sole solution, but options and experiences that may be of relevance for the discussion in delivering reparations for the war in Ukraine.

There is a clear basis in international law for reparations to be paid by Russia for its aggression in violating the territorial sovereignty of Ukraine under the United Nations Charter, as well as for violations under human rights and international humanitarian law. This creates a range of possibilities for reparations to remedy these breaches that give rise to a right to reparations for the Ukrainian state, individual and groups of victims as well as investors and corporations. This paper outlines possible options on reparation mechanisms/commissions, who would be eligible, evidential issues and funding.

### **1. A UN Claims Commission for Ukraine**

The first option is a United Nations established mechanism that could both receive claims and distribute funds from frozen and confiscated assets for the benefit of those affected by the war in Ukraine. This mechanism would mirror some comparable experience with the UN Claims Commission (UNCC) for Iraq's invasion of Kuwait. It would allow individuals, corporations and other legal entities to bring claims for the harm they have suffered, including violations of personal integrity, investment losses and property damage. However given the current political climate and ongoing conflict, it is unlikely to obtain sufficient backing to see it established as it would need to be established by the UN Security Council where Russia has a veto power. A claims commission unlike the UNCC would face difficulties in securing funding from frozen assets or from the proceeds of levies imposed on Russian oil and gas imports, which would again require UN Security Council authorisation or a bilateral agreement

between current countries using sanctions imposed on frozen assets to transfer the funds to such a commission.

## **2. The Ukrainian National Reparation Directorate**

A second option is a domestic reparation programme to deliver a range of reparation measures to victims. This would be made up of three parts: a founding legal basis; an administrative body with a registry; and an inter-ministry coordination body. The body would need to be established by a presidential decree or legislation to give it legal authority to draw down funds to pay for staff, services and other benefits to victims. The administrative body would likely be a directorate with organisational responsibility for the claims process (applications, verification, assessment and implementation), along with acting as a registry to catalogue victims' applications and supporting evidence against other corroborating data held in government and public records. The third part of an inter-ministry coordination body would act as a monitoring body as well as facilitate data access and coordinate the implementation of certain forms of reparations, such as medical rehabilitation and housing. The national reparations directorate would aim to award victims individual and collective reparations, that is both monetary awards along with a range of services and symbolic measures to comprehensively as far as possible remedy their harm. Such collective measures would complement any individual compensation lump sum or pension to victims, so as to maximise its benefits through the delivery of specialist services that victims need, such as housing, healthcare, and recovery of remains. The directorate would face two main challenges: funding; and occupied territories. Given the scale of violations it is likely that . In addition, a directorate would not have the capacity or funding to address investor and company losses, that would need to rely upon investor-state dispute settlement processes.

## **3. Ukraine-Russia Mixed Arbitration Commission**

A third option would be the establishment of an arbitration body with the consent of both parties to settle claims arising from the conflict. Such an adjudication body can be created through a bilateral agreement between Ukraine and Russia, with provisions on the nature, scope, procedure, adjudication and enforcement of claims. There is a range of practice of post-war adjudication of outstanding claims. The Permanent Court of Arbitration could be involved in such arbitration of claims, especially where Russia

is unwilling to appoint arbitrators or accept Ukraine's nominations. There are dangers of non-enforcement of any awards that are determined, leaving affected victims and other claimants no better off.

#### **4. Independent Investigative Mechanism, Registry and Trust Fund for Ukraine with the Ukrainian National Reparation Directorate**

A fourth option would be to establish a hybrid mechanism to coordinate international cooperation with delivery of reparations through a domestic programme. With the UN Security Council unlikely to establish a claims commission, the UN General Assembly could establish an independent mechanism to help the documentation of violations to support any domestic claims process. This hybrid approach between an international mechanism to support the collection and collation of supporting evidence of violations during the war in Ukraine would complement a national reparation programme in Ukraine. It would also assist in the funding of reparations by acting as a repository for confiscated assets with agreements with relevant countries. This would likely require a bilateral agreement between such countries and the mechanism, as well as with Ukraine.

Other forums, such as the International Court of Justice, the International Criminal Court and the European Court of Human Rights are not considered as viable and timely options, nor are they able to deal with mass claims. In all, a domestic reparation programme with some international cooperation to help evidence collection and collation along with liquidation of assets to fund such a programme at the moment remains the most viable option given the ongoing hostilities. The final parts of this report outline further issues of eligibility, evidence, and funding.

## Legal Basis for Reparations

1. The legal authority for reparations is significant in determining who is obliged to make such measures, for what violations, and the entitlements for those injured. The traditional basis for reparations after international armed conflict has been at the discretion of the parties, when bilateral peace agreements often waive reparations claims and seek a new peaceful arrangement, than try to exact the 'full' cost of the war.<sup>1</sup> In international law, waging an aggressive war breaches the UN Charter around the use of force, or *jus ad bellum*, and gives rise to a basis for reparations as an internationally wrongful act.<sup>2</sup> The UN Security Council has also on a number of occasions recognised for invasions and occupations that those States responsible for such aggression have an obligation to make full reparations.<sup>3</sup> Other violations of a State's territory have not given rise to reparations beyond the recognition that such an incurred violation breached international law,<sup>4</sup> or waging war and the general economic impact was a sufficient basis for reparations.<sup>5</sup> An internationally wrongful act such as waging an aggressive war does not give rise to reparations claims for all losses, there has to be a sufficient causal connection to the wrongdoing and the harm.<sup>6</sup>
2. Basing reparations on aggression and violation of the UN Charter raises issues of who is a victim of such a breach, whether the injured State alone or those

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<sup>1</sup> See Luke Moffett, *Reparations and War: Finding Balance in Repairing the Past*, OUP (2022), p122.

<sup>2</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) Judgment, ICJ Reports 1986, p.139; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, paras.151-153; and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement, para.165.

<sup>3</sup> Such as South Vietnamese soldiers trespassing into Cambodian territory and killing a number of civilians (S/ RES/ 5741 1964); Portugal's invasion of Guinea (S/ RES/ 290 1970); Israeli airstrike against a PLO base in the suburbs of Tunis ((S/ 17509 1 October 1985; Resolution 573 (1985) 4 October 1985, para.4); South Africa's invasion of Lesotho, Angola and Botswana (S/ RES/ 580 1985; Angola S/ RES/ 577 1985; and S/ RES/ 568 1985); and Uganda and Rwanda's invasion of eastern Congo (S/ RES/ 1304 2000, 16 June 2000, para.14).

<sup>4</sup> *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)*, Judgment, ICJ Report 2002, p.153.

<sup>5</sup> *The Alabama Arbitration*, Record of the Proceedings of the Tribunal of Arbitration, June 19, 1872, reprinted in Marjorie M. Whiteman, *Damages in International Law*, US Government Printing Office (1943) p.1773.

<sup>6</sup> *The Alabama Arbitration*, Record of the Proceedings of the Tribunal of Arbitration, June 19, 1872, reprinted in III Marjorie M. Whiteman, *Damages in International Law* p. 1773 (1943); Reports of International Arbitral Awards, Mixed Claims Commission (US and Germany) (1923–1939), p.23; and Eritrea-Ethiopia Claims Commission, Final Award Ethiopia's Damages Claims, Reports of International Arbitral Awards, Volume XXVI, 17 August 2009, p.631-770, herein known as 'EECC Final Award Ethiopia', para.289.

affected by such violence. Strictly speaking under international law there is no individual right to reparations for violations of *jus ad bellum*, due to the State being the primary victim for violation of its sovereignty and territorial integrity.<sup>7</sup> There is not yet a judicial precedent that recognizes individuals as victims eligible to claim reparations for the crime of aggression.<sup>8</sup> That said, this position is increasingly coming under tension with the inclusion of the crime of aggression at the International Criminal Court (ICC), which individualises criminal responsibility for violating the territory of another State, and, where there is a conviction, affords the possibility for victims to be eligible for reparations.<sup>9</sup> Given that the ICC has not at the time of writing charged anyone with the crime of aggression, it remains to be seen if an individual right to reparations for aggression will emerge beyond the court's jurisdiction.<sup>10</sup> The UN Human Rights Committee in its General Comment No. 36 on the right to life has recognized that aggression can result in widespread deprivation of life,<sup>11</sup> which may give rise to a right to a remedy beyond aggression and where international humanitarian law (IHL) is respected.<sup>12</sup>

3. Other practice from international arbitration under the UN Claims Commission for Iraq's invasion of Kuwait and the Eritrean-Ethiopian Claims Commission to resolve claims for violations during their inter-State conflict recognized that individuals could benefit from compensation. Yet with the UNCC only States and limited organizations had standing to bring claims and with the EECC the two States were the main parties and no reparations were ultimately paid out.<sup>13</sup> The UNCC departed from the traditional State-centric approach, by allowing international organizations, non-governmental organizations (NGOs), and corporations to be beneficiaries.
4. With the EECC, claims for Eritrea's violation of *jus ad bellum* were limited to those situations where a proximate cause could be shown for harm caused that

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<sup>7</sup> Friedrich Rosenfeld, Individual Civil Responsibility for the Crime of Aggression, *Journal of International Criminal Justice* 10 (2012), 249–265, p262.

<sup>8</sup> Shane Darcy, Accident and Design: Recognising Victims of Aggression in International Law, *International and Comparative Law Quarterly* 70(1) (2021), 103–132, p113.

<sup>9</sup> Articles 8*bis* and 75.

<sup>10</sup> Rosenfeld, p263–264.

<sup>11</sup> CCPR/C/GC/36, para.70.

<sup>12</sup> Darcy (2021) p120.

<sup>13</sup> Article 5(1), UNCC Governing Council, Decision 26 June 1992, S/AC.26/1992/10.

overlapped with breaches of *jus in bello*.<sup>14</sup> The decision to adjudicate on *jus ad bellum* was controversial at the EECC, as under the Algiers Agreement it did not have the jurisdiction to do so.<sup>15</sup> The EECC distinguished its own work from the traditional practice of reparations for *jus ad bellum* by finding that it was ‘heavily shaped by motives of policy and revenge unrelated to the principles of law’ with reparations under the Treaty of Versailles having a ‘brief and unsatisfactory history’.<sup>16</sup> In comparison with the UNCC, the EECC differentiated its mandate on the basis that Iraq’s invasion was an ongoing illegal act of occupation and humanitarian law violations, compared to the conflict between Eritrea and Ethiopia as equally matched belligerents.<sup>17</sup> For the war in Ukraine on this basis, the circumstances match more the UNCC experience, rather than the EECC. That said, liability was split between Eritrea and Ethiopia based on the violations in which they were found responsible for, when it comes to Ukraine, Russia is going to be responsible for the bulk of claims that make it closer to the UNCC experience.

5. The International Court of Justice has not explicitly recognized a right to reparations for each breach of *jus ad bellum* instead leaving it up to the States to negotiate amongst themselves<sup>18</sup> or the finding of a breach as sufficient to acknowledge the injury caused where occupying troops soon retreated back to their own country.<sup>19</sup> In the case of Uganda’s efforts to annex the eastern Congolese province of Ituri in the early 2000s, the Court did recognize that Uganda had an obligation to make reparations for ‘illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC’s natural resources’.<sup>20</sup> While there

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<sup>14</sup> Final Award: Ethiopia’s Damages Claims, 17 August 2009, paras.333-349. See Erik V. Koppe, Compensation for War Damage Resulting from Breaches of Jus ad Bellum in A. de Guttry et al. (eds.), *The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective*, Asser (2021), 510-531.

<sup>15</sup> Article 3. See Christine Gray, The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award? *European Journal of International Law* 17(4) (2006) 699-721.

<sup>16</sup> EECC, Decision 7, Guidance Regarding Jus ad Bellum Liability, 27 July 2007, para.22.

<sup>17</sup> *Ibid.*, para.32.

<sup>18</sup> *DRC v Uganda*, Judgment, 2005 I.C.J. Reports p82, paras.259– 260.

<sup>19</sup> *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equitorial Guinea Intervening)*, Judgment, 2002 I.C.J. Reports, p153, para.319.

<sup>20</sup> *DRC v Uganda*, para.259.



are already proceedings between Ukraine and Russia before the Court, the ICJ has already indicated that as part of provisional measures Russia should make reparations. Any substantial reparations claim process before the ICJ will like take years, and the experience from the *DRC v Uganda* case is that evidence should be collected as soon as possible to accurately support such claims.

6. In terms of the types of violations which can be covered beyond violations of the UN Charter, international humanitarian law, human rights law and even international criminal law in some respects recognise the obligation on those responsible to make reparations. Under international humanitarian law (IHL) a party to a conflict or a member of its armed forces that violates the provisions of the Conventions or Additional Protocol I gives rise to that State having an obligation to pay compensation.<sup>21</sup> States are liable for unlawful breaches under the Geneva Conventions and Additional Protocol I, rather than for individual soldiers to be identified.<sup>22</sup> However it is unclear to whom the obligation to reparations is owed, individuals are not mentioned so it is difficult to argue that an individual right exists for IHL violations.<sup>23</sup> Instead the basis of compensation being paid arises from post-war settlements or domestic reparation programmes that aim to address those affected by war 'regardless of whether the injuries resulted from the infringement of a rule of IHL.'<sup>24</sup> As such compensation programmes for war often focus on victims' harm as a consequence of a conflict-related incident, rather than establishing whether or not it was a violation, reflecting a 'disconnect' between international law and domestic State practice,<sup>25</sup> thus ensuring victims of collateral damage can benefit from a remedy despite the legality of such harm under IHL.<sup>26</sup> The ICJ has recognised where restitution is impossible, States still have 'an obligation to compensate the persons in question

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<sup>21</sup> Article 91, Additional Protocol I, reiterating Article 3 of the 1907 Hague Regulations.

<sup>22</sup> Frits Kalshoven, State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond, *The International and Comparative Law Quarterly* 40(4) (1991), 827-858, p832.

<sup>23</sup> Paola Gaeta, Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation? In O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, OUP (2011), 305-327, p308.

<sup>24</sup> Gaeta *ibid.* p310-311.

<sup>25</sup> Carla Ferstman, The Right to Reparation for Victims of Armed Conflict, in M. Lattimer and P. Sands (eds.), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War*, Hart Publishing, (2018), 207-230, p229.

<sup>26</sup> Alphonse Muleefu, *Reparation for Victims of Collateral Damage*, Wolf Legal Publishers (2014).

for the damage suffered', which 'reflects the harm suffered by individuals and communities'.<sup>27</sup> The lack of a stipulated right to compensation and an adjudication forum for victims who suffer violations under international humanitarian law has meant that victims have often turned to domestic reparation programmes or human rights bodies to seek redress.

7. For international human rights law, individual and groups of victims have a right to a remedy in times of war where a State was occupying the territory or had effective control over territory it was fighting. Reparations programmes can be more generous than claims commissions, as their focus is ensuring victims have adequate measures to repair their harm, rather than a strict application of international law. This is particularly the case with collateral damage which may not amount to a violation of human rights law or international humanitarian law. Under international criminal law, while victims can claim reparations before the International Criminal Court,<sup>28</sup> it is very much dependent on the crimes and persons convicted that will dictate the narrow scope of eligible victims. Any such reparations award is often hampered by indigent convicted persons and lack of funds and capacity of the trust fund.<sup>29</sup>
8. In terms of responsible actors, Russia in invading Ukraine in 2014 and again in 2022 has committed a series of internationally wrongful acts that gives rise to its international responsibility. Russia may also be responsible for the actions of separatist forces where they were under its effective control, in that wrongful conduct arose because of Russia's instruction, direction or control, and not simply their dependence on or support from Russia.<sup>30</sup> This issue is already raised in the shooting down of Malaysian Airlines passenger jet MH-17 over Ukrainian territory in 2014, where it remains to be established the involvement of Russian forces in the attack. Belarus and Iran's role in supplying weapons and other

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<sup>27</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, para.153; and *DRC v Uganda, Armed Activities on the Territory of the Congo*, 9 February 2022, para.408.

<sup>28</sup> Article 75, Rome Statute.

