Reparation for Injuries in Consequence of Aggression: A Multilateral Action Model for Ukraine

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I. INTRODUCTION

One of the basic tenets of modern international law is that, when conduct attributable to a state constitutes a breach of an international obligation of the state, the state shall make reparation for the injuries that are the consequence of that conduct.[1] Since 2014, the Russian Federation, without articulating any plausible legal basis to do so,[2] has made war against Ukraine.[3] Russia vastly extended the geographic scope of its war-making in 2022[4] with the stated object of destroying Ukraine and absorbing its territory and people.[5] The U.N. General Assembly has identified this as a war of aggression,[6] a fundamental illegality.[7]

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[1] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, 34, 91, A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter "ARSIWA"].

[2] *See* THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 15–35, 43–61 (2015) (detailing Russia's armed aggression in 2014).

[3] Notwithstanding the Minsk Agreements of Sept. 5, 2014 and Feb. 12, 2015, purporting to have established a ceasefire between Ukraine and the proxy groups of Russia in Ukraine's Donbas region, fighting in the region continued until Russia's all-out invasion of Ukraine in February 2022, having taken some 14,000 lives over those eight years. Protocol on the Results of Consultations of the Trilateral Contact Group, Sep. 5, 2014, ORG. FOR SEC. AND COOPERATION IN EUR., https://www.osce.org/home/123257; Kompleks Mer Po Vipolnayniya Minsky Soglasheyniya [Package of Measures for the Implementation of the Minsk Agreements], Feb. 12, 2015, ORG. FOR SEC. AND COOPERATION IN EUR., https://www.osce.org/ru/cio/140221; s*ee also Conflict in Ukraine's Donbas: A Visual Explainer*, INT'L CRISIS GRP., https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer.

[4] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, Order of the Court, 5, ¶¶ 17, 18, 81 (I.C.J. Mar. 16, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf.

[5] The former President of Russia Dmitry Medvedev, who currently serves as Chairman of the Russian Federation Security Council, has articulated war aims to include the complete elimination of Ukraine. *See, e.g.,* Igor Berezhanskiy, *"And Who Said That Ukraine Would Exist on the World Map?": Medvedev Exploded with a Statement About Genocide*, TCH (June 15, 2022, 12:43 PM), https://tsn.ua/en/ato/and-who-said-that-ukraine-would-exist-on-the-world-map-medvedev-exploded-with-a-statement-about-genocide-2087197.html. Short of *complete* elimination, Russia already has declared the forcible annexation of large parts of the country, for which the UN General Assembly has condemned it. *See* G.A. Res. ES-11/4 (Oct. 12, 2022). The totality of Russia's war aims are occluded from time to time by palliative statements by individual Russian leaders. For example, the President of Russia in October 2022 denied that Russia plans to "destroy" Ukraine. *Putin Tells Reporters Russia Has No Plan to "Destroy" Ukraine,* THE MOSCOW TIMES (Oct. 14, 2022), https://www.themoscowtimes.com/2022/10/14/putin-tells-reporters-russia-has-no-plan-to-destroy-ukraine-a79096. Russia's other statements and its conduct on the ground, however, are unequivocal.

[6] G.A. Res. ES-11/1, ¶ 2 (Mar. 2, 2022).

[7] *See* ARSIWA, *supra* note 1, art. 26 cmt. (5) ("Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."); *see also id.* art. 40 cmt. (4); art. 41, cmt. (14). Among other steps marking the seriousness of Russia's violations of international law, in the first weeks of the expanded armed aggression the Council of Europe expelled Russia from its membership, the first occasion on which the Council had expelled a member. Comm. of Ministers, *Res.CM/Res (2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe*, 1428th Ministers' Deputies Meeting (Mar. 16, 2022), https://rm.coe.int/0900001680a5da51. The General Assembly suspended Russia from the UN Human Rights Council in April 2022 and has since considered further steps to remove Russia from other U.N. organs. G.A. Res. ES-11/3 ¶ 2 (Apr. 7, 2022); *see also* EUR. PARL. ASS., *Further Escalation in the Russian Federation's Aggression Against Ukraine*, COUNCIL OF EUR. (Oct. 13, 2022), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=31390; *see also*, Draft H. Res. 1517, 117th Cong. 2d Sess. (Dec. 13, 2022).

The means and methods by which Russia has made war against Ukraine, even if considered without regard to the illegality of the war itself,[8] have shocked the world's conscience.[9] Russia, by its conduct in Ukraine, has shown a wholesale disregard of obligations that bind Russia as a matter of international law.[10] As a direct consequence, Ukraine and its people have suffered grievous injuries.[11] A search has begun for mechanisms to ensure that the Russian Federation makes reparation for these injuries.

In aid and furtherance of the search for mechanisms to hold Russia to account, the New Lines Institute, a nonpartisan think tank in Washington, D.C.,[12] in summer 2022 convened a Reparations Study Group. The Group worked under the direction of its Chair, Dr. Azeem Ibrahim OBE;[13] and included ten independent experts from various fields; a Principal Adviser, Dr. Alan

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[8] *See* INT'L COMM. OF THE Red Cross, *What are Jus Ad Bellum and Jus In Bello?*, (Jan. 22, 2015), https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 (showing the distinction between jus as bellum, the "conditions under which States may resort to war," and jus in bello, the rules regulating "the conduct of parties engaged" in war).

[9] *See*, *e.g.*, G.A.Res. ES-11/2, Humanitarian Consequences of the Aggression Against Ukraine, (Mar. 24, 2022). The Independent International Commission of Inquiry on Ukraine, established by the UN Human Rights Council under its resolution 49/1 of March 4, 2022, in its first report, distributed on October 18, 2022, documented atrocities by the Russian Federation on a massive scale in the Ukrainian regions of Kyiv, Chernihiv, Kharkiv, and Sumy. *See* Indep. Int'l Comm'n of Inquiry on Ukr., Rep. submitted in accordance with paragraph 11(f) of Human Rights Council Resolution 49/1, U.N. Doc. A/77/533 (October 18, 2022), https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf.

[10] The conventional (i.e., treaty) and general obligations that Russia has breached by prosecuting a war of aggression against Ukraine, and by the means and methods that Russia has prosecuted the war, are too many to number for present purposes. As to the invasion as such (taken in isolation from Russia's gross and systematic violations of international humanitarian law in the course of the invasion), the following may be mentioned: U.N. Charter art. 2, ¶ 4; and the many treaties and other commitments that Russia has made since the end of the USSR in December 1991 accepting the borders of Ukraine as settled and final and pledging to guarantee the territorial integrity and international security of Ukraine, for discussion of selected examples, *see* GRANT, *supra* note 2, at 104–16.

[11] On March 16, 2022—that is to say, three weeks after Russia escalated its aggression against Ukraine to the scale of an all-out invasion—the U.N. Development Programme established that the damage to Ukraine's physical infrastructure alone would cost $100 billion to repair. *Ukraine War: $100 Billion in Infrastructure Damage, and Counting,* UN NEWS (Mar. 16, 2022), https://news.un.org/en/story/2022/03/1114022. The U.N. Office of the High Commissioner for Human Rights estimates that from Feb. 24 to Oct. 3, 2022, Russia's war against Ukraine had killed 6,114 civilians and injured 9,132, though the OHCHR "believes that the actual figures are considerably higher". Office of the High Commissioner for Human Rights, *Ukraine: civilian casualty update 3 October 2022* (Oct. 3, 2022), https://www.ohchr.org/en/news/2022/10/ukraine-civilian-casualty-update-3-october-2022. In that connection, OHCHR notes that deaths in cities that Russia destroyed, in particular Mariupol, where OHCHR has not had access, likely are in very large numbers: *Id.* As to the destruction of Mariupol, s*ee* U.N. High Commissioner for Human Rights, Statement at the 50th Session of the Human Rights Council (June 16, 2022), https://www.ohchr.org/en/statements/2022/06/high-commissioner-updates-human-rights-council-mariupol-ukraine.

[12] NEW LINES INST.*,* https://newlinesinstitute.org/about/ (last visited Jan. 16, 2024).

[13] Director of Special Initiatives, New Lines Institute. Adjunct Research Professor, Strategic Studies Institute, U.S. Army War College. New Lines Institute, https://newlinesinstitute.org/people/azeem-ibrahim/ (last visited Jan. 16, 2024).

Riley;[14] and a Lead Counsel (author of the present Article). The Study Group's independent experts were the Honorable Irwin Cotler,[15] Ambassador Kelly Currie,[16] Yonah Diamond,[17] Brooks Newmark,[18] Prof. John Packer,[19] Ambassador Allan Rock,[20] Erin Farrell Rosenberg,[21] Ambassador David Scheffer,[22] Olena Sotnyk,[23] and Robert Tyler.[24] In its work, the Group considered a range of possible mechanisms that states and intergovernmental organizations might adopt to ensure that Russia makes reparation for the injuries that its aggression against Ukraine has caused.[25]

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[14] Non-resident Senior Fellow, Atlantic Council Global Energy Center; Advisory Committee Member (Judicial Panel), Energy Community, Vienna. https://www.atlanticcouncil.org/expert/alan-riley/ (last visited Jan. 16, 2024).

[15] International Chair of the Raoul Wallenberg Centre for Human Rights; Emeritus Professor of Law, McGill University; former Minister of Justice and Attorney General of Canada. Raoul Wallenberg Centre for Human Rights, https://www.raoulwallenbergcentre.org/en/leadership/irwin-cotler (last visited Jan. 16, 2024).

[16] Former U.S. Ambassador-at-Large for Global Women's Issues and U.S. Representative to the UN Economic and Social Council; Adjunct Senior Fellow, Center for New American Security, Senior Non-Resident Fellow, New Lines Institute. U.S. STATE DEPARTMENT, https://2017-2021.state.gov/biographies/kelley-e-currie/ (last visited Jan. 16, 2024).

[17] RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, https://www.raoulwallenbergcentre.org/en/leadership/staff (last visited Jan. 16, 2024).

[18] Former Minister for Civil Society (United Kingdom); former Government Whip and Lord Commissioner, UK Treasury; businessman, philanthropist, and social reform campaigner, https://www.gov.uk/government/people/brooks-newmark (last visited Jan. 16, 2024).

[19] Neuberger-Jesin Professor of International Conflict Resolution, University of Ottawa; former Senior Legal Adviser and first Director, Office of the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe. UNIV. OF OTTAWA, https://www.uottawa.ca/faculty-law/common-law/research/research-chairs/neuberger-jesin-professor-international-conflict-resolution (last visited Jan. 16, 2024).

[20] President Emeritus and Professor of Law, University of Ottawa; former Justice Minister of Canada (1993-1997); Health Minister of Canada (1997-2002), and Ambassador of Canada to the United Nations (2004-2006). UNIV. OF CINCINNATI, https://www.uc.edu/news/articles/2022/02/erin-farrell-rosenberg-named-visiting-scholar-with-urban-morgan-institute.html (last visited Jan. 16, 2024).

[21] Visiting Scholar, Urban Morgan Institute for Human Rights, University of Cincinnati College of Law; former Senior Advisor, Center for the Prevention of Genocide at the U.S. Holocaust Memorial Museum; Member, ABA Working Group on Crimes Against Humanity.

[22] International Francqui Professor, KU Leuven (2022); first U.S. Ambassador at Large for War Crimes Issues (1997-2001); Clinical Professor Emeritus and Director Emeritus, Center for International Human Rights at Northwestern Pritzker School of Law.

[23] Adviser to the Deputy Prime Minister of Ukraine; Atlantic Council Millennium Leadership Fellow (2022); former member of the Ukrainian Parliament (*Verkhovna Rada*).

[24] Senior Policy Advisor, New Direction Foundation for European Reform (Brussels); former Policy Adviser, European Parliament.

[25] The total financial cost of Ukraine's eventual reconstruction and compensation to its citizens, enterprises, and others for injuries done by Russia continues to grow. As of July 2022, Ukrainian officials estimated that the country would need $750 billion to repair physical infrastructure only. *Ukraine Needs $750 Billion For Three-Stage Recovery Plan, Leaders Tell Summit*, RADIO FREE EUR./RADIO LIBERTY (July 4, 2022), https://www.rferl.org/a/lugano-conference-ukraine-reconstruction/31927770.html. The U.N. General Assembly has recommended the creation of an "international register of damage" to record and calculate the financial toll of damages, losses, and injuries. G.A. Res.ES-11/5, ¶ 4 (Nov. 14, 2022).

The Reparations Study Group in October 2022 adopted a Multilateral Action Model on Reparations (MAMOR). Rather than taking a prescriptive approach that would call for a particular narrowly-defined course of action, the Reparations Study Group adopted a series of thirteen Draft Conclusions summarizing key observations of legal policy relative to Russia's aggression against Ukraine and the consequent obligation of Russia to make reparation for the injuries that have resulted from its conduct.[26] Accompanied by analytic Notes, which form part of the Reparations Study Group adopted text, the Draft Conclusions reflect the Study Group's working method, which was to designate the writer of the current introduction as Principal Author responsible for drafting and then to confer among the Group through iterations of the text over several weeks of intensive effort. The structure and format of the adopted text will be recognizable to international lawyers familiar with drafting projects such as those of the U.N. International Law Commission[27] and independent non-governmental bodies such as the International Law Association[28] and *Institut de Droit International.*[29] The Conclusions supply a framework for legal analysis that is wide enough to accommodate input from diverse political and strategic perspectives yet precise enough to assist states and multilateral organizations as they negotiate, draft, and implement a reparations instrument that will hopefully come into force. Since their adoption by the Reparations Study Group, the Draft Conclusions have been discussed, *inter alia,* at meetings at the European Parliament in Brussels and in roundtable discussion at the House of Commons in the United Kingdom.[30] Their full text has been translated into the Ukrainian language and a schematic summary into Estonian, French, Lithuanian, Czech, and German.[31]

A challenge that the Reparations Study Group had in view from the start is that modern times have witnessed no illegality quite the same as Russia's aggression against Ukraine.[32] The closest comparison is Iraq's invasion and illegal annexation of Kuwait in 1990.[33] One difference, perhaps not significant

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[26] *Report of the Commission to the General Assembly on the work of its fifty-third session*, [2001] 2 Y.B. Int'l L. Comm'n 91, art. 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) ("The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act.").

[27] *See, e.g.*, ARSIWA, *supra* note 1.

[28] *See, e.g.*, Int'l L. Ass'n, Res. No 3/2008 (Aug. 2008), https://www.ila-hq.org/en_GB/documents/conference-resolution-english-rio-de-janeiro-2008-3.

[29] *See, e.g.*, Inst. of Int'l L., Res. on Non-Appearance Before the International Court of Justice (Aug 31, 1991), https://www.idi-iil.org/app/uploads/2017/06/1991_bal_01_en.pdf.

[30] *Groundbreaking Model for Ukraine Reparations Launched in EU Parliament*, NEW LINES INST. (Oct. 25, 2022), https://newlinesinstitute.org/wp-content/uploads/Press-Release-Ukraine-Reparations-25-Oct.pdf.

[31] THOMAS GRANT, MULTILATERAL ACTION MODEL ON REPARATIONS, https://newlinesinstitute.org/rules-based-international-order/international-law/multilateral-action-model-on-reparations/.

[32] GRANT, s*upra* note 2; Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order,* 116 AM. J. INT'L L. 687, 687–97 (2022) (accepting the thesis advanced by Grant).

[33] *See* GRANT, *supra* note 2, at 183–85.

in itself as a matter of legal principle, but significant in practice, is that Iraq did not wield a veto in the U.N. Security Council; Russia does.[34] Following action under Chapter VII of the U.N. Charter expelling Iraq from Kuwait,[35] the Security Council adopted a reparations mechanism—the U.N. Compensation Commission (UNCC).[36] The UNCC received claims and adopted awards in accordance with which, over time, Iraq paid for the injuries that its war of aggression had caused.[37] The UNCC offers a useful model for how a mechanism might work to ensure that Russia pay for the injuries that *its* war of aggression has caused. The significant practical obstacle is the Permanent Member veto: Security Council action does not offer a pathway to adopt a reparations mechanism that Russia surely would oppose and would employ the veto it wields to block. The Reparations Study Group therefore considered the post-war reparations mechanism for Kuwait as a model for technical implementation of reparations[38] but looked elsewhere for strategies through which states realistically might adopt a reparations mechanism[39] notwithstanding Russia's all-but-inevitable rejection of responsibility for its aggression.[40]

Even with an outline in hand for a multilateral mechanism that does not rely on the Security Council, thorny questions would remain in respect of the rights of private individuals. Seizing assets that Russian citizens hold (at least nominally in private capacity) presents distinct challenges, in particular the constitutional and other guarantees that apply to private citizens and their assets in the main countries that host Russian private assets.[41] Those guarantees are robust in the United States, the United Kingdom, all European Union (EU) and Council of Europe Member States, the Commonwealth, and Japan, among other countries. For a reparation mechanism to work, states will have to fashion an approach that attains the practical goal—seizure and

[34] *See* U.N. Charter art. 23, ¶1, art. 27, ¶3.

[35] S.C. Res. 678, ¶ 2 (Nov. 29, 1990); S.C. Res. 687 recital 2 (Apr. 3, 1991) ("Welcoming the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government.").

[36] S.C. Res. 687, ¶18 (Apr. 3, 1991).

[37] UNCC, https://uncc.ch/home; *See generally* David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT'L L. 183, 187–89 (2002).

[38] *See* Annex, Conclusion VII, Notes (4), (5), (7), (8), 9), Conclusion VIII, Note (2), Conclusion IX and accompanying Notes (1), (2), and (3).

[39] *See* Annex, Conclusion VII, Note (10); Conclusion XIII and accompanying Notes (1)–(5).

[40] In view of Russia's serial allegations that it is *Ukraine* that is to blame for Russia's invasion and atrocities, it would be astonishing if Russia were to accept legal responsibility for the injuries that have resulted from the war. *See, e.g.*, U.N. SCOR, 77th Sess., 8974th mtg. at 12, U.N. Doc. S/PV.8974 (Feb. 23, 2022) (alleging that Ukraine had committed genocide against Russian-language speakers in Ukraine); Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Application Instituting Proceedings, 2022 I.C.J. 6, ¶ 8 (Feb. 26) (noting further examples of Russia's groundless accusations of genocide); U.N. SCOR, 77th Sess., 9166th (closed) mtg., U.N. Doc. S/PV.9166 (Oct. 26, 2022), U.N. SCOR, 77th Sess., 9033rd mtg. at 2, U.N. Doc. S/PV.9033 (May 13, 2022) (Russian biological weapons program allegations against Ukraine).

[41] *See* Annex, Conclusion V, and accompanying Notes (3)–(9). Regarding hurdles under U.S. law, *see* Paul B. Stephan, *Seizing Russian Assets,* 17(3) CAP. MKT.'S L.J. 276 (2022).

forfeiture of Russian assets for entrustment to a compensation fund[42]—and that also accords with the rule of law as understood and implemented in each country that carries out seizures and forfeitures through judicial means.[43] Thus, the Reparations Study Group calls for every state accepting the Draft Conclusions (or accepting the general legal and policy concepts outlined therein) to "adopt and implement rules for the seizure and forfeiture of Russian assets," to the extent that the rules as adopted and implemented accord with each state's "constitutional law, and its legislative, executive, and judicial procedures."[44] As will be seen, however,[45] with regard to *sovereign* assets, the immunity that Russia enjoys, as all states do, from judicial process and from enforcement of judgments,[46] presents no necessary obstacle to a state seizing those assets, not through judicial procedures, but through an act of policy on the international plane.

Whether states pursue Russian private assets, sovereign assets, or both, an international legal mechanism, to be effective, must function together with national legal mechanisms. Bringing to fruition a compensation fund and compensation commission along the lines that the Multilateral Action Model envisages[47] will require political support and careful drafting efforts at the international and domestic levels. The support continues to grow, and, as this article will relate,[48] the drafting efforts continue as well.

Since the Reparations Study Group completed its work and adopted the Multilateral Action Model in October 2022, intergovernmental organizations and individual countries have taken further steps in the direction that the Draft Conclusions envisage. At the intergovernmental level, a notable development is the U.N. General Assembly's adoption, on November 14, 2022, of resolution ES-11/5 on *Furtherance of remedy and reparation for aggression against Ukraine*.[49] Section II.A below considers General Assembly Resolution ES-11/5. The Council of Europe and the EU also have begun to consider reparations, the Council having taken the step on May 12, 2023 of establishing a register of damages in

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[42] *See* Annex, Conclusion VI.

[43] Property rights and related guarantees of due process also were considered in Moiseienko, et al., *infra* note 46, at 22–28.

[44] Annex, Conclusion V.

[45] *Infra* Parts III–IV.

[46] *See* Int'l Law Comm'n, Rep. on the Work of its Seventy-Third Session, U.N. Doc. A/77/10, (2022); *see also* Tom Grant, *Article 5*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 99-104 (Roger O'Keefe & Christian J. Tams eds., 2013); Tom Grant, *Article 6, in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY at 100-12 (2013). Sovereign immunity was considered in an earlier report on reparations, from which the Reparations Study Group took guidance. *See* ANTON MOISEIENKO, FROZEN RUSSIAN ASSETS AND THE RECONSTRUCTION OF UKRAINE: LEGAL OPTIONS 10, 15–23, 30 (2022), https://www.wrmcouncil.org/wp-content/uploads/2022/07/Frozen-Russian-Assets-Ukraine-Legal-Options-Report-WRMC-July2022.pdf.

[47] Annex, Conclusions VI, VII.

[48] *See infra* Section II.D.

[49] G.A. Res. 11/5, (Nov. 14, 2022).

line with Resolution ES-11/5. Parts II(B) and II(C) give a brief overview of recent developments in the Council of Europe and EU respectively. Canada and the United States number among countries that have taken steps, and are considering further steps, in their own legislation toward asset seizure and forfeiture. Section II.D touches on legislative developments in the United States and Canada. Part III suggests an answer to the main argument under international law *against* asset forfeiture. Part IV sets out brief conclusions.

With permission of the New Lines Institute, *Transnational Law & Contemporary Problems* republishes as an Annex to the present Article the short preface that originally accompanied the Draft Conclusions and the Draft Conclusions and analytic Notes for the Multilateral Action Model on Reparations.[50]

II. STEPS TOWARD REPARATION: DEVELOPMENTS SINCE THE DRAFT CONCLUSIONS

Several developments since October 2022 reflect a gathering consensus among governments in favor of steps such as those that the Draft Conclusions outline. General Assembly Resolution ES-11/5 of November 14, 2022 merits special consideration. This Part then turns to other developments now in train, in particular in the Council of Europe, EU, United States, and Canada.

A. General Assembly Resolution ES-11/5 of November 14, 2022

General Assembly Resolution ES-11/5 of November 14, 2022, entitled *Furtherance of remedy and reparation for aggression against Ukraine*, is the most conspicuous example at the multilateral level so far of an instrument intended to ensure that Ukraine receives from Russia full reparation for injuries that Russia's aggression has caused.

The resolution invokes in its recitals (preambular paragraphs) a number of legal provisions relevant to Russia's international legal responsibility and reparations before identifying in its operative paragraphs certain practical steps toward holding Russia effectively to account. The resolution as a whole, and its possible impact in practice, are best considered by reference to the resolution's interrelated parts. So, it falls now to consider the recitals (subpart 1) and the operative part (subpart 2); and then to recall how the General Assembly in the past has served as a focal point for major developments in international law, notwithstanding the non-binding character of most propositions that the Assembly adopts (subpart 3).

1. Recitals

The first preambular paragraphs of General Assembly Resolution ES-11/5 recall U.N. Charter Article 2, which includes the obligation to refrain in the conduct of international relations from threat or use of force against the territorial integrity or political independence of any State and to settle international disputes by peaceful means; Article 33(1), which obliges the Member States to seek resolution of their disputes by peaceful means; and

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[50] *See infra* Annex.

Article 14, under which the General Assembly may "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the . . . Charter setting forth the Purposes and Principles of the United Nations."[51] The recitals also recall three of the General Assembly's resolutions since Russia escalated its aggression in February 2022[52] and the Security Council's resolution calling the General Assembly into an Emergency Special Session in light of the Russian veto which had prevented the Council from fulfilling its primary responsibility for the maintenance of international peace and security.[53]

Before turning to the operative paragraphs, two other instruments noted in the recitals to General Assembly Resolution ES-11/5 merit remark: the Order of the International Court of Justice (ICJ) of March 16, 2022, indicating provisional measures in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*,[54] and General Assembly Resolution 60/147 of December 16, 2005, to which are annexed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

a. The ICJ's Provisional Measures Order of March 16, 2022

The ICJ, in its provisional measures Order of March 16, 2022, ordered the immediate suspension by Russia of all military operations against Ukraine, including the military operations that Russia commenced on February 24, 2022.[55] The ICJ's Order is legally binding on Russia from the date the ICJ adopted it and for as long as the proceedings in which the ICJ adopted it are continuing.[56] The *Allegations of Genocide* proceedings are continuing. Formally, the Order is addressed to both parties. This is as one would expect: in cases in which the ICJ has adopted a provisional measures order, the order typically addresses particular obligations to both parties.[57] Here, however, the court addressed the Order only in *form* to both parties. In practical effect, the court

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[51] G.A. Res. ES-11/5, Nov. 14, 2022 (Furtherance of remedy and reparation for aggression against Ukraine).

[52] G.A. Res. ES-11/1, Mar. 2, 2022 (Aggression against Ukraine); ES-11/2, Mar. 24, 2022 (Humanitarian consequences of the aggression against Ukraine); ES-11/4, Oct. 12, 2022 (Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations).

[53] *See* S.C.Res. 2623, ¶ 6 (Feb. 27, 2022).

[54] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order (Indication of Provisional Measures), 2022 I.C.J. 211 (Mar. 16).

[55] *Id.* ¶ 86.

[56] *Id.* ¶ 81.

[57] *See, e.g.*, Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.) (Cambodia v. Thai.), 2011 Order, I.C.J. 357, ¶ 69 (July 18); *but see* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Order, 2021 I.C.J. 361 (Dec. 7).

addressed the Order to Russia alone.[58] In so doing, the court resisted the Chinese judge's pressure to address the two States as if "complicated circumstances . . . gave rise to the conflict," a form of words that would have suggested the "conflict" to be something other than a blatant assault by Russia on international peace.[59]

The relevance of the Order to reparations, and thus to General Assembly Resolution ES-11/5, is indirect but important. The Order provides that Russia "shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine."[60] ARSIWA Article 30 provides that "[t]he State responsible for the internationally wrongful act is under an obligation: *(a)* to cease that act, if it is continuing."[61] Cessation of the wrongful act does not necessarily in itself discharge the obligations of a state that are consequent upon the state violating an international obligation that it owes another. Where the violation has caused injuries to another state, it will remain for the wrongdoing state to make reparation. The state also may be required to give meaningful assurances and guarantees that it will not repeat the violation, the duty of non-repetition also being reflected in ARSIWA Article 30. Though in many cases, and certainly in the case of Russia's aggression against Ukraine, more is required; cessation is a vital step where the violation is one of continuing character.[62]

The ICJ adopts a provisional measures order without prejudice to its final judgment in the case in which a party requests the order; the court does not "at this stage make definitive findings of fact" either.[63] Accordingly, the court's order to Russia to suspend military operations is not to be understood as a final disposition determining which, if any, obligations Russia has breached, much less satisfying Ukraine as an injured state in full. It is, instead, to be understood chiefly as a mechanism to protect Ukraine from further injuries that an eventual judgment of the court might be unable to repair—and, thus, as a mechanism to protect the court's function as a dispute settlement organ, there being little or no use in adjudicating a claim if one party is at liberty to cause injuries during the pendency of the claim of such scope and character that no judgment or award

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[58] This is visible in the operative part of the Order, only the third operative paragraph of which addresses "[b]oth Parties" and only with the general form of words that "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve," an obligation that follows from general international law in respect of any international dispute. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order on Provisional Measures, 2022 I.C.J. 211, ¶ 86(3) (Mar. 16).

[59] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Declaration of Judge Xue, 2022 I.C. J. 239, ¶1 (Mar. 16).

[60] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order on Provisional Measures, 2022 I.C.J. 211, ¶ 86(3) (Mar. 16).

[61] ARSIWA, *supra* note 1, art. 30.

[62] *Id.* art. 14(2) ("The breach of international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.").

[63] Rep. of the I.C.J., ¶ 67, U.N. Doc. A/77/4 (2022).

will be able to provide reparation to the injured party. Though the formal function of a provisional measures order thus is limited to the proceedings in which the court adopts it, fulfilment by Russia of the Order of March 16, 2022 would anticipate fulfilment of the wider obligations that now attach to Russia as a consequence of Russia's unlawful conduct. Ceasing the wrongful conduct is the first step. Making full reparation for the injuries caused by the wrongful conduct must eventually follow. In this way, the Order is relevant to the matter of reparations of which the General Assembly now is seised.

The ICJ's Order is also relevant because it identifies a distinct, further obligation on Russia—the obligation to fulfil the Order. Failure to fulfil the Order is a distinct breach of international law.[64] Self-evidently, Russia since March 16, 2022 has failed to fulfil the Order.

b. Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law

The other instrument noted in the recitals to General Assembly Resolution ES-11/5 that merits special remark is General Assembly Resolution 60/147 of December 16, 2005. Resolution 60/147 adopted a set of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which the Commission on Human Rights and Economic and Social Council had adopted in 2005.[65] Resolution 60/147 also recommended that "States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government."[66]

As to the Basic Principles and Guidelines that Resolution 60/147 adopted, their substance is an admixture of a number of interrelated legal concepts:

> *(1)* certain identified categories of primary obligations—i.e., the rules of international human rights law and the rules of international humanitarian law;[67]

[64] As to the binding character of provisional measures, *see* CAMERON A. MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 285–87 (Larissa van den Herik & Jean D' Aspremont eds., 2017).

[65] Commission on Human Rights Res. 2005/35 (Apr. 19, 2005); Economic and Social Council Res. 2005/30 (July 25, 2005).

[66] G.A. Res. 60/147, ¶ 2 (Dec. 16, 2005).

[67] *See generally id.* ("Section I—Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law"; "Section III—Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law.").

> *(2)* the main secondary obligation that arises from the breach of any primary obligation—i.e., the obligation to make reparation for harm that the breach has caused;[68]
>
> *(3)* certain propositions concerning remedies, aimed at increasing the availability of procedural mechanisms, which general international law otherwise does not supply;[69] and
>
> *(4)* certain propositions ancillary to the remedial process—e.g., a principle that states should supply access to relevant information concerning violations and reparations mechanisms.[70]

The Basic Principles and Guidelines have gained support in international practice, to a degree, note having been taken of them, for example, by the International Criminal Court[71] and European Court of Human Rights.[72]

The General Assembly, in the recitals to Resolution ES-11/5 of November 14, 2022, by no means gives a full account of the injuries that Russia has done to Ukraine nor of the international obligations that Russia has violated in the course of its war of aggression. One would not expect such an account at this stage in such an instrument. The recitals nevertheless refer to instruments that give a broad outline of the facts—i.e., the several previous resolutions in the Emergency Special Session—and identify the areas of law chiefly concerned—i.e., international human rights law, international humanitarian law, and the prohibition against aggression and territorial aggrandizement by force.

2. Operative Part

Having set out these preliminary points, Resolution ES-11/5 proceeds to its operative paragraphs. Its first operative paragraph reaffirms the commitment that the General Assembly earlier had expressed to Ukraine's territorial integrity within the internationally recognized borders of Ukraine and the demand that Russia cease its use of force against Ukraine and withdraw "immediately, completely and unconditionally" from all of Ukraine's territory.[73]

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[68] *Id.* ("Section IX—Reparation for harm suffered."). Section IX closely parallels ARSIWA articles 31 and 34 through 37. ARSIWA, *supra* note 1, at 91, 95–107. In particular, Section IX identifies the main forms that reparation may take, though it also elaborates to an extent upon ARSIWA's approach (for example, including "rehabilitation" as a separate category of reparation).

[69] *See id. ("*Section VII—Victims' right to remedies"; "Section VI—Treatment of victims"; "Section VIII—Access to justice.").

[70] *Id. See also* Thomas D. Grant et al., *Better Late Than Never? The Environmental Impact Assessment and its Timing and Function,* 39 WISC. INT'L L.J. 391 (2022) ("Section X. The importance of access to information in dispute settlement procedures is under-theorized but centrally important.").