<sup>29</sup> See Luke Moffett and Clara Sandoval, *Tilting at windmills: Reparations and the International Criminal Court*, *Leiden Journal of International Law* 34 (2021), 749–769

<sup>30</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, 26 November 1984; and Article 8, Articles of State Responsibility for Internationally Wrongful Acts.

military aid in Russia's war of aggression can give rise to them also being responsible. Their State responsibility can result from their 'aid or assistance in the commission of an internationally wrongful act' on the basis that they do so with knowledge of the circumstances of the internationally wrongful act and that 'act would be internationally wrongful if committed by that State.'<sup>31</sup> Individual soldiers brought before domestic and international criminal courts, such as the ICC, could be ordered to make reparations, but given the scale of such violations any such awards would be symbolic. Corporate entities directly participating in hostilities on behalf of Russia, such as the Wagner group,<sup>32</sup> or businesses supplying key materials to the Russian military, could also be held responsible and made to contribute to reparations.<sup>33</sup>

9. Victims have a right to reparations whether or not the perpetrator or responsible actor is identified. In instances of intense artillery barrage and urban warfare it can be difficult to ascertain which side fire the shot that killed or injured a civilian. Rather than having to investigate the responsibility of each incident which would complicate and delay any claims process, the liability for reparations should be clearly placed on Russia as consequences of the war of aggression which it started. So for civilians caught up in artillery shelling of Ukrainian and Russian forces, any civilians killed, injured or displaced, would not have suffered such a fate, but for the invasion of Russia. It is acceptable to place responsibility for the consequences of the wrongful party at the foot of the aggressive state.<sup>34</sup> Ukraine may consent to less strict liability terms as a matter of good faith to achieve other concessions from Russia, such as agreeing to make reparations to losses suffered by Russian civilians or mistreatment against Russian prisoners of war. Liability and other factors that shape a claims/reparation process are up to what the parties consent to or is imposed under international law where agreement is

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<sup>31</sup> Article 16, Articles on Responsibility of States for Internationally Wrongful Acts 2001. Though the invocation of this rule against the UK for facilitating US aircraft strikes in Libya and alleged supplying chemical weapons to Iraq in the 1980s did not result in reparations being made. See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, (2008), p66-67

<sup>32</sup> The Blackwater mercenary group was sued and settled with a number of civilian claimants in 2010.

<sup>33</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/50/40/Add.4, 8 June 2022

<sup>34</sup> Such as with the UN Claims Commission on Iraq and the Treaty of Versailles on Germany.

not reached. Institutional frameworks give different avenues with their own strengths and weaknesses in dealing with these issues.

## **Institutional Frameworks**

10. There are three challenges that cut across any option for a reparation commission for Ukraine and these are common to many redress programmes: institutional capacity; funding; and timeliness. In relation to institutional capacity, armed conflicts cause mass victimisation meaning that specialised bodies have to be established so that victims can access redress without having the complete documentary evidence that would be expected through a civil court claim. Such reparation programmes have to manage both allowing an accessible, non-adversarial and relatively low evidential threshold to allow victims to bring their claims, while at the same time maximising resources for those most affected, preventing fraudulent claims and ensuring efficiency of delivery of such measures. Such capacity requires a range of reparations beyond just compensation to be delivered by a range of institutions across a country. This is difficult when violence is ongoing or there is insecurity and organised crime that continues to violate people's rights. As one Colombian civil society actor commented, 'It is very difficult to repair a victim when you have another victimisation next month. How do you close the tap of the reparations then?'<sup>35</sup> This also reflects the challenge of making reparations in protracted conflicts, where victims can receive reparations, but also face further violations, making the redress process like a revolving door without mitigating the source of violence.

### **11. With regards to funding**

12. In relation to timeliness mass claim process aim to adjudicate on victims' claims promptly due to the serious and scale of their harm, so as mitigate worsening their circumstances. There is a need to ensure due process, some evidential basis to the claim and accessible claims procedure, a programme 'must minimize transaction costs...while maximising protection of those said to have suffered.'<sup>36</sup>

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<sup>35</sup> Luke Moffett, *Reparations and War: Finding Balancing in Repairing the Past*, OUP (2022), p127.

<sup>36</sup> *In re Agent Orange*, 611 F Supp 1396, p1410 (EDNY 1985).

This is not to say that reparations do not need to be long term or revisited in time as need harms or victims are identified, but that reparations should be promptly made.<sup>37</sup> A mass claims process has 'to devise an approach that is flexible enough to allow meaningful comparison, on the one hand, and strong and principled enough to avoid vagueness and generality, on the other.'<sup>38</sup> Armed conflict can leave victims, whether civilian or combatant, vulnerable due to the harm and consequences they have suffered, in particular around the denial of recognition of their experience and rights to redress.<sup>39</sup> Reparations should also be adequate and effective in remedying the harm caused, which requires consideration of gender and intersection of other identities that can aggravate victims' suffering.<sup>40</sup>

13. It is important to be attuned that any reparation programme or commission for the war in Ukraine will be unique to reflect the circumstances of the conflict and victim population. Previous practices of claims commissions and adjudication on war reparations provide some insight, but each reparation programme arises out of its own circumstances and negotiation between the relevant parties. For the war in Ukraine it may mean that a reparation programme cannot await until the end of hostilities or a peace agreement, which may take years, if ever to be resolved. Victims do not have the luxury of time and ongoing violations needed to be factored into the design of a reparation programme and long-term financial and institutional planning. Ultimately reparations to be effective need to have the real participation of victims so as to shape the design of such measures.

14. Before discussing in more depth the four options, it is worth briefly discussing other forums that reparations can be sought and have been raised in relations to

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<sup>37</sup> Principles 2(c), 11(b) and 15, UN Basic Principles on the Right to Remedy and Reparations for Gross Violations of Human Rights and Serious Breaches of International Humanitarian Law 2005; and Principles 8(a), 11(h) and 12(e), The Belfast Guidelines on Reparations in Post-Conflict Societies (2022).

<sup>38</sup> Hans Das, The Concept of Mass Claims and the Specificity of Mass Claims Resolution, in *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, Permanent Court of Arbitration, OUP (2006), 3-11, p11.

<sup>39</sup> See Margaret Urban Walker, Moral Vulnerability and the Task of Reparations, in C. Mackenzie, W. Rogers, and S. Dodds (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, Oxford University Press (2014), 110– 133.

<sup>40</sup> See Sunneva Gilmore, Julie Guillerot, and Clara Sandoval, *Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programmes*, RRV (2020).

the war in Ukraine: the European Court of Human Rights; the International Court of Justice; and the International Criminal Court.

15. The European Court of Human Rights (ECtHR) allows victims to bring claims where they have exhausted domestic remedies, but it is likely to be a limited forum for redress, due to the scale of violations and thousands of applications already submitted to the Court on the war in Ukraine. The Court itself has struggled to adjudicate on mass claims that arise from protracted conflict, without investigators or powers to collect evidence, it faces the challenge of a 'large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention [i.e. IHL]'.<sup>41</sup> Other human rights bodies have declined to award individual compensation on the ground that it would be impossible to fairly compensate such a large victim population.<sup>42</sup> The difficulty of assessing the claims of a large victim population has not prevented the European Court from awarding reparations before to individual claimants. In the *Chiragov* and *Sargsyan* cases involving claims against Armenia and Azerbaijan respectively for the conflict in and around Nagorno-Karabakh, the Court only awarded an aggregated amount of €5,000 for each victim on the grounds that 'some situations— especially those involving long- standing conflicts— are not, in reality, amenable to full reparation' and was '[p] ending a solution on the political level'.<sup>43</sup> Again this suggests that a negotiated total claim and administrative body as a reparation process would be better situated to deliver redress to victims that more aligned to the harm suffered and their need for a broader range of reparation measures. The Court has held that even if it is difficult after conflict to discern and evidence each harm for large numbers of victims, given the 'large number of imponderables', an award of compensation is still appropriate for violations involving the destruction of homes, ill-treatment, and extra-judicial executions.<sup>44</sup> This is discussed in more depth below with regards to the second option.

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<sup>41</sup> Application no. 38263/ 08, Judgment, 21 January 2021 para.141

<sup>42</sup> *SERAP v Nigeria*, ECW/ CCJ/ JUD/ 18/ 12, 14 December 2012, paras.114– 115.

<sup>43</sup> *Chiragov and Others v Armenia*, Application no.13216/ 05, Judgment, 12 December 2017, paras.53 and 80; and *Sargsyan v Azerbaijan* 40167/ 06, Judgment, 12 December 2017, paras.35 and 57.

<sup>44</sup> *Ahmet Özkan and Others v Turkey*, Application no.21689/ 93, 6 April 2004, para.489.

16. The International Court of Justice (ICJ) could be another avenue for victims to seek redress. The Court has recently addressed the issue of reparations for illegal occupation and annexure of Ituri province in eastern DRC by Uganda, awarding \$325 million in compensation. However, this case addresses violations nearly two decades old, and is somewhat less than the \$11 billion demanded by the Congolese government. While there are ongoing proceedings between Russia and Ukraine, any reparations award is likely to be dependent on the decision of the Court and years away, if ever. Such claims will need to be brought by a victim's respective State and will be limited to finding of violations found against the responsible State.
17. The International Criminal Court (ICC) has also been mooted as an option for reparations. While the ICC does enable victims to benefit from reparations, it is dependent on the charges and persons convicted. This narrows the field considerably on who would benefit given the limited capacity of the Court to prosecute only a handful of cases at one time and takes years for any measures to be delivered at the end of the trial. In both courts sufficient evidence has to be shown for wrongdoing, whether in terms of State responsibility for an internationally wrongful act with the ICJ (which should not be difficult), or prove beyond reasonable doubt individual criminal responsibility for international crimes with the jurisdiction of the ICC. With all courts, they are not designed to deal with complex mass claims processes that large scale international armed conflicts entail, with the legal basis and evidential requirements likely to be ill-suited to facilitate victims' claims.
18. With these issues in mind, four options present themselves, which have their own strengths and weaknesses:
1. A United Nations Claims Commission for Ukraine
  2. A domestic reparation programme – the Ukrainian National Reparation Directorate
  3. An Ukraine-Russia Mixed Arbitration Commission
  4. An Independent Investigative Mechanism, Registry and Trust Fund for Ukraine with the Ukrainian National Reparation Directorate

## 1. A United Nations Claims Commission for Ukraine

19. The closest claims commission comparator to the international armed conflict and occupation of Ukraine is Iraq's invasion of Kuwait in 1990, where reparations were paid out on the basis of aggression.<sup>45</sup> This was subject to a number of UN Security Council Resolutions that ultimately authorised the creation of the UN Claims Commission (UNCC) and with guidance from the UN Secretary General on how it would operate.<sup>46</sup> The UN Security Council established Iraq's liability for any direct losses.<sup>47</sup> The UNCC was not established as an arbitral tribunal, but as a 'political organ' carrying out a fact-finding role to assess and verify whether or not each claim evidenced damage directly linked to Iraq's unlawful invasion and occupation of Kuwait and to grant monetary awards if this was the case.<sup>48</sup> Where claims were disputed, the commission also acted in a 'quasi-judicial function' to resolve them.<sup>49</sup>
20. Funding for the UNCC was initially derived from frozen assets to cover set up costs, before operating off resources from Iraqi oil exports.<sup>50</sup> Despite finding Iraq fully liable for the consequences of the invasion and occupation of Kuwait the cost to remedy such harm was considered in light of 'the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy'.<sup>51</sup> The amount of up to 30% was set by the Security Council,<sup>52</sup> but the Governing Council had authority to modify this if needed.<sup>53</sup> With regards to the situation of Ukraine a similar or larger amount could be levied against Russia oil and gas exports given the vaster scale of violations and Russia's greater capacity to pay such amounts.

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<sup>45</sup> See S/RES/687, 8 April 1991.

<sup>46</sup> S/RES/687; S/RES/706; and S/22661.

<sup>47</sup> See S/RES/687, 3 April 1991, para.16. N Wühler, 'The United Nations Compensation Commission' in Permanent Court of Arbitration (ed), *Institutional and Procedural Aspects of Mass Claims Settlement Systems* (Kluwer Law International 2000) 17.

<sup>48</sup> Report of the Secretary-General pursuant to paragraph 19 of the Security Council Resolution 687 (1991), para.20.

<sup>49</sup> Ibid.

<sup>50</sup> S/RES/687, para.19.

<sup>51</sup> S/RES/687, para.19.

<sup>52</sup> S/RES/705, 15 August 1991.

<sup>53</sup> S/RES/778, 2 October 1992, para.10. It reduced to 25% in 2000 due to the humanitarian needs of the Iraqi people - S/RES/1330, 5 December 2000, para.12; and after the invasion of Iraq to 5% in 2003 - S/RES/1483, 22 May 2003, para.21.



21. In terms of organisation, the UNCC was made up of a governing council, as a subsidiary organ of the UN Security Council enabling it the benefit of immunities,<sup>54</sup> made up of 15 representatives of the Security Council for a two year period.<sup>55</sup> The governing council was responsible for issuing decisions to guide the work of the Commission. Decision making was delegated to commissioners to carry out fact-finding and legal reasoning on claims. Commissioners were nominated by the Secretary General and appointed by the governing council, making up 19 panels. The panels of commissioners were responsible for three tasks - determine whether claims were within the jurisdiction of the Commission (losses a direct result of the invasion and occupation of Kuwait by Iraq), verify the alleged losses, and determine the appropriate amount of compensation based on the category and evidence provided.<sup>56</sup> The council and commissioners were supported by an executive secretary and secretariat, to technically administer the scheme and service the commission.<sup>57</sup>

22. Claims before the UNCC were mainly brought by States on behalf of individuals and corporations affected by the invasion, with international organisations and some corporations allowed to bring separate claims, such as for damage caused to oil wells. With regard to refugees and potential stateless claimants – in particular Palestinians – who were not able to have claims submitted through their governments, various international organisations engaged in outreach programmes, and numerous UN offices submitted claims for claimants where no government was able to do so.<sup>58</sup>

23. The Commission categorised claims into six categories (A-F). Category A dealt with claims for those who had to leave Kuwait or Iraq during the invasion; category B for serious personal injury or death of family member; category C had 21

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<sup>54</sup> Article 105, Charter and the Convention on the Privileges and Immunities of the United Nations 1946.

<sup>55</sup> S/22559, para.5.

<sup>56</sup> Letter dated 10 February 2022 from the President of the Governing Council of the United Nations Compensation Commission addressed to the President of the Security Council, S/2022/104, 14 February 2022, para.13.

<sup>57</sup> S/22559, para.6.

<sup>58</sup> UNCC Governing Council Decision 5 of 18 October 1991, *Guidelines relating to paragraph 19 of the Criteria for Expedited Processing of Urgent Claims* UN Doc S/AC.26/1991/5 (23 October 1991).

headings for loss including personal injury, property damage and loss of income that were less than \$100,000; category D were for nine loss types that amounted to over \$100,000; category E for business losses, such as for earnings, whether privately or publicly owned corporations; category F losses, damage or injury to government and international organisations, including environmental damage and damage to consular and embassy property. The UNCC awarded compensation to claimants from 97 countries and those represented by 14 international organisations.

24. The claims for individuals in Categories A-D set out different evidential requirements based on the size and violation being claimed. For instance Category A required only simple documentation to allow for expedited claims from victims, the ceilings for compensation awards were set at \$15,000 per claimant for spouse, child or parent for those killed with \$30,000 per family unit, \$15,000 for those who suffered permanent serious personal injury or \$5,000 for temporary injury, \$5,000 per incident of sexual assault or torture, \$2,500 per claimant for those who witnessed death, serious injury or aggravated assaults with \$5,000 per family unit, \$1,500 per hostage over three days with \$100 per day after with a ceiling of \$10,000, \$1,500 for those forced to hide for well-founded fear for their life with \$50 per day beyond three days and a ceiling of \$5,000 per claimant, and \$2,500 for those individual deprived of all their economic resources that threatened their or their close family's survival with \$5,000 ceiling per family unit.<sup>59</sup> The lower amounts claimed in Categories A-C (less than \$100,000) meant they were easier to determine, whereas D-F claims were more complex, requiring them and their supporting evidence to be individually reviewed.<sup>60</sup>

25. It is important to note that despite the large amount claimed and paid out by the UNCC (\$52.4 billion to 1.5 million claimants), it is likely that a similar commission for Ukraine would be somewhat more substantial. For instance the UNCC paid out \$3.1 billion for Category A 850,000 claimants that had to flee and \$13.5 million

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<sup>59</sup> Decision taken by the Governing Council of the United Nations Compensation Commission during its Fourth Session, at the 22nd meeting, held on 24 January 1992, S/AC.26/1992/8, 27 January 1992; Category C claims required further evidence, but could allow personal claims up to \$100,000. S/AC.26/1991/1, 2 August 1991; and

<sup>60</sup> See S/AC.26/1998/2, 3 February 1998; and S/2022/104, 14 February 2022, para.37.

for deaths and serious injury under Category B 3,900 claimants. Yet already there have been over 6,100 reported deaths of civilians, over 9,000 injured between 24 February - 2 October 2022 in Ukraine,<sup>61</sup> with a further 3,400 civilians killed between 2014-2022,<sup>62</sup> as well as 7.78 million Ukrainian refugees in Europe<sup>63</sup> and a further 6.5 million internally displaced in Ukraine who have had to flee their homes.<sup>64</sup>

26. The claim categories of the UNCC are imperfect for Ukraine, but do point to a number of useful lessons, such as the need to allow victims to make simplified and prompt claims, to cover those forced to flee (which may need to include Ukrainians who fled Russia and Belarus), inclusion of environmental damage and claims by corporations, as well as claims from other governments, such as the missile strike against Germany's consulate in Kyiv in October 2022. The UNCC also provides some insights into how to organise such a body for Ukraine and how to expedite claims.

27. In order to expedite the assessment of a large number of claims the UNCC did not do an individual claim assessment for all categories, but for Categories A and C it instead used sampling of randomly selected claims on the basis that they raised 'common factual and legal issues' and would assist in 'effective justice'.<sup>65</sup> The ICC in the recent *Ntaganda* case has also directed to use just sampling of claims, some 5% to avoid time consuming individual assessment of applications.<sup>66</sup> However with the UNCC it was dealing with over 850,000 Category A claims and 1.7 million Category C claims, whereas there were only 6,500 Category B claims that were individually assessed.

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<sup>61</sup> Conflict-related civilian casualties in Ukraine, OHCHR, 27 January 2022.

<sup>62</sup> Ukraine: Civilian casualties update, OHCHR October 2022. This does not include statistics on violations against prisoners of war and hors de combat.

<sup>63</sup> The UNHCR reports over 14.85 million left Ukraine from February 2022, with 7.3 million returning in recent months. See <https://data.unhcr.org/en/situations/ukraine>

<sup>64</sup> IOM, Ukraine Internal Displacement Report General Population: Survey Round 10, 27 October 2022.

<sup>65</sup> S/AC.26/1995/4, para.9.

<sup>66</sup> Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", ICC-01/04-02/06-2786, 25 October 2022.

28. While the UNCC model and experience is a useful one, the circumstances for Ukraine, in particular consensus in the UN Security Council (UNSC), are in stark contrast and means that it will be unlikely for a similar claims commission to be created without the consent of Russia. Perhaps at the end of hostilities, a claims commission may be established with the consent of Ukraine and Russia, but it would need to have an established legal basis to operate under and demarcation of where the responsibilities lies for paying out such mass claims, otherwise arbitration between the parties may be more attractive. With the impasse at the UNSC with Russia's veto power, the UN General Assembly could establish a subsidiary body,<sup>67</sup> which could document violations and facilitate evidence collection to support subsequent reparation claims. Such subsidiary bodies established by the General Assembly have been mandated with reparation functions, such as Conciliation Commission for Palestine.<sup>68</sup> Any subsidiary body of the UNGA is inherently limited to the powers of its creating body, meaning that it can only make recommendations and initiate studies, so it is not a viable avenue for the implementation of war reparations. However the work of the IIM for Syria<sup>69</sup> and the IIMM for Myanmar suggest a potential avenue that could be useful for a more hybrid body discussed under option 4. While there have been some suggestions that the UN General Assembly could under the 'Uniting for Peace' resolution, provide an avenue to address issues that the UN Security Council cannot resolve, it does not provide any powers to the Assembly beyond its mandate of making recommendations to members for collective measures.<sup>70</sup>

29. Despite the UNCC model providing an independent way to assess mass claims from a range of claimants, the political impasse at the UN Security Council means

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<sup>67</sup> Article 22, UN Charter.

<sup>68</sup> The UN General Assembly did establish a subsidiary body in 1948 for resolving the conflict around Palestine (the Conciliation Commission), which was empowered to facilitate mediation and negotiation between the relevant parties to reach a final settlement on outstanding issues. It also recognised that refugees should be allowed to return home, and compensation for those unwilling to return for the loss or damage to their homes. Although it failed to secure the repatriation and resettlement of Palestinian refugees, it did extensively document refugees' property claims. 11 December 1948 A/RES/194, para.11. See Terry M. Rempel, *The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees*, BADIL - Information & Discussion Brief 5 (2000).

<sup>69</sup> Established in 2016 by the UN General Assembly - A/RES/71/248, 21 December 2016.

<sup>70</sup> A/RES/377(v), 3 November 1950.

that at the moment it is not feasible. In the past thirty years there has been an increasing trend for reparations programmes to be domestically established.

## **2. A Domestic Reparation Programme - The Ukrainian National Reparation**

### **Directorate**

30. A domestic reparation programme through a mass claims process or administrative regime can better cater to delivering reparations to a large universe of victims, with the State taking the responsibility to remedy the harm of all victims of armed conflict, whether by State, non-State, or unknown actors.<sup>71</sup> This lightens the burden of claiming for victims, in comparison to claiming before courts, by offering victims 'faster results, lower costs, relaxed standards of evidence, non-adversarial procedures, and the higher likelihood of receiving benefits.'<sup>72</sup> The UN Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-Recurrence defines such programmes as,

'administrative processes set up by States aiming to deal with a large universe of victims, and they identify who can claim to be a victim and what violations are to be redressed, and establish reparation measures (benefits) for the harm suffered. They are aimed at ensuring that victims are treated equally and in a consistent manner, as victims who have suffered the same type of violation would benefit from the same forms of reparation.'<sup>73</sup>

31. Much of the proposed suggestions around reparations for Ukraine for Russia's aggression has centred around compensation. While this draws from the experience of previous mass claims commissions and makes appropriate remedy quantifiable and more manageable for a responsible State to deliver on, it also overlooks the important practice of reparations in transitional societies. In particular the widespread and devastating impact war has on individuals, families, communities and societies that compensation alone cannot address. Indeed compensation has often been associated with 'buy off' or silencing victims, as blood money from those responsible to pay off their debts, rather than guaranteeing non-repetition of such violations.<sup>74</sup> It is important to frame a solution

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<sup>71</sup> Peter Van der Auweraert, The Potential for Redress: Reparations and Large- Scale Displacement, in R. Duthie (ed.), *Transitional Justice and Displacement*, ICTJ (2012), 139– 186, p142.

<sup>72</sup> A/69/518, para.4.

<sup>73</sup> A/HRC/42/45, 11 July 2019, para.31.

<sup>74</sup> Brice Dickson, Counterinsurgency and Human Rights in Northern Ireland, in P. Dixon (ed.), *The British Approach to Counterinsurgency: From Malaya and Northern Ireland to Iraq and Afghanistan*, Springer (2012), 291– 313, p300.

as a reparation programme, rather than simply a compensation commission. This is particularly significant for the range of violations that have occurred as seeking to return a victim to the situation they were in before the violation is 'impossible, insufficient, and inadequate'.<sup>75</sup> Reparations need to be made beyond compensation to reflect the serious and long-term harm victims of gross violations of human rights and serious breaches of international humanitarian law experience.<sup>76</sup> Such a comprehensive approach to alleviate victims' suffering, affirm their dignity, awaken public consciousness around such crimes and commit to non-repetition of violations.<sup>77</sup> This is often reflected in reparation programmes, such as the Peruvian integral reparation plan (PIR) sets out six reparation programmes that include 'citizens' rights restitution, education, healthcare, collective measures, symbolic reparations, and a program to promote and facilitate access to a solution of housing.<sup>78</sup>

32. There may need to be an inter-state commission to facilitate certain reparations around forcibly removed children and disappearances. For instance in cases of Ukrainian children being removed from Ukraine to Russia, it has been recognised that to remedy adequately such harm compensation is not enough, but requires the responsible State to effectively investigate, trace and identify those children forcibly removed and identify, prosecute and punish those responsible,<sup>79</sup> as well as establishing a national commission to trace young people forcibly disappeared or removed from their families, a web search page, and a genetic DNA identification system to assist in tracing.<sup>80</sup> With regards to those disappeared or the location of remains of those extra-judicially killed an inter-state commission, such as the Independent Commission for the Location of Victims Remains

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<sup>75</sup> *Blake v Guatemala*, Judgment 22 January 1999 (Reparations and Costs), para.42.

<sup>76</sup> Clara Sandoval, Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes, *The International Journal of Human Rights* 22(9) (2018), 1192– 1208, p1193.

<sup>77</sup> *Mapiripán Massacre v Colombia* Judgment, 15 September 2005, para.282

<sup>78</sup> See Julie Guillerot, *Reparations in Peru: 15 Years of Delivering Redress*, RRV (2019), p16.

<sup>79</sup> *Serrano Cruz* para.175.

<sup>80</sup> *Serrano Cruz*, paras.183-193. Judge Ventura Robles in his dissenting opinion also underscored the reasoning in this case that a State needs to 'use all possible investigative techniques' to identify such children, who have a 'right to a name' which include knowing their birth names and have recognised their relationship to their next of kin as part of re-establishing their identity - *Serrano Cruz*, p12-14.

involving the British and Irish governments,<sup>81</sup> could help facilitate the location, identification and recovery of such remains, which would to be effective require Russia cooperation.<sup>82</sup>

33. The 2005 UN Basic Principles stipulates that states should establish national reparation programmes and other assistance to victims in the event that 'the parties liable for the harm suffered are unable or unwilling to meet *their obligation*.'<sup>83</sup> A domestic reparation programme is usually made up of three elements: founding legal basis; administrative body with registry; and an inter-ministry coordination body.

34. A reparation programme needs a presidential/executive decree or legislative basis to give it authority to operate, hire staff, have legal authority for its decisions, and to draw down budgetary funds. Such legislation or executive decree while establishing the legal basis and constitution of a reparation programme, will also need to be supplemented by regulations that can be developed by the body itself, such as on specific rules on eligibility, evidentiary requirements and an appeals procedure.<sup>84</sup> Under the Ukrainian constitution there a number of rights that recognise individuals' right to remedy for violations for property, environment, material and moral damages to the person, and constitutional violations.<sup>85</sup> While Ukraine in 2021 adopted a law to facilitate the investigate and prosecution of international crimes, it does not include provisions for reparations.<sup>86</sup> Efforts have already been made from the start of the occupation of Crimea for a comprehensive approach to deal with the effects of the conflict and occupation in

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<sup>81</sup> The Commission is responsible for disappearances committed by a non-state armed group (IRA) and has been an effective neutral and impartial body to lead the recovery of those disappeared, though it is tasked with a far smaller number of victims.

<sup>82</sup> There are obligations under the Geneva Conventions to identify, document, notify families and be buried in a respectful way that are binding on Russia and Ukraine. See Article 17, First Geneva Convention; Article 120, Third Geneva Convention; and Article 130, Fourth Geneva Convention; and Articles 32-34, Additional Protocol I.

<sup>83</sup> Principle 16. See also Principle 17 on the enforcement of domestic and foreign reparations decisions against individuals or entities liable for harm suffered; and Principle 3, Chicago Principles of Post-Conflict Justice (2008), The International Human Rights Law Institute, p46.

<sup>84</sup> Many of these issues can be stipulated in the founding law, but it can be more effective for the body itself with its appointed commissioners to have some flexibility to modify such rules, especially if they are controversial to reach political consensus on.

<sup>85</sup> Articles 41, 50, 56, 142 and 152, Constitution of Ukraine 1996.

<sup>86</sup> See 2021 Law "On Amendments to Certain Legislative Acts of Ukraine Regarding the Implementation of the Norms of International Criminal and Humanitarian Law", Law No.2689.

Ukraine.<sup>87</sup> Compensation and reparations are identified in both the 2018 and 2021 draft laws,<sup>88</sup> but do not articulate a legal and administrative framework that would implement such goals for all victims of the conflict. Some Ukrainian human rights organisations have raised problem with such laws is that they are fragmented, lack legal certainty, expands the powers of the President of Ukraine and are not based on consultation with those in occupied and annexed areas.<sup>89</sup> Ukraine would need to establish a new law or presidential decree to create the national reparations directorate, with details on the scope of violations, eligibility, process and evidential standards to improve access to redress for victims of the war. As discussed further below with regards to eligibility, claimants should just have to evidence their harm as a result to the invasion and occupation of Ukraine, rather than individual violations or perpetrators. This will make the scheme simpler and easier for victims to access and providing supporting evidence for their claims.

35. The main work of a reparation programme occurs in its administrative body, which is often made up of a number of parts, this includes a governing body led by a president or through an executive/governing council, a secretariat of staff to facilitate the day-to-day operation, an adjudication body and a registry. The governing body of reparations programme can be made up of its commissioners or panel members to help direct the executive direction of the programme with the director or chair of the programme. In Chile its reparation programme was under a corporation of a director and six other members, appointed by the President and approved by the Senate.<sup>90</sup> In Turkey the Damage Assessment Commission is made up of one chairperson and six other members.<sup>91</sup> The Sri Lankan Office for Reparations consists of five members appointed by the President on recommendation from the Constitutional Council, who with the

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<sup>87</sup> See ЗАКОН УКРАЇНИ “Про реституцію майна та виплату компенсацій внутрішньо переміщеним особам, біженцям та іншим потерпілим особам”.

<sup>88</sup> Draft law on the principles of state policy of human rights protection in the context of overcoming the consequences of armed conflict; and Draft law on the Principles of the State Policy of the Transition Period, 9 August 2021.

<sup>89</sup> Analysis of the Draft Law “On the Principles of the State Policy of Transition Period”, Donbass SOS, Krym SOS, The Right to Protection, Vostok-SOS, Vplyv, Radnyk SSS, ZMINA and Crimean Human Rights Groups, 20 August 2021

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<sup>91</sup> Article 4, 2004 Turkey Law 5233 on the Compensation of Damages that occurred due to Terror and the Fight against Terror.



President recommend a Chairperson to be appointed.<sup>92</sup> In Northern Ireland the Victims' Payment Board is presided over by a judge with a governing board hired through an independent judicial appointments commission, which appoints medical, legal and lay members to sit on panels, with a select number of members for the board.<sup>93</sup> There may need to be a range of panel members to be appointed to deal with the scale of applications and for them to be adjudicated on in a timely manner. Such panels or commissions may be appointed on a regional or local level. In the aftermath of the Second World War, Germany had over 600 local reparation offices established through West Germany and 25,000 staff at its height in the 1960s.<sup>94</sup> The German Foundation 'Remembrance, Responsibility and Future' was made up of a range of German government and parliamentary officials, representatives of German companies, persecuted victim groups, relevant other governments, the UN High Commissioner for Refugees and the IOM, as well as a German council organisation for Nazi persecutees.<sup>95</sup> Accordingly there is a variety in how to establish and organise a governing body of a reparation programme.

36. The registry is responsible for collecting, collating and storing data on harm victims' experience. This is derived from victim application and other information provided by civil society organisations, as well as official documents and archives held by different government ministries, and any other support documents, such as medical records, disability assessments, property records, and in the case of Ukraine the Unified Information Database for Internally Displaced Persons. The purpose of a registry is 'to document the magnitude of human rights violations in a specific context, and to determine and specify the list of beneficiaries of the reparation programmes.'<sup>96</sup> A registry does not adjudicate on claims, but rather brings together the data to allow assessors, judges or other adjudicators to

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<sup>92</sup> Article 4, Office for Reparations Act, No.34 of 2018.

<sup>93</sup> Schedule 1, The Victims' Payments Regulations 2020.

<sup>94</sup> Überblick über den Lastenausgleich von Henning Bartels, Vizepräsident des Bundesausgleichsamts (Beitrag auf der Konferenz 'Kriegsfolgenarchivgut' in Bayreuth, 14.10.2019) <https://www.bundesarchiv.de/DE/Content/Publikationen/Aufsaeetze/kriegsfolgenarchivgut-p1-bartels.html>

<sup>95</sup> Section 5, The Law on the Creation of a Foundation "Remembrance, Responsibility and Future".

<sup>96</sup> Jairo Rivas, Official Victims' Registries: A Tool for the Recognition of Human Rights Violations, *Journal of Human Rights Practice* 8(1) (2016) 116–127.

assess the claim and evidence based on the legal basis and powers of the reparations body.

37. In terms of adjudicating on victim claims, commissioners or panel members are usually responsible for using their discretion to assess a victim's application based on the programme's criteria and categories of claim headings. An initial sifting process, such as using a traffic light system in which green = meets eligibility criteria and has sufficient evidence, amber = meets eligibility criteria, but needs more evidence, red = does not meet eligibility criteria, can be used to facilitate subsequent determination assessments by coding applications.<sup>97</sup> Those who do not have sufficient evidence can have a final decision on their application adjourned until they can submit further supporting documentation and any decision can be appealed,

38. The final strand of a domestic reparation programme is the inter-ministerial coordination body, which is particularly important to manage the cross-departmental delivery of a range of reparation measures and access to information to facilitate complex measures such as housing and specialist medical rehabilitation. For instance in Peru its reparation programme is coordinated by the High Level Multisectoral Commission (CMAN) of six government ministries.<sup>98</sup> In Guatemala its National Compensation Commission (CNR) included representatives from five government ministries, and was attached to the Secretariate for Peace.<sup>99</sup> Such coordination also have input and oversight from civil society and victim organisations, to improve transparency and accountability of decision making. In Guatemala it had a five member Consultative Council of Victim Organizations, which included women, indigenous people and human rights organisations to participate in meetings of the Council, but not to vote.<sup>100</sup> In Colombia victim tables (mesas) were established to allow victims and human rights defenders to participate at the local, national and

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<sup>97</sup> See Principle 12(e), Belfast Guidelines on Reparations in Post-Conflict Societies (2022).