[71] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3129, Order for Reparations, ¶ 13–44 (Mar. 3, 2015).

[72] *See, e.g.,* Al Nashiri v. Romania, App. No. 33234/12, ¶ 211 (May 31, 2018), https://hudoc.echr.coe.int/eng?i=001-183685. The ECtHR referred to the Guidelines and Principles as part of the "relevant international law" for purposes of the case.

[73] G.A. Res. ES-11/5, ¶ 4 (Mar. 1, 2022).

It then adopts three provisions directly relevant to the injuries to Ukraine for which Russia is responsible.

First, the resolution:

> "*[r]ecognizes* that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter… as well as any violations of international humanitarian law and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts."[74]

This paragraph of the resolution, in part, affirms the outcome that general international law requires, but, in part, indicates an accountability that general international law, without more specific adaptation, does *not* require. The outcome that general international law requires is that Russia "must bear the legal consequences" of its wrongdoing, the legal consequences including the obligation to make reparations. This outcome follows from the law of State responsibility as reflected in ARSIWA. That which does not follow from general international law in its present state is the part of the paragraph that recognizes that Russia "*must* be held to account" (emphasis added): international law remains incomplete in the procedures for holding states to account, even states whose conduct constitutes the most serious violations of international law. The incompleteness of international law in this regard owes in part to the limited and consent-based character of judicial and arbitral dispute settlement under international law.[75] The ICJ has not hesitated to find that, lacking its consent to jurisdiction, a state is not subject before the court to a claim, even where the claimant invokes a rule of fundamental importance and adduces good evidence that the respondent has breached the rule.[76] But claims procedures under courts, arbitral tribunals, and other adjudicative mechanisms are not the only way, and not the chief way, that international law has held states to account. A state or group of states in international practice often takes steps as an exercise of international policy toward another state. Those steps, being initiated outside an international institutional process such as Security Council proceedings, are decentralized; and, being performed by a state or states in the sphere of international political relations against another state, are "horizontal" steps—that is to say, they do not involve the assertion of jurisdiction *by* a state or other

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[74] *Id.* ¶ 2.

[75] Which in turn gives rise to the challenge that Sir Christopher Greenwood compared to Cinderella's in regard to the glass slipper: "Most of the time in international law you will have to try and squeeze a rather large, perhaps ungainly foot, into the glass slipper of a jurisdictional clause that really is far too small for the case you want to bring." LCIL International Law Seminar Series, *Challenges of International Litigation,* UNIV. CAMBRIDGE, at 30:31, (Oct. 7, 2011), http://itunes.apple.com/itunes-u/lcilinternational-law-seminar/id472214191; cited by Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, UNIV. CAMBRIDGE FAC. L., LEGAL STUD. RSCH. PAPER SERIES, Paper No. 9/2014. 11 (Feb. 2014).

[76] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 95 (Feb. 3).

entity *over* a state, and thus do not implicate the international law right of the state to certain immunities from the assertion of jurisdiction. This distinction—between horizontal measures calculated to bring about compliance by a state with international law and vertical measures under which a state is rendered formally *subject* to determinations of law—will be addressed in Part III below.

The General Assembly in the paragraph quoted above might seem to have placed the cart of reparatory obligation before the horse of procedural remedy: absent a compulsory procedure, there would be no binding determination that Russia has violated any rule and, so, it might seem premature to speak of reparatory obligation. The phrase "*any* violations of international law" (emphasis added) indeed might entail indefiniteness and indeterminacy as to whether there *are* any violations: to say that a state will make reparation for any violations that it has committed says nothing as to whether the state has committed a violation. However, the Assembly evidently intends to be clear that Russia *has* committed a violation. In the same paragraph, the Assembly says that Russia must be accountable for "*its* aggression in violation of the Charter" (emphasis added), a form of words leaving no doubt that Russia indeed has committed aggression. This conclusory phrasing is no surprise, for the General Assembly already had said that Russia's invasion is "[a]ggression against Ukraine." [77] With that conclusion reaffirmed, Resolution ES-11/5 turns to practical steps to implement reparations. The resolution identifies two practical steps in particular.

First, operative paragraph 3 of the resolution provides that the General Assembly "*[r]ecognizes* . . . the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine."[78] Constituting an "international mechanism," as noted in this Article above, was a crucial step in the aftermath of Iraq's aggression against Kuwait: the UNCC furnished a procedure through which financial compensation was awarded and disbursed.[79] As also noted above, the Security Council was not hampered in constituting the UNCC, Iraq having no veto (and no friend on the Council to wield a veto). The General Assembly in Resolution ES-11/5 has started to come to grips with the procedural challenge that states will have to address in order to ensure that Russia makes full reparation for the injuries that its aggression has caused.[80]

The resolution, in operative paragraph 4, then recommends

> "the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally

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[77] *Cf.* G.A. Res. ES-11/1, notes 1–4, ¶3 (Mar. 2, 2022).

[78] G.A. Res. ES-11/5, ¶ 3 (Nov. 14, 2022).

[79] *See* Annex, Conclusion VII, Note (4).

[80] *See* Annex, Conclusion V, Note (12). *Cf.* Conclusion I, Note (4).

> wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering."[81]

This step—calling for action outside the UN ("by Member States, in cooperation with Ukraine") to create a registry of war damages to be compiled and maintained during the course of the war concerned—is innovative in General Assembly practice.[82] If states implement it, the registry will fulfil a need that Resolution ES-11/5 identifies in operative paragraph 4: a reliable evidentiary record on which to calculate compensatory awards for individual claimants and particular other categories of claim. Placing reliable evidence at the disposal of an eventual procedural mechanism, in turn, will further the orderly operation of the mechanism.[83]

3. Note Regarding the Legal Effect of General Assembly Resolution ES-11/5

In respect of certain categories of subject matter that they address, General Assembly resolutions express a legal obligation;[84] they are non-binding in respect of most subject matter in most instances.[85] It is clear on the face of General Assembly Resolution ES-11/5 that, except for its house-keeping decision to adjourn the eleventh emergency special session—temporarily—and to authorize the General Assembly President to resume the session "upon request

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[81] G.A. Res. ES-11/5, ¶ 4 (Nov. 14, 2022).

[82] G.A. Res. ES-10/17 (Jan. 24, 2007) on Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory took a different approach, setting up as it did a subsidiary organ of the General Assembly, rather than relying on a decentralized coordination effort by Member States. The factual situation with which the earlier Register is concerned also differs from that addressed in G.A. Res. ES-11/5 (Nov. 14, 2022). G.A. Res. ES-10/17, ¶ 4*(c)*) (Jan. 24, 2007).

[83] As to the need to ensure that a claims process for Ukraine proceeds in orderly fashion, see Annex, Conclusion VII.

[84] U.N. Secretary-General, Letter dated May 9, 1986, from the Secretary-General to the Permanent Observer of an intergovernmental organization to the United Nations, U.N. Yearbook 1986 p. 275 (giving as examples of matters in respect of which General Assembly resolutions are binding—adoption of the scale of assessments for the apportionment of U.N. expenses under Charter Article 17; budgetary decisions; decisions relating to "the internal administration and management" of the U.N.).

[85] *See, e.g.*, Emily Crawford, *Introductory Note to United Nations General Assembly Resolution on the Territorial Integrity of Ukraine,* 53 INT'L LEGAL MATERIALS 927, 928 (2014) ("As a General Assembly resolution, the document is non-binding."); *see also* Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ,* 16(5) EUR. J. INT'L L. 879, 883-884 (2005). While some jurists have placed emphasis on the possible influence of non-binding General Assembly resolutions on the formation of customary international law, international courts and tribunals, as well as the International Law Commission, in its work on customary international law, have taken a cautious approach. *See* Sargsyan v. Azerbaijan, Application 40167/06, ¶ 23 (Dec. 12, 2017), https://hudoc.echr.coe.int/eng?i=001-179555 (referring to non-binding documents, such as General Assembly resolutions, as a source supporting a putative general responsibility to protect persons affected by internal armed conflict). *But cf. KAING Guek Eav alias Duch, Case No. 001/17-07-2007-ECC/SC,* Appeal Judgment*,* ¶ 194 (Extraordinary Chambers in the Cts. of Cambodia, Sup. Ct. Chamber Feb. 3, 2012) (finding that a non-binding General Assembly resolution was not sufficient to evince the emergence of a customary international law definition of "torture" at the relevant time), *cited with approval in* Int'l Law Comm'n, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, Conclusion 12, Comment (8), n. 768, U.N. Doc. A73/10.

from Member States,"[86] the resolution does not have direct legal effects; much less does it address any legal obligation to a Member State. The resolution nevertheless gives a number of indications that are potentially significant as a matter of law.

First, there is the reaffirmation of the General Assembly's commitment to Ukraine and its demand that Russia both terminate the war of aggression and withdraw unconditionally from the territory.[87] Connecting that reaffirmation to instruments that *are* binding, in particular to the ICJ's Provisional Measures Order of March 16, 2022, and to the accepted rules of State responsibility (which bind all states), the General Assembly suggests the outline for future effective results. It remains for an appropriate organ at an appropriate time, or, as Resolution ES-11/5 invites them to do, for states acting outside the UN or outside existing organs altogether, to implement the outline to achieve effective results for those concerned.

Second, the resolution notes that its adoption is during an emergency special session.[88] When the Security Council called the General Assembly into emergency special session on February 27, 2022, no such session had been called in forty years.[89] To recall the first occasion when the Security Council called such a session—during the Korean War when the USSR's veto stood in the way of a Chapter VII resolution by the Council—the Security Council said that

> "[if] the Security Council . . . fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."[90]

Known as the Uniting For Peace Resolution, Security Council Resolution 377 (V) (1950) has provided a procedural model for similar resolutions when, as in February 2022, a Permanent Member exercises the veto to block the Security Council from acting.[91] Resolutions of this kind implicitly rely on a *prima facie* appreciation that the situation that the resolution calls on the General Assembly to address involves a threat to the peace, breach of the peace, or act of aggression: if "there appears" to be such a situation, then at least some preliminary appreciation must have been reached that such a situation exists. A resolution

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[86] G.A. Res-11/5, ¶ 5 (Nov. 14, 2022).

[87] *Id.* ¶ 1.

[88] *See id.*, fourth recital, (citing S.C.Res 2623 (2022), (Feb. 27, 2022), by which the Security Council called the emergency special session).

[89] Security Council Report, Ukraine: Vote on Draft "Uniting for Peace" Resolution (Feb. 27, 2022).

[90] S.C. Res 377 (V), (Nov. 3, 1950).

[91] Kristen E. Eichensehr (ed.), *Contemporary Practice of the United States Relating to International Law*, 116 AM. J. INT'L L. 605, 610–11 (2022).

adopted under the Uniting For Peace procedure, though its wording may vary somewhat from Resolution 377 (V) (1950),[92] also suggests the possibility that the Assembly, when it convenes in emergency special session at the resolution's direction, will exercise a certain degree of decision-making authority: if the Assembly is to make "appropriate recommendations . . . *including in the case of a breach of the peace* [etc.]," then it should be inferred that the Assembly might determine that the situation is not merely a *seeming* case of threat to the peace, etc. but an actual one. Be that as it may, even where an actual threat to the peace, breach of the peace, or act of aggression exists, the Assembly's role still is limited to "making appropriate *recommendations*." [93] Like other stop-gap measures, a Uniting For Peace resolution is not a complete answer to the question that instigated it. As to Resolution ES-11/5, states individually and in organizations they comprise outside the UN, as the next sections will show, already have begun to take the steps necessary to complete the answer.

B. Council of Europe Initiatives and Establishment of the Register of Damage

In December 2022, the Parliamentary Assembly of the Council of Europe (PACE) heard proposals from Ukraine's Deputy Minister of Justice and others on a potential compensation mechanism for Ukraine.[94] The Ministry of Justice informed the PACE Committee on Legal Affairs and Human Rights that

> the main concept of the International Compensation Mechanism is the construction of a coherent system that would ensure real compensation for damages caused by aggression. Such a mechanism will be based on a multilateral international agreement and will provide for the establishment of a Compensation Commission especially dedicated to consider compensation claims, the Compensation Fund, from which the compensation shall be paid, and an effective procedure of enforcement of the Commission's decisions.[95]

The Deputy Minister sees the registry of damages recommended in General Assembly Resolution ES-11/5 as "an integral part of the compensation mechanism."[96] The PACE Committee on Legal Affairs and Human Rights, under the direction of Damien Cottier (Switzerland, ALDE), presented a report to

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[92] S.C. Res 2623, (Feb. 27, 2022), was briefer than S.C. Res 377 (V), though it noted that the Security Council had considered the agenda item identified by Ukraine's February 28, 2014 letter (seeking an urgent meeting of the Council following Russia's initial aggression against Ukraine) (see S/Agenda/8979, referring to S/2014/136).

[93] G.A. Res. 377 (V), at 10 (Nov. 3, 1950).

[94] Compensation Mechanisms for Ukraine the Focus of a PACE Hearing in Paris, Parliamentary Assembly Council of Eur. (Dec. 13, 2022).

[95] Ministry of Justice of Ukraine, *How Ukraine Sees the Process of Establishment of Compensation Mechanism*, (Dec. 13, 2022, 5:48 PM), https://www.kmu.gov.ua/en/news/yak-ukraina-bachyt-protses-stvorennia-mekhanizmu-kompensatsii-iryna-mudra-vystupyla-na-slukhanniakh-u-parie. *Cf.* Conclusion VI (regarding a Compensation Fund), Conclusion VII (regarding a Compensation Commission), Conclusion XI (regarding enforceability of Compensation Commission awards), Conclusion XIII (regarding a multilateral instrument to implement the reparations model).

[96] Ministry of Justice of Ukraine, *supra* note 95.

PACE for debate in January 2023, the report recommending that the Council of Europe "should as a minimum support setting up the compensation mechanism [for which General Assembly Resolution ES-11/5 calls], including the register of damage, by calling its Member States to join it and become parties to the founding agreement."[97] The report refers to General Assembly Resolution ES-11/5 and to the register of damages for which the resolution calls.[98]

The report also sets out some tentative observations about how to finance the compensation mechanism.[99] In that connection, the committee heard testimony from Professor Burkhard Hess, Director of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.[100] Professor Hess suggested some national practice (he referred to Sweden's Supreme Court in particular) under which certain sovereign assets used for investment purposes fell outside the particular national statutory protections of sovereign immunity and thus could be confiscated.[101] Professor Hess also understood that expropriation or transfer of assets would be possible as a countermeasure under the law of State responsibility.[102] More will be said below about asset seizure as a countermeasure.[103]

In Resolution 2482 (2023) of January 26, 2023, PACE "reiterate[d] its call to all member States of the Council of Europe to set up an international compensation mechanism, including an international register of damage, in co-operation with the Ukrainian authorities."[104] PACE, in the resolution, called for a treaty to "regulate matters such as the funding of the compensation fund, the enforcement of compensation awards and how decisions by other international bodies and courts on reparation and compensation . . . could be enforced through such a mechanism."[105]

The Committee of Ministers, by Resolution CM/RES (2023)3 on May 12, 2023, established an "enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine."[106] The resolution adopts a Statute of the Register, setting out that body's mandate, functions, legal status, terms by which states and international organizations

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[97] *See* Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine (Jan. 24, 2023), Report, Doc. 15689, ¶ 65 (Damien Cottier, Rapporteur), https://pace.coe.int/en/files/31576/html#_TOC_d48e1298.

[98] *Id.* ¶ 62.

[99] *Id.* ¶ 64

[100] *Id.* ¶ 3.

[101] *Id.* ¶ 68.

[102] *Id*.

[103] *See infra* Part III.

[104] PACE Resolution 2482 (2023), *Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine*, ¶ 19 (January 26, 2023), https://pace.coe.int/en/files/31620/html.

[105] *Id*. ¶ 19.3.