<sup>98</sup> See Cristián Correa, Reparations in Peru: From Recommendations to Implementation, ICTJ (2013), p5– 6.

<sup>99</sup> The Guatemalan reparations programme has been made defunct by a lack of funding and its operations being moved under government development body, despite most victims having not received redress.

<sup>100</sup> Article 4, National Compensation Program - Governmental Agreement 258-2003, 8 May 2003.

regional level in the design, implementation, execution and evaluation of the reparation programme,<sup>101</sup> though it has suffered from victim engagement in the long term.<sup>102</sup>

39. By their nature, administrative reparations schemes may (but do not necessarily) employ more relaxed rules of procedure to accommodate the larger number of victims/claimants. However, administrative reparations programmes also tend to involve lower payments of compensation, and in so doing may fall short of achieving 'full' redress and reparations for victims, reflecting a compromise in providing a more modest distribution of benefits to a larger victim universe<sup>103</sup> as well as ensuring 'expediency and accessibility'.<sup>104</sup> This is in contrast to the nature of reparations awarded by international and regional courts, which are often dealing with a smaller victim population before them.<sup>105</sup> The existence of an administrative reparation programme should not completely preclude victims from seeking reparations through courts, in line with their right to an effective remedy.<sup>106</sup>

40. A domestic reparation programme makes the most pragmatic and accessible for victims in Ukraine to receive redress promptly. In Ukraine there are already hundreds of civil claims brought by victims affected by violence pre-February 2022 by the war in the Donbas, Crimea and Luhansk.<sup>107</sup> Without any specific law in which to bring claims or programme to adjudicate them in a timely manner, most victims have had to await some 20 months for cases to be completed, which

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<sup>101</sup> Article 193, Law 1448/2011.

<sup>102</sup> See Mijke De Waardt and Sanne Weber, Beyond victims' mere presence: an empirical analysis of victim participation in transitional justice in Colombia, *Journal of Human Rights Practice* 11(1) (2019) 209–228.

<sup>103</sup> De Greiff (2014), paras.19 and 21.

<sup>104</sup> Cristián Correa, From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia, ICTJ (2015), p7. Available at [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_ColombiaReparationsChallenges\\_2015.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf).

<sup>105</sup> Sandoval (2017).

<sup>106</sup> De Greiff (2014), para.14; IACHR Principal Guidelines, para.6; and ACHPR General Comment No. 4, para.9.

<sup>107</sup> Norwegian Refugee Council, Pursuing compensation for properties damaged or destroyed as a result of hostilities in the armed conflict in eastern Ukraine: Gaps and opportunities March-October 2018, (2019). Available at [https://www.nrc.no/globalassets/pdf/reports/0.2-pursuing-compensation-for-properties-damaged-or-destroyed-as-a-result-of-hostilities-in-the-armed-conflict-in-eastern-ukraine-gaps-and-opportunities/nrc-study\\_pursuing-compensation-for-damaged-or-destroyed-property\\_eng.pdf](https://www.nrc.no/globalassets/pdf/reports/0.2-pursuing-compensation-for-properties-damaged-or-destroyed-as-a-result-of-hostilities-in-the-armed-conflict-in-eastern-ukraine-gaps-and-opportunities/nrc-study_pursuing-compensation-for-damaged-or-destroyed-property_eng.pdf)

was before the current invasion.<sup>108</sup> Claims against Russia while being heard before Ukrainian courts, will run up against the principle of sovereign immunity that bars claims against a foreign nation in domestic courts.<sup>109</sup> Ukraine cannot afford to launch numerous civil claims in foreign countries where assets are frozen to facilitate those resources being used for reparations.<sup>110</sup>

### ***Human Rights Obligations of Domestic Reparation Programmes***

41. Unlike other compensation commissions, domestic reparation programmes have often been assessed in terms of their compliance with international human rights law. The 2005 UN Basic Principles on the Right to Remedy and Reparations sets down some general, indicative, but not legal-binding guidance. Key elements include prompt, adequate and effective reparations, which is also binding requirements before regional human rights bodies.<sup>111</sup>

42. Regional human rights courts have adjudicated on victims' claims for reparations for armed conflict as well as assessed the effectiveness of domestic reparation programmes in meeting victims' right to an effective remedy. Despite human rights bodies being increasingly being turned to resolve compensation claims, the European Court of Human Rights has stated on a number of occasions that for international armed conflicts involving large victim populations, States themselves should reach a settlement on compensation through a peace agreement.<sup>112</sup> Moreover the European Court has held that such as in the Nagorno-Karabakh war such 'long-standing conflicts— are not, in reality, amenable to full reparation' ordering an aggregated award of compensation for a range of violations that would amount to war crimes,<sup>113</sup> whereas in other cases, such as in the Kurdish-Turkey war, the European Court awarded individualised

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<sup>108</sup> Ibid. p5.

<sup>109</sup> See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p.99.

<sup>110</sup> Oleksandr Vodiannikov, Compensation Mechanism for Ukraine: An Option for Multilateral Action, *OpinioJuris*, 13 May 2022 <https://opiniojuris.org/2022/05/13/compensation-mechanism-for-ukraine-an-option-for-multilateral-action/>

<sup>111</sup> For implementation of these principles see the Belfast Guidelines on Reparations for Post-Conflict Societies (2022).

<sup>112</sup> *Sargsyan v Azerbaijan*, (Application no. 40167/06) 16 June 2015, para.216.

<sup>113</sup> *Chiragov and Others v Armenia*, Application no.13216/ 05, Judgment, 12 December 2017, paras.53 and 80

awards for civilians who suffered destruction of their homes, ill-treatment in detention, and extra-judicial executions.<sup>114</sup>

43. Although international humanitarian law is considered *lex specialis* in human rights adjudication on violations during armed conflict, regional courts have still found right to life violations that would amount potentially amount to war crimes and awarded compensation, in particular with weapons that cause indiscriminate effects such as the use of cluster munitions,<sup>115</sup> flamethrowers, grenades, and incendiary rounds,<sup>116</sup> and aerial bombardment of villages.<sup>117</sup> The European Court has been unwilling reassess domestic compensation awards for war crimes, such as for Baha Mousa who received £575,000 from the British government, and does not see its place to ‘function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties’.<sup>118</sup> The Court has also said that in cases of forced displacement, such as Croatian Serbs from Croatia during Operation Storm in 1995, despite long delays in compensation claims, States in such circumstances have a ‘wide margin of appreciation’, given the ‘exceptionally difficult task’ of adjudicating such mass claims.<sup>119</sup>

44. The Inter-American Court has maintained it still has jurisdiction to assess a State’s compliance with human rights where it has established a reparation programme to deal with the harm suffered by war victims, so as to satisfy the criteria of ‘objectivity, reasonableness and effectiveness to make adequate reparation’.<sup>120</sup> The Inter-American Court has held that a domestic reparation programme for large numbers of victims of armed conflict is ‘one of the legitimate ways of satisfying the right to reparation’ and that while awards through such a programme may be less than court-ordered ones, they still needed to be guided by human rights law and the criterion of justice so that they ‘do not become illusory

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<sup>114</sup> *Ahmet Özkan and Others v Turkey*, Application no.21689/ 93, 6 April 2004, para.489.

<sup>115</sup> *Santo Domingo massacre v Colombia*, paras.215 and 229.

<sup>116</sup> *Tagayeva and Others v Russia*, para.609

<sup>117</sup> *Benzer and Others v Turkey*, 23502/ 06 12 November 2013, paras.210– 212.

<sup>118</sup> *Al-Skeini and Others v The United Kingdom*, (Application no. 55721/07), 7 July 2011, para.182.

<sup>119</sup> *Radanović v Croatia*, Judgment, no.9056/ 02, 21 December 2006, para.49.

<sup>120</sup> *Manuel Cepeda Vargas v Colombia*, Judgment 26 May 2010, para.246; *Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil*, Judgment 24 November 2010, para.303; and *Vereda la Esperanza v Colombia*, Judgment, 31 August 2017, para.265.

or derisory, and make a real contribution to helping the victim deal with the negative consequences of the human rights violations on his life'.<sup>121</sup> It also sets out that such programmes are to be assessed in light of their ability to remedy harm and satisfy obligations to truth and justice, which includes requirements on their legitimacy based on,

'the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparations by family group and not individually; the distribution criteria among members of a family (succession order or percentages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.'<sup>122</sup>

45. The Court also stipulates that in redressing large victim populations there remains a need to specify and individualize how the victims in the case will benefit from such measures.<sup>123</sup> These norms provide some guidance on what an adequate and human rights compliant domestic reparation programme should look like, but there remains challenges in realising such a programme in Ukraine.

## Challenges

46. Reparations are a key part of ensuring an effective remedy in Ukraine; however, establishing a domestic reparation programme faces a number of challenges namely but two are the most pertinent: funding; and occupied territories. In terms of funding a reparation programme for Ukraine is likely to cost billions for civilian losses. A Ukrainian reparation programme will be faced with millions of potential victims, it is unlikely with the ongoing war and damage to infrastructure be able to prioritise reparations in the short to medium term. Establishing a reparation programme without sufficient financial support to meet the expectations of what victims' need, will cause frustration and inhibit victims' ability to regain control of their lives and allow them some dignified life.<sup>124</sup> Some have suggested that trust fund be set up for donors to contribute to, but as discussed below unless this

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<sup>121</sup> *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, Judgment, 20 November 2013, paras.470– 471.

<sup>122</sup> *Ibid.*; reaffirmed in *Yarce et al. v Colombia*, Judgment, 22 November 2016, para.327

<sup>123</sup> *Yarce et al. v Colombia*, Judgment, 22 November 2016, para.329.

<sup>124</sup> See Naomi Roht-Arriaza, Reparations in the aftermath of repression and mass violence, in E. Stover and H. Weinstein (eds), *My Neighbor, My Enemy Justice and Community in the Aftermath of Mass Atrocity*, CUP 2004, 121-139.

involved confiscated assets, building a programme on voluntary donation will be grossly insufficient to adequately remedy the harm caused. In relation to the second challenge, parts of Ukraine remain under Russian occupation making any reparation programme inaccessible to victims in those areas. A reparation programme often operates for years if not decades in protracted conflicts, so it could be extended to these occupied areas when they are liberated. The German reparation scheme for Nazi persecutes, while mostly completed by the end of the 1960s, did create a new Hardship Fund in the 1980s to accommodate victims in East Germany and eastern Europe, though this offer fixed sums, rather than lifetime pensions to eligible victims.

### 3. An Ukraine-Russia Mixed Arbitration Commission

47. At the end of hostilities States parties to a conflict can in their peace agreement stipulate that any outstanding claims can be resolved through an arbitration body. The mixed nature of such bodies means that it adjudicates on claims from both sides and by commissioners from each party.<sup>125</sup> They are ad hoc bodies, which have in certain instances allowed States to seek redress for violations committed by rebels who overthrew the State or part thereof, such as in Mexico, Ireland and Venezuela<sup>126</sup> The Treaty of Versailles stipulated the creation of mixed arbitration tribunals, which enabled individuals to seek compensation from Germany for damage or injury caused to their property, rather than for war crimes.<sup>127</sup> For instance the US and Germany Mixed Claims Commission dealt with over 20,000 claims, accepting over 7,000 claims amounting to \$181 million between 1922-1939 for losses American citizens or the United States suffered.<sup>128</sup> Mixed

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<sup>125</sup> Such as five commissioners with two from each State and the five elected by the four appointed commissioners, see Treaty of Amity Commerce and Navigation, (The 'Jay Treaty'), 19 November 1794.

<sup>126</sup> See Kathryn Greenman, *State Responsibility and Rebels The History and Legacy of Protecting Investment Against Revolution*, CUP 2021. The Irish War of Independence saw Ireland agree with the United Kingdom to establish a Shaw commission to resolve outstanding claims, 2,237 grants approved of 4,032 claims with a total of £2,188,549 awards recommended – see Gemma Clark, *Everyday Violence in the Irish Civil War*, CUP (2014), p24.

<sup>127</sup> Articles 297 and 302. See Marta Requejo and Burkhard Hess, *The Mixed Arbitral Tribunals in the Peace Treaties of 1919-1922*, *Max Planck Institute Luxembourg for Procedural Law Research Paper Series No.5* (2018).

<sup>128</sup> Article 1, Agreement Between The United States And Germany Providing For The Determination Of The Amount Of The Claims Against Germany - Mixed Claims Commission (United States and Germany) (1 November 1923 - 30 October 1939), *Reports of International Arbitral Awards*, Volume VII pp.1-391, p5.

arbitration bodies have also been established to address outstanding claims between Iran and the US as well as the Eritrean-Ethiopian Claims Commission, under the auspices of the Permanent Court of Arbitration (PCA). The PCA can provide the staff, meeting rooms for hearings, and act as a registry and facilitate communications between the parties, avoiding the requirement of other options in setting up a new body. Yet such few examples of mixed arbitration bodies in the past 250 years indicate that the creation of such bodies is rare, but does reflect an avenue that at the end of hostilities and without diplomatic or workable bilateral relations, a claims process can proceed. The benefits of a mixed arbitration body is that it can set its own rules of evidence,<sup>129</sup> scope of violations it can adjudge eligible (unless otherwise stipulated), allow individuals, corporations and States to make claims, and group claims to be decided by a precedent case.<sup>130</sup>

48. There are a number of drawbacks for an arbitration body addressing such claims after the cessation of hostilities, namely: time; cost; capacity; access; and compliance. Mixed arbitration bodies take time to adjudicate individual claims, often unlike claims commissions not grouping such claims together, which can increase the cost for such claims to be resolved compared to other forums. The scale of loss and damage caused in conflicts previously addressed in mixed arbitration bodies are relatively small or would not be as extensive or widespread as the likely to be sought for the war in Ukraine. It is not impossible for an arbitration commission to pay out a large number of mass claims, the Philippine War Rehabilitation Commission did review over 1.2 million claims and was able to distribute less than \$400 million to claims for civilians, business and key infrastructure damaged as a result of the Second World War.<sup>131</sup> With regards to access, claims are usually brought by States to the arbitration body, rather than directly by the victims themselves. Moreover, arbitration bodies only have the

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<sup>129</sup> Philippine War Rehabilitation Commission required only simple evidence for most of its personal injury claims of civilians, but for claims over \$15,000 it required a sworn statement on how the money was going to be spent. See Francisco A. Delgado, *The Philippine War Damage Commission: A Factual Summary of Its Work*, *American Bar Association Journal* 38(1) (1952) 32-34, p33.

<sup>130</sup> See Tjaco T. van den Hout, Introduction, *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, Permanent Court of Arbitration, OUP (2006), pxxvii-xxxiii.

<sup>131</sup> Francisco A. Delgado, *The Philippine War Damage Commission: A Factual Summary of Its Work*, *American Bar Association Journal* 38(1) (1952) 32-34.



power to award compensation, not any other form of reparations, which may require a domestic programme to deal with issues like recovery of remains and land and property restitution. There is little connection in practice and theory between mixed claims commissions and arbitrations between State and domestic reparation programmes, which undermines the lessons that can be learned from each.<sup>132</sup> In terms of compliance the EECC final awards to both parties in 2009 has still not been complied with by Eritrea or Ethiopia, so even if such a body was established and awards agreed upon, there is no guarantee that Russia will pay them out.

49. A mixed arbitration body for the war in Ukraine could be established to address outstanding claims from the war. However, the framing of a bilateral claims body may signify that both sides have to account for their relatively similar wrongdoing, as with the EECC. A Ukrainian-Russian mixed arbitration commission could be tasked with just resolving Ukraine's losses, such as has been done with US and Germany after the First World War, allowing only American citizens or the US to make claims. Getting Russia to comply with such awards will likely be impossible, unless there is some sort of bilateral agreement that frozen assets can be used or money is transferred to an account for making such payments. Under the Permanent Court of Arbitration there are already a number of interstate and investor-state claims against Russia for its annexation of Crimea, where sizeable amounts of compensation have already been awarded to claimants.<sup>133</sup> The Iran-US Claims Tribunal avoided some of the issues of compliance with payments and paying costs of the tribunal with both parties being agreeing from the outset to allocate funding into a bank account.<sup>134</sup> In the Irish-British Shaw Commission, each party agreed to compensate its own supporters and split the costs of the commission as well as the harm caused to neutrals.<sup>135</sup> The Iran-US experience

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<sup>132</sup> See Arturo J. Carrillo and Jason S. Palmer, Transnational Mass Claim Processes (TMCPs) in International Law and Practice, *Berkely Journal of International Law* 28 (2010) 343-430.