[106] Comm. of Ministers, *Res.CM/Res (2023)3 on Establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine*, 1466th Ministers' Deputies Meeting, preambular ¶ 17 (May 12, 2023), https://rm.coe.int/0900001680ab2595.

participate in it, and mechanisms for its governance. By the terms of Article 4.1 of the Statute, participation in the Register is open to "[a]ny member or observer State of the Council of Europe and the European Union, as well as any other State that has voted in favour of the United Nations General Assembly Resolution A/RES/ES-11/5 of 14 November 2022."[107] Article 4.3 empowers the Conference of Participants (an organ of the Register constituted in accordance with Article 5 of the Statute) to "authorize any other State or international organization having so requested to join the Register as Participant or Associate Member, taking into particular account the position of the Government of Ukraine."[108] The Register has legal personality under the national law of the Netherlands and of Ukraine.[109]

Among other points of interest, the Register, in the manner of its formation, reflects a new degree of interaction and co-ordination between the U.N. General Assembly and the Council of Europe. Only sixteen days before the Council of Europe Committee of Ministers resolution constituting the Register, the U.N. General Assembly adopted a resolution on "cooperation between the United Nations and the Council of Europe."[110] In that resolution, the General Assembly, *inter alia*, "[r]ecogniz[ed]. . . that the unprecedented challenges now facing Europe following the aggression of the Russian Federation against Ukraine, and against Georgia prior to that, and the cessation of the membership of the Russian Federation in the Council of Europe, call for strengthened cooperation between the United Nations and the Council of Europe." [111] The near-simultaneity of this General Assembly resolution and the Council of Europe's implementation of the Register of damages is noteworthy at least for its symbolism. Perhaps noteworthy in a more substantive way, the ninth preambular paragraph of the General Assembly resolution—that expressing the General Assembly's recognition that Russia's aggression presents "unprecedented challenges"—was put to a separate vote—and China abstained[112] and then proceeded to vote *in favor* of the resolution as a whole.[113] China had earlier abstained from resolutions identifying Russia's invasion as an act of aggression.[114] And China had objected, in trenchant terms, to General Assembly resolution ES-11/5.[115] Whether China's vote in favor of the resolution on cooperation between the U.N. and the Council of Europe presages a shift in China's approach remains to be seen.

[107] *Id.* app. art. 4.1.

[108] *Id.* app. art. 4.3.

[109] *Id.* app. art. 3.1.

[110] G.A. Res. 77/284 (Apr. 26, 2023).

[111] *Id.* preambular para. 9.

[112] U.N. GAOR, 77th Sess., 69th plen. mtg. at 7, U.N. Doc. A/77/PV.69 (Apr. 26, 2023).

[113] *Id.*

[114] *See, e.g.*, U.N. GAOR, 11th Emergency Special Sess., 5th plen. mtg. at 15, U.N. Doc. A/ES-11/PV.5 (Mar. 2, 2022) (detailing China's abstaining vote on the first Emergency Special Session resolution on Ukraine).

[115] *See* U.N. GAOR, 11th Emergency Special Sess., 15th plen. mtg. at 19-20, U.N. Doc. A/ES-11/PV.15 (Nov. 14, 2022).

C. EU Initiatives

Having set up a "Freeze and Seize" Task Force in March 2022[116] to coordinate sanctions implementation at the EU level against Russian and Belarussian oligarchs, the European Commission has engaged with international partners, including the United States, United Kingdom, Australia, and Japan, and the G7 countries that are EU Member States–France, Germany, and Italy–to further the pursuit of Russian assets.[117] Efforts such as these have led to the freezing of very significant sums[118] but do not in themselves constitute a reparations mechanism. It was therefore a welcome step when the President of the Commission on November 30, 2022 articulated a much further-reaching intention. "With our partners," the President stated, "we will make sure that Russia pays for the devastation it caused, with the frozen funds of oligarchs and assets of its central bank."[119] The President here indicated that the EU will employ both the ostensibly private funds of Russian oligarchs and the public funds in Russia's central bank to cover or offset the financial burden of compensating Ukraine and Ukrainians for the injuries resulting from Russia's aggression. The European Parliament, in June 2022, recommended that the EU "establish a legal instrument allowing frozen Russian assets and funds to be confiscated and used for reparations and the reconstruction of Ukraine,"[120] an important indication of political support for such measures and a signal to the Commission.

Skepticism as to the legality of asset seizure would be expressed over the ensuing months, in particular in the financial media.[121] Skeptics called attention, in particular, to sovereign immunity, suggesting that that procedural principle of international law would prevent the EU from carrying out asset seizure.[122] In Part III, below, this Article will suggest grounds to doubt, in the current

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[116] *See* Press Release, Eur. Comm'n, Enforcing Sanctions Against Listed Russian and Belarussian Oligarchs: Commission's "Freeze and Seize" Task Force Steps Up Work With International Partners (Mar. 17, 2022) (IP/22/1828).

[117] *See, e.g.*, Press Release, Eur. Comm'n, "Freeze and Seize Task Force": Almost €30 Billion of Assets of Russian and Belarussian Oligarchs and Entities Frozen By the EU So Far (Apr. 8, 2023) (IP/22/2373).

[118] It is reported that some € 18.9 billion of Russian private assets have been frozen in the EU; some €300 billion in Russian state assets have been frozen worldwide. Jorge Liboreiro, *'Make Russia Pay': EU Moves Ahead with Confiscation of Frozen Assets*, Despite Legal Pitfalls, EURONEWS, (Nov. 30, 2022, 4:33 PM), https://www.euronews.com/my-europe/2022/11/30/make-russia-pay-eu-moves-ahead-with-confiscation-of-frozen-assets-despite-legal-pitfalls (last visited Sept. 7, 2023).

[119] Ursula von der Leyen (@vonderleyen), TWITTER (Nov. 30, 2022, 3:39), https://twitter.com/vonderleyen/status/1597888002436796417.

[120] *European Parliament Recommendation of 8 June 2022 to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on the EU's Foreign, Security and Defence Policy after the Russian War of Aggression Against Ukraine*, O.J. (C493) 15 (Jun. 8, 2022).

[121] *See, e.g.*, *Why the EU Will Not Seize Russian State Assets to Rebuild Ukraine: It Fears the Precedent of Undermining State Immunity Under International Law*, The Economist (July 20, 2023), https://www.economist.com/europe/2023/07/20/why-the-eu-will-not-seize-russian-state-assets-to-rebuild-ukraine.

[122] *Id.*

circumstances, whether sovereign immunity is relevant to seizing Russia's sovereign assets.[123] In the meantime, political support for seizing Russia's assets has endured. The European Parliament in a resolution dated November 9, 2023 "[c]all[ed] on the EU and its Member States to find legal avenues allowing for the confiscation of frozen Russian assets and for their use for the reconstruction of Ukraine and compensation for the victims of Russia's aggression."[124] A brief word is in order about those provisions.

D. National Legislation

It is beyond the scope of the present Article to canvass the entirety of national legislation relevant to Russian assets and compensatory mechanisms. Canada has adopted and the United States Congress, at the time this article went to press, was entertaining proposals for, statutory provisions that provide for seizing Russian assets and using these to compensate Ukraine.

1. Canada

The first G-7 country to have done so, Canada on June 23, 2022 adopted a statutory act to freeze and seize Russian assets.[125]

The Act, which amends the Special Economic Measures Act 1992 (SEMA), expressly links new economic measures to multilateral action. According to section 3.1 of SEMA as amended,

> The purpose of this Act is to enable the Government of Canada to take economic measures against certain persons in circumstances where an international organization of states or association of states of which Canada is a member calls on its members to do so, a grave breach of international peace and security has occurred, gross and systematic human rights violations have been committed in a foreign state or acts of significant corruption involving a national of a foreign state have been committed.[126]

Where one of more of the situations indicated in section 3.1 exist (as determined by the Governor in Council), the Governor in Council may, *inter alia,* "cause to be seized or restrained . . . any property situated in Canada that is owned—or that is held or controlled, directly or indirectly—by (i) a foreign state, (ii) any person in that foreign state, or (iii) a national of that foreign state who

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[123] *See* discussion *infra* Part III.

[124] Resolution of 9 November 2023 on the Effectiveness of the EU Sanctions on Russia, ¶ 20, EUR. PARL. DOC. 2023/2905(RSP).

[125] *First To Go: Canada Has Set A Legal Framework For Transferring Proceeds From Sanctioned Russian Assets To Ukraine*, SAYENKO KHARENKO (2022), https://sk.ua/first-to-go-canada-has-set-a-legal-framework-for-transferring-proceeds-from-sanctioned-russian-assets-to-ukraine/ (last visited Jan. 16, 2024). It was reported that Russian private assets frozen in Canada, as of November 2022, amounted to some 122 million Canadian dollars (approximately $90 million). Brian Platt, *Trudeau's Foreign Minister Wants Speedier Russian Asset Seizures*, BLOOMBERG (Nov. 28, 2022) https://www.bloomberg.com/news/articles/2022-11-28/trudeau-s-foreign-minister-wants-speedier-russian-asset-seizures#xj4y7vzkg.

[126] Special Economic Measures Act, S.C. 1992, c 17 (amended 2023) ("SEMA").

does not ordinarily reside in Canada."[127] Section 5.4 provides for forfeiture of property.[128]

The Act contains procedural protections for persons whose property (or other property interest or right) is affected by a forfeiture under the Act, e.g., a right to make application to a judge for an "order declaring that their interest or right is not affected by the forfeiture."[129]

Section 5.6 of the Act provides that Canada may use property forfeited under section 5.4 for any of the following purposes:

> (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.

The intention is evident in section 5.6 to place forfeited property in service of reparation. The Act does not mention Ukraine or Russia by name, but its provisions plainly have in mind the situation created by Russia's aggression.

The Canadian government indicated on December 19, 2022 that it would invoke the Act for the forfeiture of holdings in Canada of Roman Abramovich, a noted Russian oligarch.[130] This would be the first occasion on which the Act was used for purposes of forfeiture.[131] That the Act allows the government to seize or restrain both state assets and assets of private individuals, even individuals who do "not ordinarily reside in Canada," identifies the significant scope of its provisions.[132]

However, under sections 5.3 and 5.4 of SEMA, only a judge may order a forfeiture of assets.[133] This requirement of judicial action would place any attempted forfeiture of *sovereign* assets within the scope of the Canadian State Immunity Act 1985 (SIA), or at least a sovereign whose assets were subject to SEMA forfeiture would argue: section 3(1) of SIA provides that "[e]xcept as provided by this Act, a foreign state is immune from jurisdiction of any court in

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[127] SEMA § 4(1)(b).

[128] SEMA § 5(4)(1).

[129] SEMA § 5(4)(4).

[130] *Canada Begins Process Aimed at Seizing Assets of Russian Oligarch Abramovich*, RADIO FREE EUROPE/RADIO LIBERTY (Dec. 19, 2022) https://www.rferl.org/a/russia-abramovich-canada-assets-ukraine/32183813.html.

[131] *Id.*

[132] SEMA § 4(2)(a).

[133] *See* JAMISON FIRESTONE, TETYANA NESTERCHUK & YULIYA ZISKINA, LEADING BY EXAMPLE: PROPOSED AMENDMENTS TO THE SPECIAL ECONOMIC MEASURES ACT TO ENABLE THE SEIZURE OF RUSSIAN STATE ASSETS ¶ 14 (Oct. 17, 2023) [hereinafter SEMA Amendments White Paper], https://www.ratnaomidvar.ca/leading-by-example-proposed-amendments-to-the-special-economic-measures-act-to-enable-the-seizure-of-russian-state-assets/ (last visited Jan. 16, 2024).

Canada." At the time this article went to press, a bill, Bill S-278, was in second reading in the Canadian Senate, which would permit the government, where the conditions stipulated in SEMA are met, to forfeit assets of a foreign state without involvement of Canada's courts.[134] If adopted, the proposed legislation would enhance the powers that the Special Economic Measures Act already confers on the government, in particular by allowing state-to-state action against Russian sovereign assets, rather than purporting to subject Russia to the jurisdiction of Canadian courts.

The proposed amendment would take no substantive right from Russia under either Canadian law or international law. Under SEMA as it stands, the role of the judiciary is limited to verifying whether the property that the government seeks to seize is in truth "owned by the person referred to in [the relevant] order or is held or controlled, directly or indirectly, by that person."[135] As the White Paper prepared in support of the amendment observes, no serious controversy arises "when it comes to [identifying] Russian Central Bank reserves held in Canada," these being readily identifiable as such.[136] Under international law, sovereign immunity exists to preserve the right of every state to choose which, if any, judicial procedures will exercise jurisdiction over the state.[137] Sovereign immunity does not protect a state from measures of policy that another state or states might take outside judicial procedures.

2. United States

The U.S. Congress incorporated into its 2023 appropriations act the text of a bill giving the President the authority to confiscate funds and other property of certain foreign persons with connections, as defined in the bill, to Russia; and requiring any funds or property confiscated under that authority to be used only for the benefit of Ukraine. According to the legislative text as adopted, the confiscation measures are directed against any foreign person "(1) the wealth of which, according to credible information, is derived in part through corruption linked to or political support for the regime of the President of the Russian Federation . . . and (2) with respect to which the United States has imposed sanctions relating to corruption, human rights violations, the malign influence of the Russian Federation, or conflicts in Ukraine."[138] Funds confiscated under the newly adopted provisions and property liquidated or sold under those provisions

> "may be used only for the benefit of the people of Ukraine, for the following purposes:
>
> (1) Post-conflict reconstruction in Ukraine.

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[134] An Act to Amend the Special Economic Measures Act (Disposal of Foreign State Assets), Bill S-278 (First Reading, Oct. 4, 2023) (Can.).

[135] SEMA § 5.4(1)(b).

[136] FIRESTONE, *supra* note 133, ¶ 22.

[137] *See id.* ¶ 14.

[138] Asset Seizure for Ukraine Reconstruction Act, S. 3838, 117th Cong. § 2(b) (2022) (texts of the 2023 omnibus appropriations bill available as of Dec. 27, 2022 did not reflect the adopted appropriations act in its entirety).

(2) Humanitarian assistance.

(3) Weapons for the military forces of the elected government of Ukraine.

(4) Provisions to support refugees and refugee resettlement in neighboring countries and in the United States.

(5) The provision of technology items and services to ensure the free flow of information to the Ukrainian people in Ukraine, including items—

(A) to counter internet censorship by the Government of the Russian Federation;

(B) to circumvent efforts to shut down internet or communication services by that Government; or

(C) to bolster cybersecurity capabilities of the elected government of Ukraine or non-governmental organizations in Ukraine.

(6) Humanitarian and development assistance for the people of the Russian Federation, including democracy and human rights programming and monitoring."[139]

It remains for the United States to consider whether to take similar steps in relation to sovereign assets of Russia. Interestingly, jurists in the United States had reasoned that seizure of private assets would meet more obstacles, including constitutional objection, than seizure of state assets.[140]

As to state assets, as this Article went to press, the U.S. Senate was considering a bill entitled the "Rebuilding Economic Prosperity and Opportunity for Ukrainians Act" ("REPO Act").[141] The REPO Act would require the U.S.

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[139] *Id.* § 2(c).

[140] *See, e.g.,* Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?,* LAWFARE (May 23, 2022, 11:55 AM), https://www.lawfaremedia.org/article/does-american-law-currently-authorize-president-seize-sovereign-russian-assets ("Although I also favor seizing oligarch assets [i.e., assets of wealthy Russian private persons having connection to the government of Russia], doing so will probably take years of complex litigation and cannot alone deliver enough money to meet Ukraine's growing needs, much less sufficiently penalize the Russian state and deter it from continuing its spree of brazen war crimes."). For a thoughtful and detailed analysis of countermeasures and confiscation of Russian state assets, see Yuliya M. Ziskina, *The REPO Act: Confiscating Russian State Assets Consistent with U.S. and International Law*, LAWFARE (October 12, 2023, 2:38 PM), https://www.lawfaremedia.org/article/the-repo-act-confiscating-russian-state-assets-consistent-with-u.s.-and-international-law.

[141] The REPO Act was introduced in the Senate by Senators Jim Risch and Sheldon Whitehouse. The House version of the Act was introduced by U.S. Representatives Michael McCaul, Marcy Kaptur, Joe Wilson, Steve Cohen, Thomas Kean Jr., Mike Quigley, and Brian Fitzpatrick. *See* Press Release, Foreign Relations Committee, Risch, Whitehouse, McCaul, Kaptur Introduce Legislation to Repurpose Sovereign Russian Assets for Ukraine (June 15, 2023), https://www.foreign.senate.gov/press/rep/release/risch-whitehouse-mccaul-kaptur-introduce-legislation-to-repurpose-sovereign-russian-assets-for-ukraine. For the text of the Act, see Rebuilding Economic Prosperity and Opportunity for Ukrainians Act, S. 2003, 118th Cong. (2023).

Department of the Treasury to retain Russian sovereign assets until the President certifies, *inter alia,* that full compensation has been made for Russia's invasion of Ukraine and Russia is "participating in a bona fide international mechanism that, by agreement, will discharge the obligations of the Russian Federation to compensate Ukraine for all amounts determined to be owed to Ukraine."[142] Under section 104(b) of the REPO Act, the President would have authority to "confiscate any Russian sovereign assets subject to the jurisdiction of the United States."[143] Any funds confiscated under that authority would be placed in a Ukraine Support Fund, an entity to be created in accordance with section 104(c).

Section 104(d)(1) of the REPO Act refers to an "international body or mechanism charged with determining compensation and providing assistance to Ukraine" for purposes, *inter alia,* of reconstruction, rebuilding, and providing humanitarian assistance to Ukraine.[144] That entity, at least at the level of generality at which the REPO Act describes it, resembles the mechanism proposed in the Multilateral Action Plan reprinted below.[145] Section 105 of the REPO Act would empower the President to "seek to establish a common international compensation mechanism, in coordination with foreign partners including Ukraine."[146] One of the steps that section 105 would authorize the President to take is establishing a register of damage for Ukraine.[147] If the REPO Act were enacted, then commentators would likely ask how the United States might coordinate any action it takes on a register of damage with steps taken elsewhere, such as those that the Council of Europe has taken.[148] The REPO Act in its Findings notes General Assembly Resolution ES-11/5 of November 14, 2022, to which the Act's authorization of a register of damages evidently relates.[149]

III. COUNTERMEASURES AND SOVEREIGN ASSETS

The challenges adverted to above[150] remain to be addressed in connection with seizure of private assets of Russian individuals or commercial firms. In particular, countries that have legislated to freeze or seize Russian private assets continue to navigate the property and due process protections that apply when they move under their laws and procedures to take a private person's assets. It is beyond the scope of the present Article to address the challenges in detail, but some brief observations may be offered in respect of the *other* category

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[142] S. 2003 § 103(a) chapeau; § 103(a)(2)(B).

[143] *Id.* § 104(b)(1).

[144] *Id.* § 104(d)(1).

[145] *See infra* Annex.

[146] S. 2003 § 105(a) chapeau.

[147] *Id.* § 105(a)(1).

[148] *See supra* Section II.B.

[149] S. 2003 § 101(a)(6).

[150] *See supra* p. 6.

of Russian assets—Russia's *sovereign* assets—which the U.S. REPO Act and other national legislation propose to confiscate.

Sovereign immunity applies when a state's assets are pursued through judicial proceedings. Two questions relating to sovereign immunity arise for present purposes: what constitutes a judicial proceeding; and does sovereign immunity apply when a state confiscates another state's assets *other* than through judicial proceedings? It is clear that *countermeasures*—that is to say, "measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation"[151]—are not judicial proceedings. And it is at least reasonably arguable that sovereign immunity does not apply when one state invokes countermeasures to confiscate another's assets. Each of these propositions merits some elaboration.

The U.N. Convention on the Jurisdictional Immunities of States and their Property defines the term "court" to encompass a broad range of state institutions in which judicial proceedings take place but also indicates the limits of the term.[152] Those limits suggest the limits of judicial proceedings as a category.

The present author addressed the term "court" in the *Oxford Commentary* on the U.N. Convention as follows:

> According to Article 2(1)(a) [of the U.N. Convention], the term "court" as used in the Convention means "any organ of a State, however named, entitled to exercise judicial functions". The term "judicial functions" is not itself defined in the Convention. The omission was deliberate, given that "such functions vary under different constitutional and legal systems".[153]

The variations among "different constitutional and legal systems" notwithstanding, a common thread runs through the ILC's elaboration of the term "court." For the purpose of identifying the situations in which sovereign immunity might apply, the ILC referred to "judicial functions" and "adjudication" as processes that lead to "*determination* of questions of law and of fact" or that entail an "*order* of interim and enforcement measures" and "in connection with, in the course of, or pursuant to, *a legal proceeding*."[154] The ILC here thus described situations in which one state asserts decision-making authority over another state in the sense of subjecting the state to its own jurisdiction. These situations all involve national courts—or other state organs performing the

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[151] ARSIWA, *supra* note 1, pt. 3, ch. II, cmt. (1).

[152] U.N. Convention on the Jurisdictional Immunities of States and Their Property art. 2(1)(a), Dec. 2, 2004 (not in force).

[153] Thomas D. Grant, *Articles 2(1)(a) and (b)*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 40, 45 (Roger O'Keefe & Christian J. Tams eds., 2013) (quoting *Draft Articles on Jurisdictional Immunities of States and Their Property*, [1991] 2 Y.B. Int'l L. Comm'n 13, art. 2, cmt. (3), A/CN.4/SER.A/1991/Add.l (Part 2).

[154] *Id.* (emphases added).

functions that courts usually perform—resulting in judgment of the governmental acts of another state or executing upon the other state's assets in pursuit or anticipation of a decision containing such judgment. Inherent in judicial proceedings, as the ILC described them, is that a party is subject to the formal decision-making power of a court or other body exercising judicial authority.

States do not only act through judicial proceedings. In their international relations, states indeed seldom act by taking other states to court. More frequently, they resort to devices that do not involve adjudication. Such devices include diplomatic protest, which can take many different forms, and retorsion—"'unfriendly' conduct which is not inconsistent with any international obligation of the State"[155]—which, too, may take many different forms, including limiting or suspending diplomatic relations and halting voluntary foreign aid.[156] Where a state concludes that more robust measures than these are necessary to attain its policy aims, the state may invoke countermeasures.

Countermeasures, like diplomatic protest and retorsion, are not judicial acts but acts of policy. As acts of policy, countermeasures are performed by a state on the international plane with the intention of inducing a state to bring its conduct into compliance with an existing international law obligation of the state. Unlike a judicial act, a countermeasure (if lawfully implemented) does not produce a *new* legal state of affairs as regards the state toward which it is directed. It aims, instead, through the influence it exerts, to restore the state of legal relations that would have existed, if the state toward which it is directed had remained in compliance with its international obligations.[157]

Writing some years after the ILC adopted ARSIWA (for which he was the final special rapporteur), James Crawford described countermeasures as a practice of *decentralized* response, undertaken by a state on its own (or together with "like-minded states") and performing the role that "institutional sanctions"—i.e., decisions such as judgments or awards of international courts and tribunals—would play in a more organized legal community:

> All the categories of self-help . . . [under the rubric of countermeasures] share an emphasis on unilateral action; that is, they are taken by states acting alone (or alongside other like-minded states) to seek protection or performance of international legal rights and obligations. The measures are adopted as a consequence of the view of the reacting state that the target state has committed an internationally wrongful act . . . . In other words, institutional sanctions create 'vertical' relationships of enforcement, whereas in the case of decentralized

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[155] ARSIWA, *supra* note 1, pt. 3, ch. II, cmt. (3).

[156] *Id.*

[157] To quote the ILC in Comment (1) to the Countermeasures chapter of ARSIWA, "Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act." *Id.* pt. 3, ch. II, cmt. (1).

> countermeasures the relationships between the responsible and reacting states are horizontal.[158]

We gain an appreciation for the significance of the decentralized character of countermeasures when we consider (1) the distinction between them and *centralized* mechanisms of control and judicial procedures and (2) the prevalence of decentralized modalities in international law overall.

The distinctive character of countermeasures as a means to implement state responsibility is highlighted when countermeasures are contrasted with centralized mechanisms of control and with judicialized implementation. To take the foremost example of a centralized mechanism of control, the U.N. Security Council acting under Chapter VII of the U.N. Charter may adopt binding resolutions that impose new legal obligations on the parties whom they address. The Security Council in this way, in some instances, has constituted an entire legal régime, such as that under Security Council Resolution 1244 (1999) in Kosovo.[159] Countermeasures have no such transformative effects on the legal relations of the parties concerned. A difference is also visible in legal effects between countermeasures and judicialized implementation. The latter entails the determination and imposition of new legal realities upon the responsible state whom the judicial decision (whether interim, final, or post-award) addresses. In that effect, the subjection of the responsible state to a superior decision-making instance is manifest. It is the purpose of sovereign immunity to assure that the state retains the freedom to avoid such subjection. By contrast, countermeasures operate *between* states. This is the sense in which Crawford observed that countermeasures are characterized by a horizontal geometry. Through countermeasures, states respond to one another on the international plane as sovereign equals, which is to say on terms that assert no control by, or jurisdictional supremacy of, one over the other. [160]

Countermeasures are a piece of international law as it actually is—that is to say, as a quintessentially decentralized system. Over half a century ago, McDougal and Reisman referred to international law as an "unorganized process of decision."[161] Notwithstanding the considerable growth of organized decision processes under international law since that time, such as international human rights courts and international investment treaty arbitration, not to mention the

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[158] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 706–07 (2013) p. § 21.3. *See also* ARSIWA, *supra* note 1, pt. 3, ch. II, cmt. (1).

[159] S.C. Res. 1244 (June 10, 1999). As to the legal régime that it constituted, see Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Rep. 2010 p. 403, 443–44 ¶ 98 (July 22).

[160] Reflecting this difference, Crawford described judicialized implementation of State responsibility as a distinct kind of action. *See* CRAWFORD, *supra* note 158, at 598–643, § 19.1.

[161] Myres S. McDougal & W. Michael Reisman, *"The Changing Structure of International Law:" Unchanging Theory for Inquiry*, 65 COLUM. L. REV. 810, 820 (1965). *See also* Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, *in* THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, VOLUME I: TRENDS AND PATTERNS 73, 80 (Cyril E. Black & Richard A. Falk, eds., Princeton University Press 1969).

proliferation of multilateral bodies on which states have conferred technical functions,[162] countermeasures remain a part of state practice.[163]

Among other examples that operate as neither judicialized nor centralized procedures, two may be given that perform important functions in international law: suspension of treaties and recognition of states and governments.

Under Article 60 of the Vienna Convention on the Law of Treaties (VCLT), a "material breach of a bilateral treaty" opens the door to a party invoking the breach as a "ground for terminating the treaty or suspending its operation in whole or in part."[164] With respect to a multilateral treaty as well, breach opens the door to suspension under certain circumstances.[165] Invocation of breach as a ground for terminating, or for suspending, a treaty, or part of the treaty, is a matter for a state or states in their "horizontal" relations with the other party or parties to the treaty; it is neither judicialized nor centralized.

As for recognition of states and governments, no treaty addresses the terms on which one state recognizes another, or another's government, but recognition shares this characteristic with suspension of treaties: a state recognizes, or refrains from recognizing, another entity in a decentralized format; its conduct in this domain, as with treaty suspension, is not necessarily constrained by a judicial or other institutional procedure. In respect of the closely analogous issue of the existence of a state, Crawford wrote, "[i]t is one thing to say that statehood is regulated under law; quite another to claim that it has been bureaucratized under the auspices of an international organization."[166] Recognition, like the regulation of states' treaty relations, is not subject to a superior authority as bureaucratizing the matter would entail.

Tellingly, nobody says that such horizontal measures as treaty suspension and recognizing, or refraining from recognizing, a state or government violate the sovereign immunity of a state. For example, Hungary invoked Article 60 of the VCLT against Slovakia to terminate the Treaty of September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks on the Danube River;[167] Slovakia said nothing about sovereign

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[162] For examples of that growth and of Crawford's role in it, see Thomas D. Grant, *The 'Open System' and Its Gatekeepers: From* Complexity in International Law, *a Seminar in Honour of James Crawford*, 13 J. INT'L DISP. SETTLEMENT 41, 49–51 (2022).

[163] *See generally* MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW (2017).

[164] VCLT art. 60(1): 1155 U.N.T.S. 346.

[165] *Id.* art. 60(2).

[166] CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 193 (2d ed. 2006). Note: Crawford "acknowledge[d] a particular debt" to the present author "[i]n completing this encyclopaedic work." Sir Michael Wood, *Book Review: The Creation of States in International Law (Second Edition)*, 55(4) INT'L & COMP. L. Q'LY 994, 994 (2006).

[167] *See* Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Memorial of the Republic of Hungary, vol. I, 317 ¶¶10.89–10.90 (May 2, 1994), https://icj-cij.org/sites/default/files/case-related/92/10921.pdf.

immunity in its reply.[168] To give an example regarding non-recognition, the Federal Republic of Yugoslavia (FRY) vigorously objected to the refusal of states to recognize it as the continuation of the former Socialist Federal Republic of Yugoslavia,[169] but the FRY did not say that non-recognition was a failure to observe sovereign immunity.[170] Like countermeasures that a state adopts to implement state responsibility, these modes of action do not affect the rights that a state protects through the invocation of its immunity.

IV. CONCLUSION

As Russia's aggression against Ukraine continues, countries that wish to preserve public order in the world community continue to struggle to fashion a meaningful response. As noted here, the presence of Russia in the U.N. Security Council and its exercise of a veto there prevents the Security Council from carrying out its primary responsibility in regard to international peace and security. However, that the Security Council cannot act does not mean that states might not act by other means. Whether and how they act depends on whether they appreciate Russia's attack against public order for what it is.

If one sees Russia's aggression as simply another disturbance on a violent world stage—regrettable, but not different in kind from other impasses of the previous seventy-eight years—then one's prescriptions for an international response will draw on a familiar repertoire of conflict management. On that view, states will consider themselves bounded by the many constraints that international law places on measures against a sovereign. Among the constraints are sovereign immunity and the principle that states are subject to compulsory procedure only when they have consented to be. Thus, international law writers who suggest that the best, and possibly only, recourse against Russia would be the enforcement of money judgments adopted by courts or awards adopted by arbitral tribunals,[171] have identified a course of action that has, at most, a rather limited scope: true, a country does not avoid the legal effect of an internationally-binding judgment or award by invoking sovereign immunity, but the country readily avoids binding judgments and awards in the first place—i.e., it can decline to consent to the exercise of jurisdiction by dispute settlement organs; and, even after a dispute settlement organ adopts a judgment against a state, the state might avoid, or at least delay, satisfying any duty indicated in the judgment to make financial compensation by invoking its sovereign immunity.

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[168] *See* Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Memorial of the Slovak Republic, vol I, *passim* (May 2, 1994), , https://icj-cij.org/sites/default/files/case-related/92/10939.pdf. Further to suspension of treaty obligations in relation to implementing responsibility, see CRAWFORD, *supra* note 158, at 682–684, § 21.2.3.

[169] As to the FRY's attempts to obtain recognition as the continuation of the SFRY, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. Rep. 412, 426–427 ¶¶ 43-51 (Nov. 18).

[170] A search of pleadings in the numerous ICJ cases to which the FRY (or Serbia and Montenegro; or Serbia) was party discloses no evidence that that state invoked sovereign immunity in its objections.

[171] *See* Paul B. Stephan, *Seizing Russian Assets,* 17 CAP. MKT. L.J. 286 (2022).

Approaching the problem within these constraints is fundamentally deficient. It is deficient not because a constrained approach will deny Ukraine reparation, though it almost certainly will. There are many cases in which a country has suffered injury but no compulsory, binding process exists, and no other lawful recourse exists, and so the country receives little or nothing to repair its injuries. The deficiency in approaching the problem of Russia's aggression as if it were an ordinary incident is that Russia's aggression is unlike any case in the modern era of international law. It is an attack on public order in general, and if states do not address it as such, then little will remain of public order in its wake.

This is *not* a plea about the magnitude of the harm that Russia has inflicted on Ukraine. The magnitude of Russia's violations of international law against Ukraine and in Ukraine are shocking. But the grounds for extraordinary action are qualitative. The *quality,* not the magnitude, of Russia's aggression is what sets it apart. No precedent in the post-1945 era, with the limited exception of Iraq's attempted destruction and absorption of Kuwait, matches Russia's war against Ukraine. Too little, however, have jurists and governments acknowledged the qualitative grounds on which action must be taken.