<sup>133</sup> There are two interstate and six investor-state cases pending resolution. \$130 million was awarded for expropriation of hotels and other properties in *Everest and Others v the Russian Federation*, (PCA Case No. 2015-36); \$1.111 billion for seizure of a branch of Oschadbank, *Oschadbank v. Russia* (PCA Case No. 2016-14); for the seizure of petrol stations with awards of \$34.5 million and \$44.5 million in *Stabil and others v. Russia* (PCA Case No. 2015-35 and *Ukrnafta v. The Russian Federation* (PCA Case No. 2015-34) respectively.

<sup>134</sup> Point II, Algiers Accord 19 January 1981.

<sup>135</sup> Clark (2014), p23.

is perhaps more useful here, as it would be financially crippling for Ukraine to cover the losses its citizens have suffered. Nonetheless getting to a point where a settlement can be reached between Ukraine and Russia, a mixed arbitration body could provide an independent basis to establish claims for compensation.

#### **4. An Independent Investigative Mechanism, Registry and Trust Fund for Ukraine with the Ukrainian National Reparation Directorate**

50. The absence of a bilateral agreement for a claims commission or a peace agreement between Ukraine and Russia to settle claims from the war, and the unlikelihood of the UN Security Council establishing a UN claims commission mean that an alternative international body could be established by the UN General Assembly. Such a mechanism would combine international efforts to document violations in the Ukraine-Russia war with the domestic capacity to deliver reparations to victims. This involves a reworking of investigative mechanisms established by the UN, but with a victim interface to enable them to corroborate their domestic claims. Such an international mechanism could facilitate asset transfer as well as act as a repository and archive for evidence collection.

51. The UN has in the past recommended reparation programmes without UN Security Council approval. For instance the UN Commission of Inquiry into Darfur recommended that the UN Security Council establish a compensation commission given the difficulties of victims bringing court claims - The shape of such a commission was to be made up of 15 members, ten appointed by the UN and 5 by an independent Sudanese body,<sup>136</sup> with expertise in law, accounting, loss adjustment and environmental damage, and made up of five chambers with three members each, with one chamber dedicated to rape. It was suggested that for State violations, funding would be provided by the Sudanese government, whereas for violations committed by non-state armed groups a trust fund based on international voluntary contributions would be established.<sup>137</sup>

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<sup>136</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General, S/2005/60, 1 February 2005, para.601.

<sup>137</sup> Ibid. para.603.

52. For this option of an international support mechanism with a domestic reparation programme is a twist on the supportive investigative mechanisms established in recent years to assist in the investigations and prosecutions of international crimes. The HRC in establishing the IIMM called upon the government of Myanmar to provide 'compensation for all losses' to victims and for other States to support the Rohingya victims, including the 'establishment of a trust fund to address their needs, including the needs of those who have been victims of sexual violence, as well as child victims and witnesses.'<sup>138</sup> Both bodies terms of reference 'to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law ... and to prepare files in order to facilitate and expedite fair and independent criminal proceedings'.<sup>139</sup> While there are a number of cases ongoing in relation to both these situations at the moment, both suffer from being hermetically sealed from victims, in that they cannot access them for their own personal claims, given concerns over security, protection of identities of sources and maintaining chain of custody of evidence.<sup>140</sup> Moreover without on the ground access in the immediate aftermath of violations by an investigative authority, the ability to identify, collect, store and catalogue with a clear chain of custody in ongoing situation of armed conflict can undermine the reliability of evidence that is collected by such bodies, which are often reliant on local civil society organisations. In addition, data likely unavailable to Ukraine, such as satellite imagery and social media and geolocation data could be transferred to the mechanism. There are lessons to be learned from the Independent Investigative Mechanism for Myanmar on protocols, policies and procedures to protect such data, including storage, security and handling of forensic, physical and digital evidence.<sup>141</sup>

53. In terms of sanctioned assets, these have not been unilaterally imposed, there are a range of issues around assets discussed further below. For those assets

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<sup>138</sup> Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/RES/39/2, 27 September 2019, paras.15 and 33.

<sup>139</sup> A/RES/71/248, para.4; and A/73/716, Annex para.1. See also UNITAD for Da'esh crimes, though it is established by the UNSC (S/RES/2379 (2017)) - S/2018/118, Annex para.2.

<sup>140</sup> Arguably there is the possibility that the IIMM can share documentation with a 'competent authority, body or organization' provided it is in line with international human rights standards.

<sup>141</sup> A/HRC/48/18, 5 July 2021.

that have been confiscated and liquidated in other countries, they could be transferred to a Ukrainian Reparations Fund, which could be established by the UN General Assembly similar to other victim funds it has established in the past, and could complement the work of the independent investigative mechanism for Ukraine.<sup>142</sup> The difficulty with such funds that are reliant on voluntary donation is that they fail to mobilise sufficient resources each year for victims and as such the UN and the ICC Trust Fund for Victims manage relatively small budgets for victim population within their ambits. If a UN Ukrainian Reparations Fund was to be established it could be operated by a UN body like the International Organisation for Migration (IOM). The IOM was responsible for facilitating compensation for German force labour claims to victims who lived outside of Germany, which amounted in total to 89 countries and 1.66 million victims. Alternatively a domestic organisation could be created in Ukraine like the German Foundation Remembrance, Responsibility and Future, established in German law.<sup>143</sup> The funds could be used to fund collective reparation projects identified by victims in the Ukrainian reparation programme, such as housing and specialist healthcare. The German Foundation benefited from capital from responsible German companies and the German government for their role in forced and slave labour to the amount of DM10 billion.<sup>144</sup> The Foundation while distributing most of its funds to individual victims has a residual amount of funds that it funds cultural activities of groups to commemorate the past and educate future generations, as well as support to elderly victims, such as in Ukraine where it assists with emergency relief.<sup>145</sup> Like the UN Torture Fund this could be delivered to local civil society organisations to support grassroots victim activities, such as counselling, advocacy, and group activities.

54. Whatever option is followed for the war in Ukraine, issue of eligibility, evidence and funding will need to be addressed, which can pose a range of challenges to seeing reparations delivered to victims.

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<sup>142</sup> Such as the UN Voluntary Fund for Victims of Torture, A/RES/36.151, 16 December 1981; and the UN Voluntary Trust Fund on Contemporary Forms of Slavery (A/RES/46/122 17 December 1991).

<sup>143</sup> The Law on the Creation of a Foundation “Remembrance, Responsibility and Future”, 2 August 2000, Federal Law Gazette I 1263.

<sup>144</sup> Section 3, The Law on the Creation of a Foundation “Remembrance, Responsibility and Future”.

<sup>145</sup> See Activity Report 2021, Foundation EVZ, p21

## Eligibility

55. A reparation programme delimits the scope of victims who would be eligible for reparations from the total victim universe of those affected by the conflict, to concentrate resources on those most affected/harmed. A reparation programme will often stipulate eligibility based on certain types of violations or groups of victims based on the circumstances and context of the conflict. Eligibility for reparations is often drawn across territorial/spatial, temporal, and personal dimensions.

### Territorial/Spatial

56. In terms of the territorial jurisdiction of a body of a reparation body, it would be limited to violations that occurred on the territory of Ukraine, including occupied territory in Crimea, Donetsk and Luhansk. Particular focus may be on areas or communities that suffered extensive and prolonged violations that not only caused individual, but also collective harm that has torn the local social fabric. For instance in Bucha or Izyum where gross violations were carried out in the homes, communal buildings and surrounding areas of these towns, including torture, forced disappearance and extrajudicial executions,<sup>146</sup> collective measures may need to be considered given the scale of such violations. Colombia, Peru, Morocco and Tunisia have all adopted collective reparations as a means to remedy the communal harm or those targeted because of their locality or 'victim zone' where structural violence increases victims' vulnerability.<sup>147</sup> Collective reparations are distinguishable from general economic development to war-affected areas, by being responsive to victimized groups' suffering and the acknowledgement of such harm by a responsible actor. Providing collective reparations alongside compensation may help to broaden benefits and inclusion of affected communities in the reparation process and may provide financial support to continue communal activities such as annual memorial prayers and

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<sup>146</sup> Ukraine: Russian Forces' Trail of Death in Bucha Preserving Evidence Critical for War Crimes Prosecutions, HRW 21 April 2022; and Ukraine war: Mass exhumations at Izyum forest graves site, BBC News, 16 September 2022.

<sup>147</sup> Simon Robins, Paul Gready, Ahmed Aloui, Kora Andrieu, Hajer Ben Hamza, Wahid Ferchichi, Transitional justice from the margins: Collective reparations and Tunisia's Truth and Dignity Commission, *Political Geography* 94 (2022).

commemorations.<sup>148</sup> Given the passage of time, the lack of basic services during the conflict to mitigate initial harm, and the continuing economic and social marginalization of many victims, collective measures through specialist services to victims may help to alleviate their continuing vulnerability.

57. There may be grounds for including other areas outside of Ukrainian territory where the conflict spilled over, such as Transnistria.

### Temporal

58. Claims commissions and reparation programmes are ad hoc bodies that have a temporal mandate,<sup>149</sup> usually backward looking with a specific cut-off date for future claims. In temporal terms, eligibility is often limited to the start of hostilities, occupation or a particular violent event.<sup>150</sup> In Colombia despite the conflict with the FARC and other armed groups starting in the 1960s, reparations are only available from the 1<sup>st</sup> January 1985.<sup>151</sup> Other programmes have allowed claims past the end of hostilities. Despite being focused on the damage caused by the Iraq invasion and occupation of Kuwait (2 August 1990 to 2 March 1991), the UNCC allowed claims for an individual who was killed by a landmine over a decade later, given the harm was a direct result.<sup>152</sup> The Japanese American internment compensation scheme included the period beginning on 7<sup>th</sup> December 1941 and ending on 20<sup>th</sup> June 1946, nearly a year after the end of hostilities.<sup>153</sup> The Northern Ireland Victims' Payment Board allows claims for the conflict from 1 January 1966 (3.5 years before the start of the Troubles) and 12 April 2010 (12 years after the Good Friday Agreement).<sup>154</sup> The Tripartite Claims Commission allowed claims between 1914-1921 when the US Congress ended the declaration of war with the Austro-Hungarian government.<sup>155</sup>

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<sup>148</sup> See Moffett (2022), p275.

<sup>149</sup> Lea Brilmayer, Chiara Giorgetti and Lorraine Charlton, *International Claims Commissions: Rights Wrongs after Conflict*, Elgar (2017), p9.

<sup>150</sup> In the Netherlands this is the period from 10 May 1940 to 8 May 1945. Article 1(1)(f) Payment Scheme Foundation for Individual Compensation for Victims of WWII Transport by NS (2019)

<sup>151</sup> Article 3 Law 1448/2011.

<sup>152</sup> S/AC.26/2005/8, 8 July 2005, para.66-68.

<sup>153</sup> Section 108(1) Civil Liberties Act 1988 Public Law 100-383.

<sup>154</sup> Regulation 5(1)(d), The Victims' Payments Regulations 2020.

<sup>155</sup> Tripartite Claims Commission (United States, Austria and Hungary) constituted under the Agreement of November 26, 1924 (12 April 1927 – 28 June 1929), REPORTS OF INTERNATIONAL ARBITRAL AWARDS, Volume VI pp191-292, p204.

59. In the case of the Russian invasion of Ukraine reparations could be from the beginning of the annexation of Crimea on 20<sup>th</sup> February 2014 or the later date of the 24<sup>th</sup> February 2022. This could extend beyond the end of the war for those injured, killed or suffer property damage from mines and unexploded ordinance as well as those forcible transferred or deported outside of Ukraine and may take months or years to be returned.

60. Eligibility for reparations has been prioritised to victims who are considered to have suffered the most severe violations or are vulnerable. The prioritisation of those most seriously and proximately harmed is a proportionate means to concentrate resources to the greatest harm,<sup>156</sup> and to avoid an ‘unacceptable dilution of benefits.’<sup>157</sup> Former UN Special Rapporteur Pablo de Greiff found that a general definition of who constitutes a ‘victim’ cannot, in and of itself, facilitate the design of a reparations programme; however, it is potentially a helpful tool to ‘frame the design of reparations programmes’.<sup>158</sup> The truth commissions in Timor Leste and Sierra Leone recommended that reparations be addressed to amputees, orphans, widows, victims of sexual violence, and victims of torture.<sup>159</sup> In the Philippines reparations are organised on a ten point system which grants: 10 points to victims who died or disappeared and remain missing; 6-9 points to victims of torture, rape or sexual abuse; 3-5 points to victims who were detained; and 1-2 points for victims who suffered from kidnapping, involuntary exile by intimidation, or forceful takeover of businesses and property.<sup>160</sup> Due to limited funds, the German Forced Labour Compensation Programme prioritised compensation to victims of medical experiments, injury or death of children in certain homes used in forced labour camps, but all claims for personal injury in lower priority categories were denied on the basis of lack of funds.<sup>161</sup> Priority can

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<sup>156</sup> Clara Sandoval, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 11 July 2019, A/HRC/42/45, para.44(e).

<sup>157</sup> Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para.26.

<sup>158</sup> See de Greiff Report, para. 25.

<sup>159</sup> Sierra Leone TRC Report Volume II, Chapter 4, para. 69-70; and Chega! Commission for Reception, Truth and Reconciliation in East Timor (CAVR), (2005), section 12.1.

<sup>160</sup> Section 19, Human Rights Victims Reparation and Recognition Act 2013.

<sup>161</sup> German Foundation Act, section 9(3), section 11(1) sentence 3, number 5. Over 85% of claims were rejected due to lack of funds, only 1,370 awards were made for personal injury. Edda Kristjansdottir and

also place some victims at the front of the queue. In Peru individual reparations have been prioritised for elderly victims, so they are paid first, given their greater vulnerability and limited time to avail of such measures.<sup>162</sup> Similarly in the Swiss Banks Holocaust settlement, direct victims who had ongoing injuries were prioritised over heirs of those who had died.<sup>163</sup> At the same time as prioritising vulnerable victims it has to be balance with avoiding creating a hierarchy of victims and remedying only victims of certain categories that garner more international attention, such as sexual violence, and not those left seriously disabled or children forcibly transferred.

### Personal

61.A domestic reparation programme often does not address corporation or investment claims, owing to it focusing on civil and political violations of personal integrity and residential property loss. Claims by corporations and investors can be better facilitated through investor-state dispute settlement foras. Some claims commissions, such as the UNCC have dealt with corporate and State claims, beyond just individuals, but this reflects the international nature of this body, which had the jurisdiction to do so and The rest of this sub-section addresses groups of victims who can be neglected in reparation claims processes or may need specific provisions to ensure they can benefit, namely nationals from other countries, internally displaced persons and refugees, combatants, collaborators and members of separatist forces, and environmental harm.

### **Nationals from other countries**

62.Nationals from third countries can also be eligible claimants. Under the UNCC, migrant workers were able to claim compensation, but only states or corporations could make direct claims, with individuals requiring a state to act on their behalf as a claimant, such as Egyptian workers.<sup>164</sup> For refugees and potential stateless

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Barbora Simerova, Processing Claims for “Other Personal injury” under the German Forced Labour Compensation Programme. 109-137, p110.

<sup>162</sup> Cristián Correa, Reparations in Peru: From Recommendations to Implementation, ICTJ, June 2013, p16.

<sup>163</sup> See J. Gribetz and S. C. Reig, The Swiss Banks Holocaust Settlement, in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill (2009), 115-142.

<sup>164</sup> S/AC.26/1997/3, 2 October 1997.



claimants, in particular Palestinians,<sup>165</sup> who were eligible, but were not able to have claims submitted through their governments, various international organisations engaged in outreach programmes, and numerous UN offices submitted claims for claimants where no government was able to do so.<sup>166</sup> The UNCC created an extended deadline for these claimants.<sup>167</sup> Under the Israel Compensation for Victims of Hostile Actions Law claimants were only eligible if a victim of acts committed outside of Israel or an area under its control previously had to prove that their injury was caused by a “hostile act” committed by, on behalf of or in order to assist a country or an organization hostile to Israel, or pursuant to such a country’s or organisation’s objectives. An amendment in 2017 now recognises harm caused to Israeli citizens or lawful residents by an act of terrorism committed outside Israel or areas under its control ‘even if the act’s primary or secondary objective was not to harm Israel or the Jewish people.’<sup>168</sup> Spanish nationals who are victims of terrorist acts abroad are only entitled to economic compensation, 50% if they are resident in the country where the terrorist attack occurs or 40% where they do not resident in that country.<sup>169</sup> Moreover, the Spanish government pays the difference if the country where the attacks takes place does not provide the victim compensation or at least pays the difference where the award obtained abroad is lower than the Spanish amount.<sup>170</sup> Other schemes have limited claims based on nationality, even where perpetrators came from the same country and the incident happened abroad.<sup>171</sup>

63. Whether Russian victims will be able to claim reparations through any claims body for the war in Ukraine will likely prove controversial. If they are allowed to claim, framing the legal basis would be on the grounds of gross violations of human rights and serious breaches of international law, such as mistreated prisoners of

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<sup>165</sup> As permitted under the UNCC Rules, Article 5(2), S/AC.26/1992/10. The Palestinian Authority helped in filing the claims, but at the time was not recognised as a state. Some 402 claims were accepted amounting to over USD \$866 million in compensation.