International law did not start as the rich and variegated system of rules, procedures, and institutions that it came to be after 1945. Attempts to protect human rights and the rights of foreigners; attempts to ameliorate suffering on the battlefield; attempts to create technical agencies to deal with inherently international matters such as country-to-country transit in goods and persons—all these were halting before the U.N. era. Internationalists could claim only modest successes, and the durability of every legal development that might be claimed as a success was uncertain. What opened the door to the transformative growth of international law and its seeming durability?

The end of wars over territory between states opened the door. The *sine qua non* of modern international law has been the acceptance between states that the spatial limits of every state's jurisdiction are fixed and may change only by consent freely given.[172] Nothing else in international law, as international law after 1945 came to be, could have been achieved without that acceptance. It is the cardinal achievement of world order in the modern era. A system that accepted the forcible change of boundaries precluded the advancement of international law past a certain point; a system that forbade forcible change allowed sovereigns and their citizens to develop legal relations across borders of an ever deeper and more intricate kind. Practically all that states once jealously guarded as part of the national sovereign domain they came to negotiate, qualify, or even relinquish once they achieved the security in international relations that long had eluded them. Russia's war is qualitatively different from any since 1945 because Russia's war is a violent attack on the territorial settlement on which all modern international law relies.

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[172] *See*, op. cit., THOMAS D. GRANT, Aggression Against Ukraine: Territory, Responsibility and International Law 101-167 (Palgrave Macmillan 1st ed.2015); *but cf.* Ingrid Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order,* 116 AM. J. INT'L L. 687 (2022).

Countries that recognize the value of modern international law, and, moreover, the essential and inseparable dependency of international law on the territorial settlement, will act to prevent Russia's war from opening the door to further wars of the same kind. Seizing Russia's assets is a realistic step that countries can take. By taking that step, states will diminish Russia's war-making capability. They also will shift the ledger sheet against aggression and in favor of the international territorial settlement: a country that goes to war to annex another country should count on international law to impose such significant losses that the venture will bring no profit. If, by contrast, going to war to expand the spatial limits of a state rewards the aggressor, then the territorial settlement of the post-1945 era will fall apart and, with it, the system of international law that the territorial settlement enabled and sustained.

Not all countries have recognized the systemic danger that Russia's aggression presents. "Russia, China and perhaps a few other states in the global South might disagree" with proposals to invoke countermeasures against Russia to take hold of Russian assets.[173] No doubt, Russia would "disagree!" But resisting the use of well-tested tools of statecraft, such as countermeasures, and insisting on the centralized procedures and courts which form but one part of the international legal order ignores what is at stake. It is the legal order that Russia now threatens; international law as a system is what is at stake.

The system has the means to protect itself. The Security Council exercised its system-protecting function in 1991 when it obligated Iraq to pay reparations. However, a Security Council resolution against Russia is impossible when Russia is present in the Council and exercises the veto.[174] The General Assembly has been the focal point of important developments in international law, but its resolutions are not binding in themselves, at least for general purposes. So, it is to states in the decentralized arena of international relations that one must turn, if one is to find a meaningful response to the threat.

The New Lines Draft Conclusions propose that states take action to address the systemic danger that Russia's aggression presents. Whether states set that action in train under the auspices of the U.N., through countermeasures, or in a novel dispositive form is less important than the action itself.

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[173] Stephan, *supra* note 171, at 285.

[174] *See* Thomas D. Grant, *Removing Russia from the UN: Grounds, Procedures, and Precedents*, ABA INT'L L. NEWS (Mar. 6, 2023), https://www.americanbar.org/groups/international_law/publications/international_law_news/2023/winter/removing-russia-from-un-grounds-procedures-precedents/; Thomas Grant, *Removing Russia from the Security Council: Part One,* OPINIOJURIS (Oct. 18, 2022), http://opiniojuris.org/2022/10/18/removing-russia-from-the-security-council-part-one/; Thomas Grant, *Removing Russia from the Security Council: Part Two*, OPINIOJURIS (Oct. 19, 2022), http://opiniojuris.org/2022/10/19/removing-russia-from-the-security-council-part-two/ (Suggestions to remove or suspend Russia from the Security Council, while supported by UN practice, remain to be pursued in earnest); *see also*, H.R. Res. 1517, 117th Cong. (2022) (the present author drafted H.R. Res. 1517 at the request of the U.S. Commission on Security and Cooperation in Europe) (U.S. Helsinki Commission).

ANNEX

Preface to the Draft Conclusions*

Aggression by Russia against Ukraine, which began in 2014 and was followed in 2022 by invasion and atrocities on a scale not witnessed in Europe since the Second World War, entails a legal obligation on Russia to make reparation for the injuries Russia's breaches of international law have caused. Governments supporting Ukraine to date have focused rightly on the immediate exigencies of Ukraine's self-defence. However, rebuilding Ukraine, and compensating individual Ukrainians for the losses that they have suffered as a result of Russia's aggression, will require long-term planning—and enormous financial sums.

To identify options available for implementing Russia's legal obligation to make reparation, the New Lines Institute has convened a Reparations Study Group of experts in international law, international finance, and post-conflict reconstruction. The Reparations Study Group, in the present report, proposes that governments establish a Compensation Commission to decide financial compensation claims and a Compensation Fund to satisfy compensation awards for the benefit of Ukraine and its citizens. Anticipating that Russia will not acknowledge its legal responsibility for aggression against Ukraine, much less voluntarily contribute financial resources to a Compensation Fund, the Study Group in this report considers options available to governments for taking hold Russian assets, public and private, around the world.

The report considers challenges likely to arise under national and international law as governments pursue Russian assets to establish the Compensation Fund. The report also places the challenges in perspective. Russia, holder of a permanent seat on the Security Council, having declared that Ukraine, an Original Member of the UN and largest country in Europe, has no right to exist, prosecutes a war of annihilation against Ukraine and its people. A failure to implement full reparation for Ukraine will impose the costs of Russia's egregious violations of international order on the target of those violations and, correspondingly, relieve Russia of the costs. Just as making territorial concessions to Russia or accepting Russia's dictated political preferences would create an incentive for future aggression, so would a failure to implement full reparation. Neither a "rules-based order" nor geopolitical order will survive if Russia's practice of territorial aggression is entrenched in that way.

The report is organized around a set of thirteen Draft Conclusions. The Draft Conclusions propose a multilateral action model for reparations, the MAMOR, for the forfeiture of Russian assets and their entrustment to a Compensation Fund; and a Compensation Commission, recalling past multilateral

* New Lines Institute, Multilateral Action Model on Reparations: Developing an Effective System for Reparation and Compensation for Ukraine and Ukrainians for Damage caused by the Russian Federation (October 2022) pp. 11-12.

compensation procedures such as that set up after Iraq's aggression against Kuwait, for the orderly resolution of claims to cover financially assessable damage that Russia's aggression shall be established to have caused.

With each Draft Conclusion, notes contain selected observations from State practice and general rules of international law, as well as national constitutional law.

Both international law and national constitutional systems guard against the arbitrary taking of private assets, and inter-governmental relations rely on respect for the presumptive immunity of sovereign assets from legal process. Yet, following modern history's most serious breaches of international peace, governments have fashioned ways to bring responsible States to account, including by making them bear the financial costs of the harm they have done. Russia's aggression against Ukraine is the most serious breach of international peace in over two generations. Russia and its richest private citizens and enterprises have profited on an historic scale from trade, investment, and financial transactions that would have been impossible without peace. Before inviting Russia to return to normal international relations, governments should pursue options for making Russia bear the financial costs of the harm it has done. The Reparations Study Group presents this report and Draft Conclusions as a starting point to assist governments in that pursuit.

Draft Conclusions with Explanatory Notes

Multilateral Action Model On Reparations:

Draft Conclusions in Regard to Russian Assets Abroad

Conclusion I

Russia's aggression against Ukraine constitutes an attack against general public order of a magnitude and kind without precedent since 1945.

Conclusion II

Ukraine as a State and Ukrainian citizens as individuals are entitled under international law to reparation for injuries resulting from Russia's aggression.

Conclusion III

Reparation for injuries resulting from Russia's aggression shall include, to the extent practicable, restitution re-establishing the state of affairs which existed before the commencement of Russia's aggression.

Conclusion IV

Reparation for injuries resulting from Russia's aggression shall include compensation to cover all financially assessable damage that Russia's aggression shall be established to have caused.

Conclusion V

To the extent in accordance with international law, its constitutional law, and its legislative, executive, and judicial procedures, every state accepting these Draft Conclusions shall adopt and implement rules for the seizure and forfeiture of Russian assets, to include assets of the Russian State and assets of Russian natural and juridical persons within that state's jurisdiction.

Conclusion VI

Russian assets seized and forfeited in accordance with Conclusion V above shall be placed in trust and managed by a Compensation Fund authorized under national law and international agreement.

Conclusion VII

To ensure orderly calculation of compensation, a Compensation Commission shall be established under international law. Ukraine as a State, including organs of the State, and Ukrainian private natural and juridical persons may have standing before the Compensation Commission to present claims for compensation. The Compensation Commission shall adopt awards in accordance with rules and procedures it shall have promulgated.

Conclusion VIII

In awards that it adopts, the Compensation Commission shall establish for each claimant whether Russia's aggression has caused financially assessable damage

and, where it has established that Russia's aggression has caused such damage, the amount of compensation.

Conclusion IX

In promulgating its rules and procedures and adopting awards, the Compensation Commission shall have due regard for the interest in a just and orderly distribution of compensation to all claimants to whom the Compensation Commission has established that Russia's aggression has caused financially assessable damage.

Conclusion X

The Compensation Fund shall distribute compensation to claimants in accordance with the awards that the Compensation Commission adopts.

Conclusion XI

Every State accepting these Draft Conclusions shall recognize and give effect in its national law to the authority of the Compensation Fund to distribute compensation to claimants in accordance with the awards that the Compensation Commission adopts and shall accept such awards as final, enforceable, and without challenge or appeal.

Conclusion XII

For purposes of the establishment and valuation of injuries, the temporal scope of Russia's aggression shall extend from the commencement of Russia's armed actions against Ukraine in February 2014 to a future date at which Russia's armed forces have been established to have ceased to be unlawfully present in and to have ceased to operate against Ukraine.

Conclusion XIII

A legally binding multilateral agreement shall be pursued in accordance with and in furtherance of these Draft Conclusion.

Notes on

Draft Conclusions in Regard to Russian Assets Abroad

Conclusion I

Russia's aggression against Ukraine constitutes an attack against general public order of a magnitude and kind without precedent since 1945.

Note (1) The United Nations Charter of 1945 provides for the general pacification of international relations, in particular requiring in accordance with its Article 2(4) that all Members refrain from the use of force, or its threat, against the territorial integrity or political independence of any state. The drafters of the Charter had in view a half century of efforts toward a general prohibition against use or threat of force, including the failure of such efforts to avert the Second World War.[1]

Note (2) The wording of Charter Article 2(4) places 'territorial integrity' and 'political independence' on an equal footing. State practice since 1945 nevertheless lays special emphasis on the stability of boundary settlements reached between states. This is visible, *inter alia,* in the Friendly Relations Declaration of 1970 (first principle),[2] the Definition of Aggression of 1974 (Article 5),[3] the Helsinki Final Act of 1975 (Principle III),[4] the Vienna Convention on the Law of Treaties of 1969 (Article 62),[5] and the Vienna Convention on Succession of States in Respect of Treaties of 1978 (Articles 11, 12).[6] Attempts to change boundaries by force or threat are inimical to the Charter and to the geopolitical order of the past seventy-seven years.

Note (3) States have respected post-colonial boundaries throughout the world as final, subject only to agreed change, such as through negotiation or consent-

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[1] See, e.g., Soviet Foreign Minister, Mr. Molotov, at the San Francisco Conference on International Organization, stating that the League of Nations had 'in no way coped with these problems' and had 'betrayed the hopes of those who believed in it': *Documents of the United Nations Conference on International Organization* (1945), vol. I, p. 132. Mr. Molotov did not mention that the League of Nations less than six years before had expelled the USSR for invading Finland, a violation of international law that the League Assembly and League Council agreed constituted an act of aggression: League of Nations, *Records of the Twentieth Ordinary Session of the Assembly, Plenary Meetings,* p. 53 (14 December 1939); League of Nations, *Official Journal (O.J.),* 1939, p. 508 (14 December 1939).

[2] GA resolution 2625 (XXV) (Declaration on Principles of International Law, Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations), 24 October 1970.

[3] GA resolution 3314 (XXIX) (Definition of Aggression), 14 December 1974.

[4] Conference on Security and Co-operation in Europe Final Act (Helsinki Final Act), concluded 1 August 1975: (1975) 14 International Legal Materials at p. 1294.

[5] Vienna Convention on the Law of Treaties, concluded 23 May 1969; entered into force 27 January 1980: 1155 UNTS at p. 347.

[6] Vienna Convention on succession of States in respect of treaties, concluded 23 August 1978, entered into force 6 November 1996: 1946 UNTS at p. 10.

based third-party dispute settlement.[7] Outside the post-colonial setting, the socialist federations in Europe dissolved in the 1990s—i.e., Czechoslovakia, Yugoslavia, and the USSR—and they accepted that their pre-existing constitutional-level internal boundaries now constitute their international boundaries and that those boundaries are settled and final between them. In the Minsk and Alma Ata instruments of December 1991,[8] the Russian Federation accepted a disposition to this effect in regard to the boundaries that had existed between the 'union republics' of the USSR under USSR law as it was in force at that time. The Russian Federation reiterated its acceptance of its boundary with Ukraine in a number of further instruments through the 1990s and into the 2000s, including the Budapest Memorandum of 1994 under which a comprehensive territorial and security guarantee was extended to Ukraine in return for Ukraine's accession to the Treaty on the Non-proliferation of Nuclear Weapons as a non-nuclear weapon state;[9] an Agreement between Ukraine and the Russian Federation on Further Development of Interstate Legal Relations,[10] a Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation,[11] and an Agreement on the Ukrainian-Russian State Border of 2003 verifying in detail the boundary between the two states.[12] At no time before February 2014, when it invaded Ukraine and forcibly annexed Ukraine's Crimean peninsula, did Russia indicate in any formal manner any

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[7] See, e.g., Organization of African Unity (OAU), Resolution AHG/Res. 16(I) (1964), 17-21 July 1964 ('Cairo Resolution') and Constitutive Act of the African Union (AU), concluded at Lome, 11 July 200, Article 4*(b)*. As to the application of the principle in the Western Hemisphere, see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),* Judgment, 8 October 2007: ICJ Rep. 2007 p. 659 at p. 706, paras. 151-154. And in respect of the independence of states following the end of the SFRY and USSR, see Arbitration Committee of the Peace Conference on Yugoslavia (Badinter Committee) Opinion No. 2, para. 1 (11 January 1992), reprinted in Alain Pellet, 'The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples,' (1992) 3 *European Journal of International Law* 178, 184.

[8] Agreement Establishing the Commonwealth of Independent States, concluded at Minsk, 8 December 1991: A/46/771, annex II; Protocol to the Agreement establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991 by the Republic of Belarus, the Russian Federation (RSFSR) and Ukraine (Alma-Ata Declaration), 21 December 1991: A/47/60-S/23329, annex II.

[9] Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, concluded 5 December 1994 at Budapest: 3007 UNTS 167 *et seq.*

[10] Signed and entered into force 23 June 1992: 2382 UNTS 3, esp. para 1, affirming the 'Treaty between the Ukrainian Soviet Socialist Republic and the Russian Soviet Federative Socialist Republic of 19 November 1990' and para. 9, affirming that 'there are currently no grounds for worries and mutual claims in the field of interstate relations between Ukraine and Russia'. The 19 November 1990 instrument, registered at 1641 UNTS 219 and entered into force 14 June 1991, in its Article 6 provides that the two parties 'recognize and respect the territorial integrity of the Russian Soviet Federative Socialist Republic and the Ukrainian Soviet Socialist Republic within their currently existing fronters in the USSR.'

[11] Signed, Kyiv, 31 May 1997; entered into force 1 April 1999: 3007 UNTS 117, in which see esp. Arts. 2, 3.