<sup>166</sup> UNCC Governing Council Decision 5 of 18 October 1991, Guidelines relating to paragraph 19 of the Criteria for Expedited Processing of Urgent Claims UN Doc S/AC.26/1991/5 (23 October 1991).

<sup>167</sup> S/AC.26/2005/8.

<sup>168</sup> Amendment Law [1] adding [12A(a)] to the Law.

<sup>169</sup> Articles 6(3) and 22, Act on the Recognition and Comprehensive Protection of Victims of Terrorism, Ministerio del Interior, October 2014.

<sup>170</sup> Article 22(2), *ibid*.

<sup>171</sup> Regulation 5(1)(c), Victims’ Payment Regulations 2020.

war. However it is likely that such cases are likely to be few, given the tens or hundreds of thousands of claims Ukraine will likely seek from Russia.

### **Internally displaced persons and refugees**

64. Some countries have included internally displaced persons (IDPs) and refugees in their reparation programmes. With Category A claims under the UNCC, it provided \$2,500 or \$4,000 for individuals and max of \$5,000 or \$8,000 for families for those forced to flee Kuwait or Iraq due to the invasion, the higher amounts reflecting that the claimant would not claim under any other category.<sup>172</sup> The lower evidentiary standard of only simple documentation reflected the relatively smaller amounts that could be awarded and the circumstances of the invasion, which involved the movement of millions of people and the difficulties of preserving sufficient documentary evidence.<sup>173</sup> As a result some \$3.1 billion was awarded to over 850,000 claimants under the Category A claims. A more complex process under the Colombian reparation programme with the inclusion of IDPs resulted in them accounting for over 8.3 million claimants out of 9.36 million registered victims.<sup>174</sup> However including such a large number of victims has meant that only a fraction of victims have actually received redress. Despite the scale of land restitution in Colombia, efforts continue to return housing, land and property to those displaced.

65. Due to its likely limited funds and potential mass influx of returnees at the end of hostilities, it may be best to deal with displaced persons through a separate reparation programme, given their housing needs and rights under different Ukrainian laws. In Kosovo a separate scheme was established before the reparation programme, by the UN authorities, the Housing and Property Claims Commission (HPCC), which was responsible for adjudicating on three categories of claims: discrimination; informal transaction; and illegal occupation.<sup>175</sup> The HPCC resolved cases involving discrimination since 1989 by awarding them the

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<sup>172</sup> S/AC.26/1994/2, 21 October 1994, p8.

<sup>173</sup> S/AC.26/1994/2, p10.

<sup>174</sup> Data from 1 October 2022, available at <https://www.unidadvictimas.gov.co/es/registro-unico-de-victim-ruv/37394>. Nearly 2 million individuals who have registered fall outside the eligibility criteria.

<sup>175</sup> Section 1.2(a-c), UNMIK Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, 15 November 1999.

right over the property, informal transactions have their exact title established, and those which had been illegal occupied during the conflict were only compensated, as only those with a privatised property right for ownership could have their right to occupation restored.<sup>176</sup> While over 29,000 claims were resolved by the Commission, over 11,000 claims for damaged or destroyed properties was beyond the jurisdiction of the HPCC to provide a remedy and could only make a declaratory order recognising a claimant's right over the property when it was destroyed.<sup>177</sup> In Bosnia the Commission for Real Property Claims of Displaced Persons and Refugees the claims commission prioritised the restitution of property rights to facilitate the return of those displaced and avoid the permanent effects of ethnic cleansing, but in practice returnees told their restored property rights in order to facilitate their own resettlement in an area of their choosing, rather than their pre-war residence.<sup>178</sup>

66. The difficulty of establishing land title and dealing with occupiers and good faith purchasers, especially in territory occupied by Russian forces, will likely require a choice of options for victims, including restitution, restitution in kind and compensation. Such programmes can have an impact on investors' property and state obligations under international investment agreements.<sup>179</sup> Land restitution after gross violations of human rights and serious breaches of international humanitarian law is incredibly problematic, especially with ongoing insecurity, and can entrench inequalities and sectarian divisions so needs to be carefully designed with those affected.<sup>180</sup>

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<sup>176</sup> See OSCE, Property Rights Mass-Claim Mechanism: Kosovo experience, June 2020; and *Final Report Of The Housing and Property Claims Commission*, HPCC (2007), p78-79.

<sup>177</sup> HPCC *ibid.* p79.

<sup>178</sup> Rhodri C. Williams, Post-Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement, TESEV International Symposium on "Internal Displacement in Turkey and Abroad" Istanbul, 5 December 2006.

<sup>179</sup> See Enrique Prieto-Rios, Juan Francisco Soto Hoyos, and Juan P. Pontón-Serra, Foreign concerns: the impact of international investment law on the ethnic-based land restitution programme in Colombia, *The International Journal of Human Rights* (2022).

<sup>180</sup> See Bernadette Atuahene, *We Want What's Ours: Learning from South Africa's Land Restitution Process*, (Oxford University Press, 2014); and Jemima García-Godos and Henrik Wiig, Ideals and Realities of Restitution: The Colombian Land Restitution Programme, *Journal of Human Rights Practice*, 10(1) (2018), 40–57.

67. Ukrainian law already protects a number of IDP rights<sup>181</sup> including access to social security, family unity, information about the fate and location of missing family members and close relatives, the creation of appropriate conditions for her/his permanent or temporary residence, safe living conditions and health, free temporary residence especially for those disabled, and assistance and medical support. While the 2014 law recognises IDPs' right to return and protection from forced return,<sup>182</sup> the law has no reparation provisions beyond empowering local authorities to acquire land plots from state-owned land or for the national government to provide loans to IDPs to purchase land, housing or construction materials.<sup>183</sup> Ukrainian citizens are entitled to compensation and social support in cases of emergencies such as war.<sup>184</sup> In practice there remains a legal barrier in allocating such funds from the state budget to resource such claims,<sup>185</sup> and while there are a number of draft laws specifically aimed at compensation and restitution for property loss they have not been implemented.<sup>186</sup> Moreover, given the scale of such violations across large parts of Ukraine involving hundreds of thousands of properties, it is likely to be beyond the capacity of local authorities to manage and compensation by itself does not adequately address housing, land and property rights, especially where the war and occupation was used to ethnically cleanse Ukrainian territory.

68. To move towards a more comprehensive reparative programme for IDPs and refugees who have fled the country, a number of measures would need to be considered. IDPs and refugees should be able to avail of an administrative programme that manages their property claims, registers land, addresses the rights of current occupiers, provides rules around 'good faith' purchasers, and

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<sup>181</sup> The 2014 law defines IDPs as 'internally displaced person is a citizen of Ukraine, a foreigner or a stateless person who is in the territory of Ukraine on legal grounds and has the right to permanent residence in Ukraine, who was forced to leave or leave his place of residence as a result of or in order to avoid the negative consequences of an armed conflict, temporary occupation, widespread manifestations of violence, violations of human rights and emergency situations of a natural or man-made nature' – Article 1(1), Law of Ukraine On ensuring the rights and freedoms of internally displaced persons (2014).

<sup>182</sup> Articles 2 and 3.

<sup>183</sup> Articles 11(8)(8) and 17.

<sup>184</sup> Under Articles 84-85, Code of Civil Protection of Ukraine 2013 Nos.34-35, last modified 17 June 2021.

<sup>185</sup> Oleg Martynenko, International experience and national mechanisms of reparation for victims of the conflict in Ukraine, Ukrainian Helsinki Human Rights Union (2019), p11.

<sup>186</sup> Martynenko *ibid.* p11-13.

provide compensation avenues where the property is destroyed, now owned by a good faith purchasers or the victim chooses to live elsewhere.<sup>187</sup> Restitution-in-kind', could be a further option in restoring as far as possible a displaced person to similar situation they were before the violation (housing in the same area and of the same quality). Compensation should also be offered if restitution is impossible, such as insecurity or difficulty in establishing ownership, i.e. unclear if good faith purchaser (bona fide). The UN Pinheiro Principles refers to compensation where restitution is 'factually impossible to restore'.<sup>188</sup> Reparations should be effective in the sense in offering victims a choice in how best to move from the violation, even if there is a bona fide purchaser a displaced person may not be able to return. The value of compensation should be standardised in some way by an independent and impartial assessor.

69. Returning IDPs and refugees voluntarily to their homes also requires ensuring their security and guarantees of non-recurrence from local criminal or separatist elements who may want to continue the effects of ethnic cleansing. A provision in the scheme should include an obligation on local authorities to guarantee the security of those who chose to return.<sup>189</sup> Returning property and land is not only about re-establishing a victim's circumstances before the war, but should also be facilitated as far as possible. A further formulation could be made along the lines of restoring the 'livelihood, as far as possible, such displaced person attached to their lands as a community or group'.<sup>190</sup> It is also worth prioritising certain groups of victims due to their vulnerability to ensure greater attention to their needs, especially given their exposure with the loss of their home and security. The Inter-American Court has set down the following guidance for states that it is,

'necessary to take into account the circumstances in which the events took place and, in particular, the socioeconomic situation and vulnerability of the victims, and the fact that the damage caused to their property might have a greater effect and impact than it would have had for other persons or groups in other conditions. In that regard, the States should be mindful that groups of people who live in adverse circumstances and with fewer resources, such as those living in

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<sup>187</sup> See the Colombian Victims' Law 2011 which has a number of provisions around reversing the burden of proof on claimants, (Articles 76-118).

<sup>188</sup> See Principles 2 and 21, The Pinheiro Principles United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005).

<sup>189</sup> *Mapiripán massacre v Colombia* para.313.

<sup>190</sup> Article 7(1), 2006 Great Lakes Protocol on the Property Rights of Returning Persons.

conditions of poverty, face an increased degree of impairment of their rights precisely because of their situation of increased vulnerability.<sup>191</sup>

70. Care will also need to be taken to minimise tensions between the diaspora and those internally displaced, in particular around their capacity to organise themselves and participate in the shaping of a reparation process that does not unfairly benefit one over the other.<sup>192</sup>

71. As part of guaranteeing non-repetition of violence will need to address the volume of projectiles, mines and other unexploded ordnance across Ukrainian territory, which continues to pose a risk to civilians, cattle and wildlife. Such unexploded ordnance risks causing further death, serious injury and property damage that can substantially impact on a people's way of life and enjoyment of their land and environment. Any land restitution programme needs to be connected to demining and weapon decontamination schemes.

## Combatants

72. In wars of aggression, it has been suggested that soldiers of the invaded nation could be considered as victims given the grievous violation of the UN Charter.<sup>193</sup> The International Court of Justice (ICJ) heard such arguments in the *Armed Activities* case, where Uganda invaded and occupied Ituri; however, as the DRC was unable to substantiate the killing of 2,000 soldiers by furnishing some record of their military service, the claim was not upheld. The Court recognized that 10,000– 15,000 civilians were killed using a lesser evidential requirement, given the difficulties of civilian victims evidencing their harm and Uganda occupying Congolese territory.<sup>194</sup> For Ukraine it may be worth including Ukrainian soldiers who suffered violations to have access to reparations. It is often more useful to create a separate programme for veterans and their families to better reflect their needs from being continuously exposed to war, trauma and loss, as well as

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<sup>191</sup> *La Vereda la Esperanza v Colombia*, para.240.

<sup>192</sup> Peter Van der Auweraert, *The Potential for Redress: Reparations and Large-Scale Displacement*, in R. Duthie (ed.), *Transitional Justice and Displacement*, ICTJ (2012), 139-186, p161.

<sup>193</sup> Tom Dannenbaum, *The Criminalization of Aggression and Soldiers' Rights*, *European Journal of International Law* 29(3) (2018), 859– 886.

<sup>194</sup> *Armed Activities on the Territory of the Congo*, Reparations Judgment, 9 February 2022, paras.157–158 and 165.

pension provisions and healthcare support already provided. For those who have been tortured, suffered sexual violence or force labour the severity of their suffering may justify their inclusion in a victim reparation programme as well, where these additional needs can be better catered for by specialists.

73. Claims commissions have often excluded military costs and loss, or harm caused to military forces, in order to maximise funds for those who have suffered harm and loss.<sup>195</sup> The UNCC Governing Council decided that members of allied coalition armed forces were not eligible for compensation unless they are entitled based on the criteria established by the Commission, they were prisoners of war and suffered loss or injury as a result from mistreatment in violation of international humanitarian law.<sup>196</sup> In the case of Ukraine there have been a number of reports of Ukrainian prisoners of war being tortured and extra-judicially killed, including large scale incidents in Olenivka,<sup>197</sup> as well two reports of Russian prisoners of war suffering similar violations.<sup>198</sup> The EECC awarded compensation for mistreatment by both sides of each other's prisoners of war, but recognised that Eritrea had more extensively mistreated Ethiopian prisoners.<sup>199</sup> Such awards are not intended to find that violations were equally committed by both sides to the same degree, but to reflect that a victim nation of aggression is not immune from responsibility and the obligation to remedy the harm they have caused through gross violations of human rights or serious breaches of international humanitarian law.

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<sup>195</sup> The EECC did not have jurisdiction to hear costs of military operations and preparation, save to the extent they involved violations of international humanitarian law – Article 5(1), Algiers Agreement. At the UNCC the Governing Council decided that such military costs were not eligible for compensation. See Decision taken by the Governing Council of the United Nations Compensation Commission at its 41st meeting, S/AC.26/Dec.19, 24 March 1994. During the Treaty of Versailles negotiations British delegations wanted some of the military costs covered in the form of war pensions for widows and disabled veterans covered, but this was ultimately rejected as went beyond the Armistice discussions for civilian losses alone. See Jean- Louis Halpérin, Article 231 of the Versailles Treaty and Reparations: The Reparation Commission as a Place for Dispute Settlement?, in M. Erpelding, B. Hess, and H. Ruiz Fabri (eds.), *Peace Through Law, The Versailles Peace Treaty and Dispute Settlement After World War I*, Nomos (2019), 193–203, p195.

<sup>196</sup> S/AC.26/1992/11, 26 June 1992.

<sup>197</sup> The difficulty with documenting such Russian violations is that the OHCHR and the ICRC have been unable to access many detention sites, where there are reports of inadequate basic necessities for prisoners, as well as allegations of systematic torture and killings.

<sup>198</sup> Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation 24 February — 15 May 2022, 29 June 2022, para.105.

<sup>199</sup> \$4 million was awarded to Eritrea and \$7.5 million to Ethiopia.

74. Efforts should also be made to make the any combatant reintegration process more comprehensive and integrated with a wider reparations and transitional justice system, in particular for disabled or otherwise victimized ex-combatants, such as those subjected to torture. In Kosovo the reparation law includes provision for civilians and combatants killed or injured during the conflict to have access to reparations.<sup>200</sup> However such a mix of civilians and combatants may not fully address their specific needs or may allow a more generous compensation package to government officials.<sup>201</sup> In Nepal a special care package and monthly pension is only provided to injured former Maoist combatants, split across four classes from 0-100%, but there is no similar provision for civilian disabled victims.<sup>202</sup> Framing reparations around veterans also risks creating a hierarchy of victims, which places those who fought the most at the top, marginalising civilian victims. For instance in Timor Leste the veteran associations have been more influential in shaping state policy around the past, including expanding their pension provision, building veteran memorials and valorizing them as heroic, in comparison to victims who are negatively viewed as a 'nonagentive nonresister' and receive no benefits.<sup>203</sup> The European Court has held that such differential treatment of providing more benefits for disabled veterans than disabled civilians after a conflict is not per se discriminatory, but up to the state to find a fair balance, which may include a 'moral debt which States may feel obliged to honour in response to the service provided by their war veterans'.<sup>204</sup>

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<sup>200</sup> 2011 Law on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovar Liberation Army, Civilian Victims of War and Their Families, Law No. 04/L-054.

<sup>201</sup> For instance under Sri Lanka's REPPA, government officials were compensated twice the amount of injured or killed civilians.

<sup>202</sup> See Govinda Sharma, James Gallen, Luke Moffett and Laxmi Pokharel, *From Relief to Redress: Reparations in Post-Conflict Nepal*, RRV (2019), p33.