[12] Concluded 28 January 2003; entered into force 20 April 2004. See A/58/62-S/2003/156.

outstanding territorial issue between itself and Ukraine, or any serious human rights issue in Ukraine.[13]

Note (4) Other instances of use of force since 1945 supply no precise analogy to Russia's aggression against Ukraine. The use of force by Iraq against Kuwait and contemporaneous annexation of the territory of that state was a gross violation of international law and motivated the UN Security Council to act under UN Charter Chapter VII,[14] but, unlike Russia, Iraq is not a Permanent Member of the Security Council, and so Iraq could not veto collective enforcement action in response to Iraq's aggression.[15] Other boundary-related conflicts either had nothing to do with settled inter-state boundaries (e.g., India's use of force to integrate Portugal's colonial exclaves into India did not concern settled inter-state boundaries: by definition a colonial territory is not juridically integral to the administering power for purposes of international law and the final disposition of such a territory is not a settled matter); or concerned relatively confined boundary areas, not the totality of provinces, regions, or states (e.g., the Eritrea-Ethiopia conflict; Thailand-Cambodia skirmishes concerning the Temple of Preah Vihear). In any event, with the qualified exception of Iraq's aggression against Kuwait, until Russia's aggression against Ukraine no state since 1945 had attempted completely to destroy and absorb another state.

Note (5) States have remained at peace since 1945, no general breakdown of international order having taken place since then such as that between 1789 and 1815, 1914 and 1918, or 1939 and 1945. The development of international law and international institutions since 1945, unprecedented in scope and depth, may be traced to an environment of security in which aggression largely has been absent of the kind that Russia now perpetrates against Ukraine. That environment is unlikely to survive, if the results of Russia's aggression become entrenched.

Conclusion II

Ukraine as a State and Ukrainian citizens as individuals are entitled under international law to reparation for injuries resulting from Russia's aggression.

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[13] Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law* (Palgrave Macmillan, 2015), pp. 31-32, quoting observations of the Russian Federation in respect of Ukraine in the framework of the Universal Periodic Review (HRC, Report of the Working Group on the Universal Periodic Review, Ukraine, 20 December 2012, para. 28: A/HRC/22/7, p. 6).

[14] SC resolution 678 (1990), 29 November 1990.

[15] Also unlike Russia in regard to Ukraine, Iraq in regard to Kuwait had long expressed in formal settings that it did not accept the independence of Kuwait, on grounds that Kuwait was a colonial territory that should have 'reverted' to Iraq at the end of the period of British protectorate. Of course, articulating a claim does not validate use of force. States even with valid claims—which Iraq's against Kuwait was not—are at liberty to pursue negotiations, to consent to third-party settlement, and to express dissatisfaction if they understand their claims not to have achieved appropriate resolution. They are not free to invade states with which they are in dispute.

Note (1) Every internationally wrongful act of a state entails the international responsibility of that state—i.e., the state attracts liability under international law for its conduct that breaches international law.[16] Where a state has international responsibility, consequent upon its responsibility is a general obligation to make full reparation for the injury caused by its internationally wrongful act.[17] In other words, the general obligation to make full reparation inheres in the international responsibility of the state; it is not necessary that the state independently consent to make full reparation. The same holds, *a fortiori,* where the wrongful act is an act of international aggression.[18]

Note (2) The obligation of the responsible state, being a legal obligation to make full reparation for the injury caused by its internationally wrongful act, includes an obligation to make reparation for both material and moral damage.[19]

Note (3) While the law of state responsibility emerged as a law to govern relations among sovereigns—i.e., inter-governmental relations—modern international law entails the obligation on a state to make full reparation when its internationally wrongful acts are the cause of injury to individuals as well. It is a question of legal theory that may have consequences in practice (e.g., in establishing standing in dispute settlement procedures) whether individuals injured by the wrongful acts of the responsible state have rights under international law directly opposable against the responsible state or, instead, only rights that are derivative of the rights of an injured state. Under various international arrangements, most prominently modern investment treaties and human rights treaties, individuals hold international legal rights directly opposable against states responsible for particular breaches of international law.[20] Individuals continue also to avail themselves of diplomatic protection, the process by which a state may espouse a claim by an individual against another state.[21]

Note (4) Under the European Convention on Human Rights, individuals as well as states have brought claims to the European Court of Human Rights and obtained judgments including financial compensation for rights violations arising in connection with the armed occupation of national territory.[22] Ukraine

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[16] ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Art. 1: ILC YB 2001, Vol. II, Part Two, p. 31.

[17] *Factory at Chorzów,* Jurisdiction, Judgment No. 8, 1927 PCIJ Ser. A, No. 9, p. 21.

[18] A point reflected, e.g., in Article 5(1) of GA resolution 3314 (XXIX), 14 December 1974 (Definition of Aggression): 'Aggression gives rise to international responsibility,' from which the reparative obligation, in turn, follows.

[19] ARSIWA, Article 31.

[20] *Republic of Ecuador v Occidental Petroleum & Production Co.* [2005] EWCA Civ 1116, 9 September 2005, para 16 (Mance LJ), citing Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 169.

[21] See, e.g., Ben Juratowitch, 'Diplomatic Protection of Shareholders,' (2011) 81 *British Yearbook of International Law* 281-323.

[22] See, e.g., *Cyprus v. Turkey*, Application no. 25781/94, ECtHR, Judgment (Just Satisfaction), 12 May 2014; *Cazac and Surchician v. Republic of Moldova and Russia*, Application no. 22365/10, ECtHR, 7 Jan. 2020.

on 28 February 2022 instituted proceedings at the Court against Russia; the Court on 1 March 2022 granted urgent interim measures requiring that Russia cease its use of armed force in Ukraine and on 4 March 2022 further interim measures addressing requests that individual Ukrainians have instituted against Russia. Russia's expulsion from the Council of Europe,[23] non-participation in international dispute settlement procedures, and non-compliance with international judgments and awards casts doubt on whether claims instituted at the European Court of Human Rights will result directly in implementation of reparations by Russia to Ukraine or to Ukrainians.[24] Ukraine's claims instituted at the International Court of Justice,[25] under the UN Convention on the Law of the Sea,[26] and under bilateral investment treaties[27] for similar reasons are unlikely to result directly in implementation of reparations.

Note (5) In regard to any new procedure that is promulgated outside existing treaty frameworks to adopt awards of reparation for injuries caused by Russia's aggression against Ukraine, it is a judgment of policy whether individual injured Ukrainians (and injured Ukrainian enterprises and other organizations) are to have a free-standing right to full reparation of their own opposable against Russia, or whether the right to full reparation for their injuries is to be derivative of the rights of Ukraine as a state. However, international practice strongly supports providing for full reparation to individual injured Ukrainians (and injured Ukrainian enterprises and other organizations), as well as to the Ukrainian state. Because an extremely high number of Ukrainians (millions of

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[23] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (16 March 2022). Cf. CM/Del/Dec(2022)1426ter/2.3: Situation in Ukraine—Measures to be taken, including under Article 8 of the Statute of the Council of Europe, as to which see further https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729296/EPRS_ATA(2022)729296_EN.pdf.

[24] Noting the difficulty in implementing judgments and orders against Russia, see Anton Moiseienko, International Lawyers Project, and Spotlight on Corruption, *Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options* (June 2022), at p. 6: available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149158. See also précis of cases *sub judice* against Russia: Moiseinko et al at pp. 6-7 and nn. 14, 15, 16, 17, 18, 19. See also Julia Crawford, 'Ukraine vs Russia: What the European Court of Human Rights Can (and Can't) Do,' Justiceinfo.net (7 April 2022), available at https://www.justiceinfo.net/en/90187-ukraine-russia-european-court-of-human-rights-can-do.html.

[25] See Ukraine's Application instituting proceedings under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (27 Feb. 2022) (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*); and Ukraine's Application instituting proceedings under the Convention for the Suppression of the Financing of Terrorism and under the International Convention on the Elimination of All Forms of Racial Discrimination (16 January 2017).

[26] See Dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russia), Case No. 2017-06, PCA/UNCLOS Annex VII (instituted 16 September 2016); Case concerning detention of three Ukrainian naval vessels and the twenty-four servicemen on board (Ukraine v. Russian Federation), ITLOS (instituted 16 April 2019).

[27]E.g., *PJSC CB PrivatBank and Finance Company Finilon LLC AS v. Russian Federation,* PCA Case No. 2015-21; partial ward adopted 4 February 2019. As to Russia's non-participation, see PCA Press Release dated 30 March 2016, available at https://www.italaw.com/sites/default/files/case-documents/italaw7185.pdf.

individuals) are likely to have credible claims, states in constituting a claims process will foster orderly and efficient proceedings if they adopt suitable procedures and consider, as well, if judged appropriate, fixed-sum rates tailored to particular kinds and severity of injuries.[28]

Conclusion III

Reparation for injuries resulting from Russia's aggression shall include, to the extent practicable, restitution re-establishing the state of affairs which existed before the commencement of Russia's aggression.

Note (1) As the general obligation to make full reparation inheres in the legal responsibility of the state, so does an obligation to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act has not been committed.'[29] An obvious step toward 'wip[ing] out all the consequences' of Russia's aggression against Ukraine will be the cessation of Russia's military presence in and armed attacks against Ukraine, cessation being a legal obligation consequent upon Russia's legal responsibility.[30] In addition to the obligation of cessation (and the concomitant obligation of non-repetition), Russia is obliged to make restitution to Ukraine, 'that is, to re-establish the situation which existed before the wrongful act was committed.'[31]

Note (2) The obligation to make restitution is qualified by material possibility: Russia is not obliged to make restitution beyond that restitution which is materially possible.[32] Nor is Russia obliged to make restitution 'involv[ing] a burden out of all proportion to the benefit deriving from restitution instead of compensation.'[33] As to the first qualification—material possibility—Russia obviously cannot restore to life the vast numbers of civilians whom its war of aggression has killed. Nor can it re-establish the bodily and emotional integrity of the further vast numbers of civilians to whom its war of aggression has caused injuries short of death. Restitution is impossible as well for Ukrainian armed services personnel killed as a consequence of Russia's unlawful war or suffering personal injuries. To similar legal effect, where physical property 'has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some [other] reason,'[34] there too it will not be possible for Russia to make restitution.

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[28] See the difference between the parties over expert testimony in regard to fixed-sum rates and valuations for individual injuries (deaths): *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, 9 Feb. 2022, p. 50 para. 163. (N.B.: the reference here to deaths is not meant to imply limitation of individual claims in Ukraine to deaths).

[29] *Factory at Chorzów,* 1928 PCIJ Ser. A., No. 17, Merits, p. 47.

[30] ARSIWA Article 30 (Cessation and non-repetition).

[31] ARSIWA Article 35 (Restitution).

[32] ARSIWA Article 35*(a)*.

[33] ARSIWA Article 35*(b)*.

[34] ARSIWA Article 35, Comment (4): ILC YB 2001, Vol. II, Part Two, p. 97.

Note (3) As to the second qualification—proportionality—it is less clear what limits this places on Russia's obligation to make restitution. For example, the mass forced removal of children from Ukraine and their placement in custody of Russian families in remote parts of Russia might be burdensome on Russia to reverse, but the egregiousness of the unlawful act, and the scope of the injuries it has caused, dwarfs any burden that returning the children would impose. The International Law Commission, when considering the form and extent of reparation due to an injured state, suggested that 'cases of restitution… involving the return of persons, property or territory of the injured State' presented no question as to the 'respective rights and competences of the States concerned'[35]—which may be taken to entail that questions of proportionality between benefit and burden, in such cases, are less likely to arise than elsewhere.[36]

Note (4) Even in cases where questions of proportionality do arise, international practice suggests that the risks and burdens arising from a breach of international law should fall chiefly on the responsible state—i.e., on the state the conduct of which has constituted the breach. The suggestion that assessments of proportionality are to favour the injured state, not the responsible state, is visible, for example, in the *Great Belt* case. The respondent state argued that removing its bridge over the Great Belt—i.e., making reparation in the form of restitution—would be 'excessively onerous.'[37] The ICJ admonished, however, that 'in principle… if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled.'[38] This admonition accords with the priority that international law gives to restitution among the possible forms of reparation. As the ILC commented, restitution 'comes first among the forms of reparation.'[39]

Conclusion IV

Reparation for injuries resulting from Russia's aggression shall include compensation to cover all financially assessable damage that Russia's aggression shall be established to have caused.

Note (1) As noted above (Conclusion III, *note (2)*), the legal obligation to make reparation in the form of restitution is qualified by material possibility. Russia's war of aggression has caused injuries, and on a large scale, that it will not be materially possible to address through restitution. That is to say, it is impossible, as a matter of material fact, for Russia to restore the *status quo ante* in regard

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[35] ARSIWA Article 34 (Forms of reparation), Comment (3): ILC YB 2001, Vol. II, Part Two, p. 96.

[36] Further to return of persons, see SC resolution 687 (1991), 3 April 1991, para. 30.

[37] *Passage through the Great Belt (Finland v. Denmark),* Provisional Measures, Order, 29 July 1991, ICJ Rep. 1991 p. 12 at 19, para. 31.

[38] Id.

[39] ARSIWA Article 35 (Restitution), Comment (3): ILC YB 2001, Vol. II, Part Two, p. 96.

to many of the injuries its war of aggression has caused (*e.g.,* civilian and military deaths; bodily and emotional harm; destruction of physical property). Accordingly, Russia is under an obligation to compensate for the damage caused,[40] and the compensation shall cover any financially assessable damage.[41]

Note (2) Compensation 'is perhaps the most commonly sought [form of reparation] in international practice.'[42] International claims practice contains examples of compensatory calculations for many kinds of damage. With reference, for example, to investment awards under bilateral investment treaties, judgments of the International Court of Justice in state-to-state cases, and judgments of the European Court of Human Rights in both individual claims and state-to-state cases, the range of kinds of damages for which responsible states have been determined to owe compensation, and the range of compensatory calculations for kinds of damages, may be canvassed.[43]

Note (3) Damage to a state is not limited to material harm. Damage also may result from '[u]nlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State.'[44] However, compensation, in international claims practice, does not ordinarily cover non-material interests. Nor is compensation punitive.[45] The obligation to make reparation in the form of compensation 'is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms.'[46]

Note (4) Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by [its] nationals, whether persons or companies,'[47] including loss of profits.[48] Particular 'heads of compensable damage' are numerous. They include, by way of example and not limitation, the destruction of aircraft or ships; damage to public property; pollution damage including radiation damage; incidental damage arising, e.g., from the public costs of pensions and medical expenses for state employees whom the wrongful conduct has injured; injuries to individual citizens;

[40] ARSIWA Article 36 (Compensation), para. 1.

[41] *Id.* , para. 2.

[42] ARSIWA Article 36 (Compensation), Comment (2): ILC YB 2001, Vol. II, Part Two, p. 98.

[43] See examples of relevant dispute settlement bodies at ARSIWA Article 36 (Compensation), Comment (6): ILC YB 2001, Vol. II, Part Two, pp. 99-100.

[44] *'Rainbow Warrior,* XX UNRIAA (199) at pp. 266-267, paras. 107 and 109.

[45] ARSIWA Article 36 (Compensation), Comment (4): ILC YB 2001, Vol. II, Part Two, p. 99. Philip Zelikow, in a policy commentary, correctly identifies this distinction: Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine,' *Lawfare* (12 May 2022), available at https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine.

[46] ARSIWA Article 36 (Compensation), Comment (5): ILC YB 2001, Vol. II, Part Two, p. 99.

[47] Id.

[48] ARSIWA Article 36 (Compensation), Comments (28) to (31): ILC YB 2001, Vol. II, Part Two, pp. 104-105.

environmental damage and depletion of natural resources.[49] It is open to Ukraine to 'seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered'[50] as a consequence of Russia's aggression.

Note (5) While compensation is not punitive, and therefore international claims practice does not generally support the award of compensatory sums for any damage in excess of that which is financially assessable, additional sums may be awarded in furtherance of satisfaction.[51] In claims practice, satisfaction has been awarded chiefly where neither restitution nor compensation has sufficed to make full reparation to the injured state.[52] Satisfaction, when it is awarded, typically consists in an acknowledgement by the responsible state that its conduct was unlawful, an expression by that state of regret, or a formal apology. Given that the Russian Federation will not supply satisfaction by acknowledging its legal responsibility, expressing regret, or making apology, a trust fund or other financial measure of reparation may be adopted as satisfaction.[53] Such reparation would be in addition to compensatory measures taken as part of the implementation of Russia's responsibility to Ukraine.