<sup>203</sup> Amy Rothschild, *Victims versus Veterans: Agency, Resistance and Legacies of Timor- Leste's Truth Commission*, *International Journal of Transitional Justice* 11(3) (2017), 443– 462.

<sup>204</sup> *Popović and Others v. Serbia*, Applications nos. 26944/13 and others, 30 June 2020, paras.75-78.



## **Collaborators and members of separatist forces**

75. There may be political motivations to screen claimants in occupied or formerly occupied territories to exclude those who collaborated with Russian forces or members of separatist forces who suffered gross violations of human rights.<sup>205</sup>

76. Under the law in Iraq, members of non-state armed groups are excluded where they have convictions until 'proven innocent'.<sup>206</sup> In Northern Ireland only those who injured themselves with their own hands and have convictions are excluded, but those who are injured by others and have convictions need to be assessed by a separate panel from civilians to avoid moral equivalence.<sup>207</sup> This reflects private law principles of 'clean hands' that one should not be able to claim loss from their own wrongdoing.<sup>208</sup>

77. Some administrative reparations schemes expressly exclude certain categories of victims, for example, members of rebel or insurgent groups who suffer violations at the hands of state forces. In the Colombia context such individuals are excluded, but their family members and child soldiers who leave before the age of 18 can be eligible as direct victims for rights violations against themselves, not as indirect victims for violence against such groups.<sup>209</sup> While those persons would presumably not be blocked from pursuing individual judicial remedies (because they cannot participate in administrative claims procedures), it may nonetheless be helpful to emphasise the non-exclusive nature of any administrative reparations scheme for the sake of these victims. This is particularly so if the reparations mechanism is or purports to be comprehensive and/or complete for violations suffered during a particular situation of conflict or mass violations. In situations of armed conflict, States still have an obligation to ensure an effective remedy and reparations for gross violations of human rights

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<sup>205</sup> While there may be political pressure to retain Russian prisoners of war after the end of hostilities to facilitate Ukrainian

<sup>206</sup> Article 17, Compensation for those Affected by Military Operations, Military Mistakes and Terrorist Actions, Law No 20. 2009.

<sup>207</sup> Regulation 6, Victims' Payment Regulations 2020.

<sup>208</sup> *Volenti non fit injuria, ex turpi causa non oritur actio*. See *Aidan McKeever v Ministry of Defence* [2011] NIQB 87; and Luke Moffett, A pension for injured victims of the Troubles: reparations or reifying victim hierarchy?, *Northern Ireland Legal Quarterly* 66(4) (2016) 297–319.

<sup>209</sup> Article 3(2), Law 1448/2011.

and serious breaches of international humanitarian law outside the rules of international humanitarian law against members of separatist forces or targeting collaborators,<sup>210</sup> their association does not change this, but may justify a separate category or assessment of their applications to reflect their responsibility in victimising others.<sup>211</sup>

## Evidential Issues

78. In the aftermath of mass violence or conflict undue burden should not be placed on victims in claiming a remedy, given that many are likely to be displaced, and personal identification or other evidence lost or destroyed. Often the evidential burden of proof is at a maximum level of a balance of probabilities.<sup>212</sup> In other contexts this has included evidential presumptions that victims' claims for certain reparations would be accepted on the grounds of 'good faith' subject to verification by the state administrative body.<sup>213</sup> Some reparation programmes, such as that in Peru, have accepted the victim's testimony as sufficient.<sup>214</sup> Other programmes have accepted simple or *prima facie* proof for small claims<sup>215</sup> or 'plausibility' provided a link to a family member who was killed can be shown.<sup>216</sup> The European and Inter-American Courts of Human Rights have consistently held that in cases of gross violations of human rights, such as extra-judicial killings and serious injury, moral damage is reasonably assumed, often requiring victims only to register and prove their identification. The Inter-American Court of Human Rights in dealing with reparation claims after conflict has taken a relaxed burden of proof, finding that such claims are 'not subject to the same formalities as

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<sup>210</sup> See Luke Moffett, Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice* 10(1) (2016), 146–167.

<sup>211</sup> The Northern Ireland Victims' Payment Board allows former members of paramilitary groups and State forces to apply but with the former they are reviewed by a separate panel that weighs up their past convictions, perpetration, contribution to the peace process and harm/disability in determining their compensation award.

<sup>212</sup> Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-3129-AnxA, para.22.

<sup>213</sup> In Colombia see Artículo 5, Ley de 1448/2011.

<sup>214</sup> A/HRC/42/45, para.57.

<sup>215</sup> Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category 'B' Claims), S/AC.26/1994/1 26 May 1994, at 34–35. Article 35(2)(b), UNCC Rules.

<sup>216</sup> Article 22, Rules of Procedure for The Claims Resolution Process Adopted on October 15, 1997 by the Board of Trustees of the Independent Claims Resolution Foundation.

domestic judicial actions’ and the court pays ‘special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties.’<sup>217</sup> As such for gross violation of human rights, such as the killing of a child, harm is often accepted as presumed.<sup>218</sup>

79. In terms of proof, a reverse burden can be imposed on those responsible for internationally wrongful acts. In the *DRC v Uganda* judgment on reparations the ICJ distinguished between the situations where violations occurred in territory that Uganda occupied and those outside it in terms of proof and the requisite causal nexus. For an occupying power, they have a ‘duty of vigilance preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.’<sup>219</sup> For Uganda this meant that it had 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’.<sup>220</sup> For those outside of occupied territory, the burden of proof rests with the injured State.

80. In other programmes there is a presumption of harm where an individual can show a causal nexus between their harm and the area which was affected by such violations, such as Nazi occupation and forced labour.<sup>221</sup> Many individuals may never have had personal identification documents, have insufficient medical records, or be unable to provide other evidence to support their claims for reparations. To require victims to supply such evidence may exclude most victims, in particular impoverished and rural victims who cannot afford to travel to the capital to have new documents issued. Under international law a government

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<sup>217</sup> *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs. Judgment 25 November 2006, Series C No.160 (IACtHR), para.184. See also *Prosecutor v Lubanga*, Judgement on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, ICC-01/04-01/06, 3 March 2015, para.80; and *Prosecutor v Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07, 24 March 2017, paras.60-61.

<sup>218</sup> Inter-American Court, *Aloeboetoe et al. v Suriname (Reparations and Costs)*, 10 September 1993, para.76.

<sup>219</sup> Article 43, 1907 Hague Regulation IV.

<sup>220</sup> 2022 reparations judgement, paras.78, 118-119.

<sup>221</sup> German Forced Labour Compensation Programme, Article 11 (2) of the Law on the Creation of a German Foundation “Remembrance, Responsibility and Future”.

has a responsibility to provide displaced individuals with new documentation,<sup>222</sup> and this is reflected in Ukrainian law.<sup>223</sup>

81. In other contexts identification by two credible witnesses' statements were deemed necessary to support victims' claims on harm and identification.<sup>224</sup> In Morocco and Peru victims' testimonies were accepted as sufficient, taking into account that many had lost their documentation.<sup>225</sup> In Guatemala a victim's statement is corroborated against records available to the reparation body (PNR) including the truth commission report and other sources on the conflict, then other documents such as church registers provided by the victim. In cases of victims of sexual violence their statement can be corroborated through a sworn affidavit before a public notary.<sup>226</sup>

82. Most claims commissions have used a relaxed burden of proof, with the parties cooperating in gathering evidence to reduce the evidential burden on the claimant. The UN Claims Commission for the Iraqi invasion of Kuwait took a flexible approach requiring claimants to provide 'simply' documentation on the proof of the fact and the date of injury or death, i.e. *prima facie* proof.<sup>227</sup> This was justified on the grounds that the general situation of emergency and breakdown of civil order resulted in a scarcity of evidence meaning many victims would be unable to provide sufficient evidence to support their claims. For those claiming for property damage up to \$100,000 they had to be 'supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss', i.e. on the higher evidential burden of a balance

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<sup>222</sup> Article 13(2), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 22 October 2009 .

<sup>223</sup> Article 6, 2014 On ensuring the rights and freedoms of internally displaced persons, amended up until 19 July 2022.

<sup>224</sup> Carla Ferstman and Mariana Goetz, Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings, in C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009), 313–350, p323. *Uganda Situation*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, ICC-02/04-101, 10 August 2007, para.14.

<sup>225</sup> Sandoval, A/HRC/42/45, para.57.

<sup>226</sup> Guatemala PNR, Manual para la Calificación de Beneficiarios del Programa de Resarcimiento, Articles 7-8; and see s.1705(9), Guam World War II Loyalty Recognition Act 2016.

<sup>227</sup> Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), S/AC.26/1994/1 26 May 1994, at 34-5. Article 35(2)(b), UNCC Rules.

of probabilities.<sup>228</sup> In some of the later Holocaust claims processes a relaxed standard of proof of ‘plausibility’ that claimants were entitled to the dormant bank accounts, taking into account the destruction of the Second World War and the Holocaust, as well as the long passage of time.<sup>229</sup> Where stringent evidential requirements are imposed, such as the Philippines scheme requiring collaboration through two sworn statements, it meant that out of 75,000 claimants only 11,100 were eligible for compensation.<sup>230</sup>

83. Reparation programmes often have to assess the extent of physical and psychological injuries based on paper evidence and records or in person/virtual assessment. A specialist medical commission or committee are often created within reparation programmes to help determine extent of injuries, levels of disability, and/or appropriate amount of compensation or rehabilitation.<sup>231</sup> In Zimbabwe a medical board to assess claimants is made up of two medical doctors.<sup>232</sup> In Spain the Medical Advisory Board is made up of doctors and a member of the Ministry of the Interior who is familiar with providing assistance to victims of terrorism.<sup>233</sup> In Northern Ireland, a single health care professional is required to determine if an individual claimant has suffered a ‘permanent disablement’ as a result of a Troubles-related incident, more than 14%, with differing levels of a monthly pension awarded, but most applications are assessed by a three person panel made up of a medical, legal and ordinary member.<sup>234</sup>

84. In the case of Ukraine evidence of victims’ losses and verifying evidence could make use of their own digital storage of data, such as personal photographs and geolocation data, to be uploaded alongside any application form to support their claim. A database and registry could be built around corroborating such claims with data already in Ukrainian government archives such as land titles, medical

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<sup>228</sup> Article 35(2)(c), UNCC Rules.

<sup>229</sup> Article 22, Rules of Procedure for The Claims Resolution Process Adopted on October 15, 1997 by the Board of Trustees of the Independent Claims Resolution Foundation.

<sup>230</sup> A/HRC/42/45, para.58.

<sup>231</sup> Article 10.2, Kosovo 2011; and Article 2(2), Iraq Law No. 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions, 2009.

<sup>232</sup> Section 27, War Victims Compensation Act 1980.

<sup>233</sup> Article 28(2), Act on the Recognition and Comprehensive Protection of Victims of Terrorism, Ministerio del Interior, October 2014.

<sup>234</sup> Victims’ Payments Regulations 2020.

records and personal identity documentation. Data retention, storage and protection measures need to be carefully considered to ensure confidentiality and avoid secondary victimisation.<sup>235</sup> The NI Victims Payment Regulations 2020 establish the 'need for personal data to be handled sensitively' as one of their core operating principles.<sup>236</sup>

### Application forms

85. Information relevant to be collected and processed in an application form fall under three main headings of first personal identifying information to distinguish the individual claimant, second the nature of injury and third declaration of truthfulness. Identifying information should include bank details (whether physical, virtual or mobile details) to facilitate transfer of funds if awarded.<sup>237</sup> The first type of evidence is to identify and distinguish the personal identification of the applicant. This can be achieved by normal identification documents such as a driver's licence, passport or other photographic documentation accepted for voting. In countries affected by conflict it may be difficult to provide this, and the government is responsible for promptly providing replacement identification documents or land titles.<sup>238</sup> In terms of the injury or violation the application form should include the date of incident, nature of harm suffered, and other relevant information. An application form should include a declaration signed by injured victim or person acting on their behalf. This should include a notice that intentionally providing or withholding information can be construed as fraud and the relevant provisions around consent for disclosure in line with Ukrainian laws.
86. Application forms for reparations should be accessible, written in a simple and clear manner, in local languages of victims. Well-designed application forms can 'contribute to an efficient and transparent registration process that can respond to victims' right to "access to relevant information concerning violations and

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<sup>235</sup> Section 13, Sri Lankan Office of Reparations Act of 2018; and Regulation 31, Victims' Payments Regulations 2020. See General Data Protection Regulation (EU) 2016/679.

<sup>236</sup> Regulation 4(e).

<sup>237</sup> Ruben Carranza, Cristián Correa, and Elena Naughton, *Forms of Justice A Guide to Designing Reparations Application Forms and Registration Processes for Victims of Human Rights Violations*, ICTJ (2017), p21.

<sup>238</sup> E/CN.4/Sub.2/2005/17, para.15.5.

reparation mechanisms.”<sup>239</sup> It may be helpful for victims to have a body map on the application form to indicate their disability, rather than having to articulate it.<sup>240</sup> Alternative versions of the application form should be made available in braille, audiotape and other mediums as needed for those who are audio or visually impaired. An application form should allow for it to be completed by someone on behalf of the direct victim if they are incapable or dead, such as a dependent, sufficiently close next of kin or carer.

87. An application form should include a declaration signed by injured victim or person acting on their behalf. This should include a notice that intentionally providing or withholding information can be construed as fraud and the relevant provisions around consent for disclosure. The application form should also provide a space for gender identification, as part of a wider on gender-inclusion principle and to help facilitate the collection of data to better understand the gender dimensions of the harm and reparation process’s operation.<sup>241</sup>

88. Victim participation in reparation programmes plays an integral part of shaping appropriate processes and forms that correspond to their needs and interests. Correa, Guillerot and Magarell suggest four key moments for victim participation ‘a) when the scope of violations that would give rise to reparations is defined; b) when truth commissions design recommendations for a reparations policy, in cases where reparations are preceded by truth seeking efforts; c) when recommended reparations measures must make the leap from a statement of intended policy to reality; and d) when reparations policies are implemented.’<sup>242</sup> At each stage victims can play a significant role in shaping the course of reparations. Victim associations can make a vital contribution to reparation awareness and development, having self-educated and organised themselves to articulate their own vision of reparations. Victims do not speak with one voice,

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<sup>239</sup> Ruben Carranza, Cristián Correa, and Elena Naughton, *Forms of Justice A Guide to Designing Reparations Application Forms and Registration Processes for Victims of Human Rights Violations*, ICTJ 2017, p10, citing UN General Assembly, *Basic Principles on Reparation*, paragraph VII. 11(c).

<sup>240</sup> See ICTJ *ibid.* p30-31.

<sup>241</sup> ICTJ 2017 p19.

<sup>242</sup> *Reparations and Victim Participation: Experiences with the Design and Implementation of Domestic Reparations Programmes* Cristián Correa, Julie Guillerot and Lisa Magarrell, in Ferstman and Goetz (2020), 240-270, p253.

and can compete with each other, so efforts need to be taken to ensure equitable access to participate for all victims. The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I) enabled the representatives of the largest group of potential claimants to take part in the planning and implementation of CRT-I. The Memorandum of Understanding between the World Jewish Restitution Organisation, the World Jewish Congress and the Swiss Bankers Association resulted in the formation of an Independent Committee of Eminent Persons that included officials of these organisations. As the same procedures governed all claimants equally, the participation in the planning process of a representative of the largest group of potential claimants effectively provided a voice for other claimants as well.<sup>243</sup>

### Nature of injuries

89. The UNCC defined 'serious personal injury' as including '(a) Dismemberment; (b) Permanent or temporary significant disfigurement, such as substantial change in one's outward appearance; (c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; (d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.' This also included 'instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained.' However, the following were excluded 'bruises, simple strains and sprains, minor burns, cuts and wounds; or other irritations not requiring a course of medical treatment.'<sup>244</sup> The UNCC also accepted that victims of sexual violence and torture, may never have had a medical record of such instances or have evidence on their body, months or years after the violation. Instead there was a presumption that such violations did occur, and independent verification was sought through

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<sup>243</sup> International Mass Claims Processes, p141.

<sup>244</sup> Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991, S/AC.26/1991/3, 23 October 1991.



organisations such as the ICRC or accessing detention reports, to accept such claims for rape and torture.<sup>245</sup>

90. Under the Irish Remembrance Scheme injury was defined as 'physical injury', with psychological trauma alone not being sufficient for this purpose, with only the 'psychological effects' being included where it was 'consequent to the suffering of a physical injury'.<sup>246</sup> Some countries require that injured amounts to a certain level of seriousness, such as more than 50%<sup>247</sup> or a lower level,<sup>248</sup> other countries have a scaled rate of compensation above a certain threshold.<sup>249</sup>

91. In terms of splitting amounts of compensation amongst family members who have lost a loved one during the conflict, there are different practices to ensure an equitable outcome. In Spain payment awards are split half between spouse/cohabiting partner and half to any children.<sup>250</sup> Under the NS Compensation scheme, children where the direct victim and their spouse/partner has died have an equal share, the compensation paid out in full to the child that submits the application first.<sup>251</sup> In Chile reparations were allocated according to a standard formula whereby the pension for a person disappeared or killed was apportioned as 40% for a surviving spouse, 30% for a mother or father in the absence of a surviving spouse, 15% for the mother or father of victim's biological

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<sup>245</sup> Rajesh Singh, Raising the Stakes: Evidentiary Issues in Individual Claims before the United Nations Compensation Commission, in *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, Permanent Court of Arbitration, OUP (2006), 61-93, p72.

<sup>246</sup> Amended Scheme of Acknowledgement, Remembrance and Assistance for victims in this Jurisdiction of the Conflict in Northern Ireland. Available at [www.justice.ie/en/JELR/RemAmendScheme.pdf/Files/RemAmendScheme.pdf](http://www.justice.ie/en/JELR/RemAmendScheme.pdf/Files/RemAmendScheme.pdf)

<sup>247</sup> Article 2, Serbian Law on Civilian Invalids of War 1996.

<sup>248</sup> With over 40% - 2011 Kosovo Law No. 04/L-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosova Liberation Army, Civilian Victims of War and their Families. Spain requires only 26% disability under its Victims of Terrorism Solidarity Act (32/1999) and Law for the integral protection and recognition of victims of terrorism (29/2011). In Croatia those under 20% are excluded and those over 60% are treated as civilian war disabled with specific benefits - Article 8, Law on the Protection of Military and Civilian Disabled Persons of War OG 33/92, 57/92, 77/92, 27/93, 58/93, 02/94, 76/94, 108/95, 108/96, 82/01, 103/03, 148/13, 98/19.

<sup>249</sup> Section 32, Federal Act on Compensation for Victims of National Socialist Persecution (Federal Compensation Act - BEG), 1953; Article 56, Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (Official Gazette the Federation of Bosnia and Herzegovina", no. 36/99); and Regulation 5(1)(b), Victims' Payments Regulations 2020.

<sup>250</sup> Article 17(3), Act on the Recognition and Comprehensive Protection of Victims of Terrorism, Ministerio del Interior, October 2014.

<sup>251</sup> Article 5(2), Payment scheme Foundation for Individual Compensation for Victims of WWII Transport by NS, 1 August 2019.

children and 15% for each child of a victim.<sup>252</sup> Apportionment of reparations does not have to follow domestic inheritance law. The Moroccan Equity and Reconciliation Commission (IER) departed from sharia-based inheritance law to give a larger percentage to widows (40% rather than 12.5%) instead of the eldest son. In Peru the Comisión de la Verdad y Reconciliación (CVR) prioritised compensation to the spouse or widow, over children and parents. This amount was to be split with the spouse or cohabitee partner to obtain not less than 2/5, with 2/5 for children (to be equally divided), and not less than 1/5 for the parents (equally divided).<sup>253</sup> Under the German Forced Labour Compensation Programme the highest priority is given to surviving spouses and children of a claimant, where no spouse or child survived, the award could be awarded in equal shares to grandchildren, or none of them are living, then siblings.<sup>254</sup>

92. Children born as a result of rape are often forgotten or excluded in reparation programmes, such as in Kosovo, whereas in other contexts they have been recognised as 'autonomous' victims in their own right.<sup>255</sup> Other schemes have limited the ability of family members to claim from psychiatric or psychological harm based on their proximity or closeness to the direct victim, such as witnessing an attack or bombing where a family member was killed or seriously injured.<sup>256</sup> Some reparation programmes allow a family member or carer to be designated as the beneficiary after the death of the direct victim.<sup>257</sup> In Croatia family members

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<sup>252</sup> Article 20, Law 19.123, Establishes the National Corporation for Reparation and Reconciliation and Grants other Benefits to Persons as Indicated, Official Gazette No. 34 (188), 8, February 1992.

<sup>253</sup> Comisión de la Verdad y Reconciliación (CVR), 27 August 2003, p190-191, available at: <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2.%20PIR.pdf>

<sup>254</sup> Section 13(1), The Law on the Creation of a Foundation "Remembrance, Responsibility and Future" 2 August 2000.

<sup>255</sup> Clara Sandoval, Domestic Reparation Programmes, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non- recurrence, A/HRC/42/45, 11 July 2019, paras.114-115; and Julie Guillerot, The gender perspective in transitional justice processes, UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/75/174, 17 July 2020, para.29(c). In Colombia children born as a result of rape are recognised as direct victims (Article 181, Law 1448/2011) whereas they are seen as indirect victims (Article 6(c), Law 28592).

<sup>256</sup> Under the NI Victims' Regulations 2020, regulation 7(1) - indirect victims to be eligible have to be present at the incident or in the 'immediate aftermath' or 'responding, in the course of employment, to a Troubles-related incident, in which the person reasonably believed a loved one had died or suffered significant injury'.

<sup>257</sup> Spouse, civil or cohabiting partner or someone 'regularly and substantially engaged in caring for the beneficiary' are entitled to 10 years payment of a pension, under regulation 9(3), NI Victims' Regulations 2020. Other countries allow carers to be eligible for social protection payments or other allowances after the death of the direct victim – see Article 62, Bosnian Law; and Article 14(6), Kosovo Law 2011.

who are responsible for looking after those who are 100% disabled are entitled to a family care and assistance pension.<sup>258</sup>

### Environmental harm

93. Ukraine may also be able to seek environmental harm caused by the Russia invasion and occupation. Under international law a State is 'obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.'<sup>259</sup> The UNCC awarded over \$4.3 billion in claims which included projects aimed at remediation of groundwater sources, recovery and disposal of unexploded ordinance, and addressing damage to marine and coastal environments.<sup>260</sup> The ICJ has recognised that environmental damage is both compensatable and may require 'active restoration measures' to restore the environment.<sup>261</sup>

### **Funding**

94. A critical part of effective reparations programmes is sufficient and sustainable funding through a dedicated finance stream.<sup>262</sup> International claims commissions often stipulate in their founding legal basis how they will be funded, whether through levies imposed on exports of responsible actor, assets, fund,<sup>263</sup> or agreement between the parties.<sup>264</sup> Trust funds with voluntary contributions have often been established to support reparations to war victims, but they consistently fail to mobilise sufficient resources to adequately remedy victims' harm. For

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<sup>258</sup> This is around €876 annually just over 10% of the annual average wage, but is complemented with other benefits. Article 17, Law on the Protection of Military and Civilian Disabled Persons of War OG 33/92, 57/92, 77/92, 27/93, 58/93, 02/94, 76/94, 108/95, 108/96, 82/01, 103/03, 148/13, 98/19.

<sup>259</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp55-56, para.101; cited in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment 15 December 2015, para.104.

<sup>260</sup> See Post-Conflict Environmental Restoration: The UNCC Follow-Up Programme for Environmental Awards, UNCC, (2013).

<sup>261</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, 2 February 2018, Reparations Judgment, paras.41-43.

<sup>262</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 8 October 2014, para.56

<sup>263</sup> The German Forced Labour Compensation fund

<sup>264</sup> The EECC and the Iran-US Claims Tribunal both establish that the parties will equally bear the expenses of the claims body – Article 4(17), Algiers Agreement; and Algiers Accord, Point II.

instance in Sierra Leone the United Nations Peacebuilding Fund (UNPF) provided some \$4.5 million to the National Commission for Social Action to deliver interim reparations to some 32,000 war widows, victims of sexual violence, orphans and amputees. This was supported by \$246,000 by the Sierra Leone government, and nearly \$4 million in contributions from other UN agencies making a total of \$8.5 million, short of the estimated \$20 million to make the reparations scheme fully operational.<sup>265</sup> The UNPF justified this support on the basis of securing the long-term peace in Sierra Leone that mapped on to its objectives of ‘peace consolidation, stabilization and national reconciliation’.<sup>266</sup> A domestic War Victims Trust Fund was established in November 2009, but only received \$50,000 from contributors.<sup>267</sup>

95. Donors have been more willing to provide funds to support capacity building of reparation programmes. In Colombia the World Bank has provided \$4.7 million to strengthen the capacity of the Victims Unit to implement collective reparations.<sup>268</sup> Similarly in Sierra Leone the International Organisation for Migration (IOM) provided oversight and capacity building for victim outreach, registration and reparation design for the Reparations Directorate in the National Commission for Social Action.<sup>269</sup>

96. The ICJ in the *DRC v Uganda* case, while sticking to the principle of ‘full reparations’ for internationally wrongful acts, only awarded ‘global’ sums for harm caused due to the lack of specific evidence. As the Court itself said, ‘compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations. ... where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the

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<sup>265</sup> Eva Ottendörfer, *The Fortunate Ones and the Ones Still Waiting: Reparations for War Victims in Sierra Leone*, Peace Research Institute Frankfurt, 2014, p15-16.

<sup>266</sup> Investing in peace: 2012 Annual Report, United Nations Peacebuilding Fund, p53.

<sup>267</sup> National Commission for Social Action, *Sierra Leone Reparations Programme Newsletter*, October 2016, p8.

<sup>268</sup> International Bank for Reconstruction and Development Project: *Collective Reparation for Victims Through Social Reconstruction*, Integrated Safeguards Data Sheet: Appraisal Stage, Report No. 94041, 29 January 2015.

<sup>269</sup> Support to the Implementation of the Sierra Leone Reparations Programme (SLRP), IOM (2016).

extent or scale of such injury'.<sup>270</sup> The ICJ also took into consideration the ability of the responsible state's financial capacity to make such compensation, so as to avoid compromising its own people's basic needs.<sup>271</sup>

97. There are proposals for a 'Marshall Plan' for Ukraine,<sup>272</sup> any external funding of such assistance and development should also aim to support reparation programmes. Donors are often reluctant to engage on reparations, given their own rules around development aid and the legal implications of reparations for wrongdoing. Reparations often take years or decades to be established, they are not a 'one-off' time bound event, making the average 2-3 year funding of local programmes and activities insufficient to substantially improve victims' situation.

98. Donors can constructively support reparation programmes indirectly through providing funding to Ukrainian victim and civil society organisations to articulate their own agenda and policy on reparations, plan funding to be allocated on a staged basis that enables victim and civil society organisations to plan long term reparation mobilisation, advocacy and monitoring. Donors can also help CSOs to strengthen reparations programmes on the ground, plug funding gaps in supporting the delivery of reparations, such as economic support for returning displaced persons.<sup>273</sup>

### *Assets and sanctions*

99. In the European Union there is a new directive being proposed for assets freezing and seizure involving criminal activities, with the war in Ukraine in mind.<sup>274</sup> While victims' right to compensation is still protected to claim against such assets, it requires there to be a criminal offence, with some suggestions that the crime of aggression and other international crimes would fit this. This raises to what extent

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<sup>270</sup> *DRC v Uganda*, para.106.

<sup>271</sup> *DRC v Uganda*, paras.110 and 407, citing ECCC, Final Award, Eritrea's Damages Claims, Decision of 17 August 2009, RIAA, Vol. XXVI, pp. 522-524, paras. 19-22).

<sup>272</sup> Reparations for Ukraine: An international route map, Ceasefire Centre for Civilian Rights (2022), p20-21.

<sup>273</sup> See Handbook on Civil Society Organisations and Donors Engagement on Reparations, RRV (2022).

<sup>274</sup> Article 18, proposed Directive on Asset Recovery and Confiscation, COM(2022) 245, 2022/0167(COD), 25 May 2022.

frozen assets can be sufficiently connected to violations. Even where they are connected those with property interests in them would still be entitled to appeal any presumption or decision that such assets could be confiscated. The European Court of Human Rights has held that such asset seizure and confiscation does not necessarily violate a person or organisation's right to property where it is done so in a manner which is proportionate and allows the affected party to seek a remedy to protect their property rights<sup>275</sup> – this can include the use of a reverse burden of proof on a party to evidence that such an asset is not from a proceed of crime. Such an assessment is guided by proportionality, the severity of the sanction must correspond to the gravity of the offence it intends to punish.<sup>276</sup>

100. In domestic jurisdictions there remains a patchwork of sanctioning and asset recovery powers, the absence of unilateral UN ordered sanctions has meant that the legal effective of national laws rub up against other regional and international law, in particular around the right to property and sovereign immunity for state assets. However, such immunity is not absolute.<sup>277</sup> In the UK a number of Oligarchs have had their assets frozen, including Roman Abramovich, former owners of Chelsea Football Club, has had £2.5 billion set aside in a frozen bank account for the benefit for victims of the war in Ukraine. In Canada any identified assets can be subject to a forfeiture order, which is transferred to a seized property management account that make payments out for the purposes of:

- (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.<sup>278</sup>

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<sup>275</sup> States have a wide margin of appreciation to balance the general interest to confiscate assets against a person's right to property, see Koch, T., Somers-Joce, C. and Rowland, E. (2022) Enacting ECHR compliant measures to confiscate property: imposing sanctions on Russian oligarchs for the invasion of Ukraine. Available at: <https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/enacting-echr-compliant-measures-confiscate>

<sup>276</sup> *Imeri v Croatia*, Application no. 77668/14, Judgment 24 June 2021, para.71.

<sup>277</sup> Katherine Reece Thomas, Enforcing against state assets: The case for restricting private creditor enforcement and how judges in England have used "context" when applying the "commercial purposes" test, *Journal of International and Comparative Law*, 2(1) (2015).

<sup>278</sup> Section 5.6 C-19, An Act to implement certain provisions of the budget 2022.

101. In the United States there are some efforts to seek to use frozen Russian assets,<sup>279</sup> under the current law it does not fall into the permissible exceptions of assets of a foreign enemy or sponsor of terror.<sup>280</sup>

102. In all these countries there remains a diversity of practice in seizing, freezing and confiscating such assets. Any sort of transfer of such assets to be used as reparations for the Ukrainian war will have to traverse a complex legal thicket of domestic and international claims. In political and economic terms, Western nations who have mostly frozen such assets, may also face reprisals with their own nationals and corporations' assets seized by Russia and its allies. In the best legal circumstances, a peace agreement at the end of hostilities would allow such assets to be set aside for reparations in Ukraine. However it is likely that instead there may be this patchwork practice of asset seizure, where it is confiscated is at the discretion of the seizing nation the extent they designate it for humanitarian or military assistance, with little efforts currently to put reparations on the agenda in practice.

## Conclusion

103. At the present time when fighting remains ongoing, it remains difficult to see reparations being delivered in the near future. The options outlined each have their benefits and drawbacks. A UN Security Council mandated body would be

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<sup>279</sup> RUSSIA Act - Reparations for Ukraine through Sovereign nation Support and Integration Act, US HR7724, using the International Emergency Economic Powers Act with seek an agreement between US and other nations that have frozen the assets of the Russian Central Bank to be consolidated and distributed for the 'reconstruction of Ukraine upon cessation of hostilities'. There are a range of other bills, such as the 'Make Russia Pay Act', which proposes to transfer Russian assets to a 'Ukrainian Humanitarian Aid Fund' with the US Secretary of the Trust to determine its use (H.R.7083). 'Yachts for Ukraine Act' similar proposes seizing Russian oligarchs yachts to be liquidated for the provision of humanitarian assistance to Ukraine (H.R. 7187). The bill 'Asset Seizure for Ukraine Reconstruction Act' targets certain Russian persons subjected to US sanctions with their property to be for the benefit of the Ukrainian people or other purposes, which includes supplying weapons, post-conflict reconstruction to counter Russian misinformation and to support and resettle refugees (S. 3838, S.3936, see also H.R.6930). 'Oligarch Assets for Ukrainian Victory Act of 2022' stipulates that forfeited property is to be used to remedy the harm caused by Russian aggression to Ukraine to be transferred to the US Secretary of State (H.R.8156). Most of these bills are quite rhetorical, without much thought for process or respecting the agency of Ukrainians in such decision making, it remains to be seen if any will become law.

<sup>280</sup> See Andrew Boyle, Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable, JustSecurity 18 April 2022 available at <https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/>

the most authoritative and with unilateral sanctions enable a substantial amount of funds to be used for victims. A substantial amount of political will and funding will be required to support a domestic reparation programme in Ukraine, which would allow a range of benefits for victims and allow better local access. A mixed arbitration body would help to independently assess claims on both sides, but may result in non-compliance of any awards decided. A hybrid body that brings together international support with domestic delivery of reparations offers something new and overcomes some of the challenges (funding) of a domestic reparation programme, but issues would remain over transferring frozen assets to a UN fund. Ultimately there is a strong international legal basis for reparations to be made for the war in Ukraine and Russia's international responsibility for waging an aggressive war. How best to achieve this depends on the parties involved and the extent of the international community's support to Ukraine and victims of the war.