Conclusion V

To the extent in accordance with international law, its constitutional law, and its legislative, executive, and judicial procedures, every state accepting these Draft Conclusions shall adopt and implement rules for the seizure and forfeiture of Russian assets, to include assets of the Russian State and assets of Russian natural and juridical persons within that state's jurisdiction.

Note (1) The international law of state responsibility for internationally wrongful acts has emerged chiefly through claims practice, which is to say in settings in which both the injured state and the state responsible for the injury have consented to the jurisdiction of a third-party organ to determine their respective rights and obligations, including reparative obligations; and through treaty practice and negotiation, which is to say in settings in which both states, likewise, have consented to a settlement of their differences. It appears improbable that the Russian Federation will consent in the current geopolitical setting to make full reparation to Ukraine for the injuries that Russia's war of aggression has caused. Therefore, need arises to consider steps that Ukraine and other states and intergovernmental organizations may take in the absence of

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[49] Comments (8) to (15): ILC YB 2001, Vol. II, Part Two, pp. 100-101.

[50] See ARSIWA Article 36 (Compensation), Comment (16): ILC YB 2001, Vol. II, Part Two, p. 101.

[51] ARSIWA Article 36 (Compensation), Comment (4): ILC YB 2001, Vol. II, Part Two, 99.

[52] ARSIWA Article 37 (Satisfaction), Comment (1): ILC YB 2001, Vol. II, Part Two, p. 105.

[53] The ILC mentions the possibility of a 'trust fund to manage compensation payments' but seems to consider as well the possibility of financial payments in connection with satisfaction (see ARSIWA Art. 37, Comment (5), p. 106). Since adoption of ARSIWA in 2001, the possibility of satisfaction in financial form has been affirmed, e.g. by the European Court of Human Rights: *Cyprus v. Turkey*, Application no. 25781/94, ECtHR, Judgment (Just Satisfaction), 12 May 2014.

Russia's consent in order to provide that Ukraine and its citizens receive full reparation.

Note (2) The terms 'seizure' and 'forfeiture' here are used without prejudice to variations in precise meaning or terminology employed in particular national jurisdictions or in international claims practice under the range of international procedures. In referring to the seizing or forfeiting of Russian assets, these draft Conclusions intend to distinguish between temporary measures of restraint, typically referred to as asset freezing, under which title to assets does not change, and measures under which title does change, seizure or forfeiture denoting the latter.[54]

Note (3) States in the period since 1945, until now, have had no occasion to carry out a seizure of assets of an aggressor state and its nationals on a scale called for today against Russia. The only comparable instance of aggression in the post-1945 era—Iraq's aggression against Kuwait (see Draft Conclusion I, *note (4)* above)—presented distinct considerations. In particular, the Security Council acted under Chapter VII against Iraq's aggression, including in the form of a sanctions regime that imposed comprehensive constraints against Iraqi property abroad. Also, Iraq's assets under the jurisdiction of other states were not as large as Russia's, and the international consensus against Iraq opened the door to encumbering Iraq's oil revenues and using those revenues to finance compensatory awards. It remains to be seen whether states will be in a position to encumber new revenues from Russia in such a manner.

Note (4) In the aftermath of World War Two, multilateral action was taken to establish a pool of assets, drawn from both public and private assets of the former German Reich. Meeting at Paris in November and December 1945 (i.e., starting some six months after victory in Europe), the Allies negotiated the Paris Agreement on Reparation, which they adopted on 14 January 1946.[55] The Paris Agreement on Reparation provided for the taking, *inter alia,* of German private property located in the territory of the parties to the Agreement. It also called for negotiations with neutral countries not party to the Agreement in order to arrange the transfer of German private property in those countries to the assets pool that the Agreement constituted.[56] Article 6(A) of the Agreement provided that '[e]ach Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to prevent their return to German ownership or control and shall

[54] Further to the distinction between asset freezes and asset forfeiture, seizure, or confiscation, see Moiseienko et al at pp. 9 *et seq.* and 12.

[55] Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, Paris, 24 January 1946: 555 UNTS 69.

[56] See Henry P. deVries, 'The International Responsibility of the United States for Vested German Assets,' (1957) 51 *American Journal of International Law* 18, 21 n. 13.

charge against its reparation share such assets.'[57] The Allies, under this disposition, made no distinction between public and private ownership.[58]

Note (5) Objections under national law, to the extent that they were raised, did not prevent conclusion of the Paris Agreement on Reparation of 1946, and countries proceeded to incorporate the terms of the Agreement into their national legislation. The United States Congress, for example, in the War Claims Act of 1948,[59] added a section to the Trading with the Enemy Act barring the return of vested assets under the provisions of the Paris Conference.[60]

Note (6) Enemy assets frozen in the United States during World War Two were valued at nearly $8 billion in 1949 terms.[61] It is true that contemporary jurists recognized that *freezing* assets raised fewer legal concerns than *seizing* or 'vesting' assets.[62] When it came to vesting enemy assets in the United States government, a senior Justice Department lawyer trenchantly observed, 'some holders of such property—especially banks and large commercial organizations—seem to have a deep-rooted, probably instinctive, aversion to the handing over of large sums of money upon the naked demand of a Government agency.'[63] U.S. courts, however, upheld the government Custodian's measures seizing enemy assets.[64]

Note (7) Along similar lines, in parliamentary debate in the United Kingdom after World War Two, it seems to have been taken for granted that assets of German nationals in the United Kingdom (which had a value of around £15 million in 1949 terms) would not be returned.[65] To the extent that German nationals had any rights or remedies in respect of their property in the UK that fell under the Trading with the Enemy Act, 1939, and the disposition of the Paris Agreement on Reparation of 1946, these were restricted to rights and remedies between those German nationals and the German government.[66]

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[57] 554 UNTS at 83-85.

[58] Rudolf Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945,' (2002) 20 *Berkeley Journal of International Law* 296, 316.

[59] 62 Stat. 1240; 50 U.S.C. Ch. 51.

[60] 62 STAT. 1246 (1948), 50 U.S.C. APP. § 39 (Supp. 1952).

[61] Annual Report, Office of Alien Property Custodian, Fiscal Year Ending June 30, 1944, 14: H.R. Rep. No. 1507, 77th Cong., 1st Sess. 2-3 (1941).

[62] Joseph W. Bishop, Jr., 'Judicial Construction of the Trading with the Enemy Act,' (1949) 62(5) *Harvard Law Review* 721, 721-723. So, too, today has freezing Russian assets been identified as more straightforward than seizure or confiscation: Moiseienko et al at p. 9.

[63] Bishop, 62(5) *Harvard Law Review* at 726.

[64] *Id.* at 728-729, addressing *Clark v. Manufacturers Trust Co.,* 169 F.2d 932 (2d Cir. 1948), *cert. denied,* 335 U.S. 910 (1949).

[65] See the Financial Secretary to the Treasury, Mr. Glenvil Hall, at HC Deb 15 November 1949 vol 469 cc 1866-1867.

[66] *Id.* at cc 1867-1868.

Note (8) While governments have used existing national legislation to freeze large sums of Russian money,[67] existing national legislation is unlikely to contain provisions suitable for seizing Russian assets.[68] States participating in the reparation model proposed in these draft Conclusions each should consider legislative measures, in accord with their constitutional law and human rights obligations,[69] to enable seizure of Russian assets for purposes of contributing to a financial pool to provide compensation to Ukraine and Ukrainians.[70]

Note (9) As the United States did after World War Two, states today participating in the reparation model proposed in these draft Conclusions should consider adopting procedures to protect private interests from mistaken asset seizure or forfeiture.[71]

Note (10) Jurists express concern that measures suspending or circumventing Russia's sovereign immunity would supply a precedent, opening the door to future erosion of sovereign immunity, including the sovereign immunity of states which have seized and forfeited Russian assets in accordance with the proposals in these draft Conclusions. However, such concern is misplaced. Seizure and forfeiture of Russian assets is a remedy *in extremis*: the harm that the remedy addresses is an act of international aggression of a kind and scope having no precedent in international practice since 1945. Russia's invasion of Ukraine, a plain violation of international law in itself, is accompanied by stated Russian war aims of an extremity not seen since World War Two. Russia's stated war aims include the destruction of Ukraine as a state and Ukrainians as a people or ethnic group, and Russia's ancillary war aims, also stated, include the 'restoration' of territorial and maritime boundaries of past Russian empires, e.g. the boundaries of the USSR. The present situation is readily understood as unique and unlikely to have precise analogues in future practice. Indeed, a central objective of the international response to Russia's aggression is to deter and prevent Russia or any other state from a future act of aggression of this kind.

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[67] For estimates, see Moiseienko et al at pp.

[68] See Moiseinko et al at p. 13.

[69] Maintaining consistency with constitutional rights is one of the goals in a proposed enactment recently passed by the U.S. House of Representatives (though yet to be considered in the Senate), the Asset Seizure for Ukraine Reconstruction Act (H.R. 6930), available at https://www.congress.gov/bill/117th-congress/house-bill/6930/text which would require the President, *inter alia,* to

> '[E]stablish an interagency working group, which shall be headed by the Secretary of State, to determine the constitutional mechanisms through which the President can take steps to seize and confiscate assets under the jurisdiction of the United States of foreign persons whose wealth is derived in part through corruption linked to or political support for the regime of Russian President Vladimir Putin and with respect to which the President has imposed sanctions.'

[70] Numerous proposals have been put forward for new legislation to facilitate seizure of Russian assets. Canvassing proposals, including bills in draft in the U.S. Congress, see Moiseienko et al at pp. 14-15, 31-32. For a selected list of proposals, see the References section of the present document.

[71] See 'Return of Property Seized During World War II: Judicial and Administrative Proceedings under the Trading with the Enemy Act,' (1953) 62 *Yale Law Journal* 1210.

Note (11) While under the *general* international law regarding state immunity, the severity or gravity of a breach of international law does not affect immunity,[72] states may through processes of customary rule formation or, more directly, through treaty, clarify or modify existing rules. The proposal here for a remedy *in extremis* is not a proposal for a pleading strategy before courts or tribunals under existing rules. The proposal is, instead, one of policy. It is a proposal that states adopt new rules to qualify or suspend Russia's immunity to the extent necessary to implement Russia's international legal responsibility for its aggression against Ukraine.[73]

Note (12) Rules that states adopt and implement for the seizure and forfeiture of Russian assets may be promulgated in terms that make clear that measures against Russian assets are a special remedy. For example, seizure and forfeiture may be referred to Security Council resolution 2623 of 27 February 2022, the first of its kind in forty years, calling the General Assembly to convene under the 'Uniting for Peace' procedure, and leading to the adoption by the General Assembly on 2 March 2022 of resolution ES-11/1, in which the General Assembly '*[d]eplore[d]* in the strongest terms the aggression by the Russian Federation against Ukraine' and '*[d]emand[ed]* that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.'[74] (See further below Conclusion XII, *Note (4)*). National legislation might refer to that UN procedure and those UN determinations as a necessary predicate to the exercise of authority to seize and forfeit assets that otherwise would be immune.[75] The once-in-a-generation character of the procedure and determinations makes clear that it is only under the narrowest of circumstances that the door might open to the exercise of the proposed authority.[76]

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[72] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 3 February 2012, ICJ Rep. 2012 p. 99 at p. 139, para. 91:

> 'The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.'

See also *id.* at p. 136, para. 82.

[73] See Moiseienko et al at p. 35: 'It may also be desirable, both in view of the current situation and to disincentivize future aggression, to postulate a new exception to sovereign immunity rules…'

[74] GA res. ES-11/1, 2 March 2022, paras. 2, 4.

[75] For other possible factors that new legislation could identify as prerequisites to measures against Russian assets, see Moiseienko et al at p. 31, quoting Ukrainian Sovereignty Act of 2022 (H.R. 7205; not yet adopted), proposing as prerequisites to the suspension of immunity, *inter alia,* invasion by a foreign state of 'another sovereign national located in Europe.' See also Moiseienko et al at pp. 17, 35.

[76] For purposes of U.S. legislation, it may be relevant that the Trading With the Enemy Act continues to apply to Cuba, notwithstanding the absence of a formal state of war of the kind that existed between the United States and the Axis Powers during World War Two. See Presidential Determination No. 2022-22 (2 September 2022) (continuing Cuba's designation under section 101(b) of 91 Stat. 1625; 50 U.S.C. 4305 note). Also, regarding possible deficiencies in a 'terrorist state' designation under existing U.S. law, see Moiseienko et al at p. 30.

Note (13) Similar restrictive terms may be adopted in the multilateral international agreement that these draft Conclusions propose.[77]

Note (14) Having seized and forfeited Russian assets, states then would be in a position to transfer those assets either directly or indirectly to Ukraine and individual Ukrainian persons, natural or juridical.

Conclusion VI

Russian assets seized and forfeited in accordance with Conclusion V above shall be placed in trust and managed by a Compensation Fund authorized under national law and international agreement.

Note (1) General international law contains no rules indicating precisely how states might constitute and manage an organ under which to consolidate funds taken from different sources for purposes of later disbursement. However, international arrangements have existed for some time which are analogous at least in a general way to the trust funds that exist under national legal systems.[78]

Note (2) The Security Council has established trusts in the past, and the UN Secretariat has served as trustee in some instances.[79] The World Bank, the IBRD, and other international institutions also have established trusts. States have done so as well in bilateral and other multilateral settings. Trusts constituted at the international level have been conferred international legal personality, to the extent necessary for the discharge of their assigned functions.[80]

Note (3) The purposes for which states and inter-governmental institutions have constituted organs in forms analogous to a trust are varied. For example, the General Assembly has placed funds in 'special accounts' to finance peacekeeping, peace monitoring, and peace enforcement outside the regular budget of the UN.[81] The General Assembly also has set up Voluntary Funds for indigenous populations, for victims of torture, and for preventive action against contemporary forms of slavery.[82]

Note (4) Particularly salient as states consider a model for implementing reparations for Ukraine is the Kuwait Compensation Fund. The Security Council constituted the Kuwait Compensation Fund, together with a Compensation Commission, to implement payment of reparations by Iraq to Kuwait for damages that Iraq's aggression against Kuwait had caused. SC

[77] See Conclusion XIII; cf. Conclusion VI, *Note (5)*.

[78] Ilias Bantekas, 'The Emergence of the Intergovernmental Trust in International Law,' (2011) 81 *British Yearbook of International Law* 224.

[79] *Id.* at 236.

[80] *Id.* at 240.

[81] *Id.* at 253-254.

[82] *Id.* at 254.

resolution 687 of 8 April 1991, having provided, *inter alia,* for the substantial disarmament of Iraq and on-going verification of the same,[83] in its paragraph 16

'[r]eaffirm[ed] that Iraq… [was] liable under international law for any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.'[84] SC resolution 687 (1991) then indicated the Security Council's decision 'to create a fund to pay compensation for claims that fall within paragraph 16 and to establish a commission that will administer the fund.'[85] The detailed operationalization of the Kuwait Compensation Fund was entrusted to the UN Secretary-General (e.g., administrative mechanisms, arrangements for money entering the fund, arrangements for money to be disbursed by the fund, etc.).[86]

Note (5) While a Permanent Member veto would prevent the Security Council from adopting a resolution to implement Russia's legal responsibility for its aggression against Ukraine analogous to SC resolution 687 (1991), it is open to states to adopt a separate multilateral agreement promulgating much the same result.[87] Such an agreement would be limited in any effect it might have beyond its parties,[88] but, if the states in which substantial Russian assets are located are among its parties, then the agreement would achieve its functional purpose: i.e., it would establish an organ—the compensation fund—and confer on the organ the authority and practical means to receive and hold money and, eventually, to disburse money as compensation in accordance with awards adopted by a compensation commission.[89]

Conclusion VII

To ensure orderly calculation of compensation, a Compensation Commission shall be established under international law. Ukraine as a State, including organs of the State, and Ukrainian private natural and juridical persons may have standing before the Compensation Commission to present claims for compensation. The Compensation

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[83] SC res. 687 (1991), 3 April 1991, paras. 8-14.

[84] SC res. 687 (1991), para. 16.

[85] *Id.*, para. 18

[86] *Id.,* para. 19.

[87] See proposal for possible terms in a multilateral treaty, Moiseienko et al at pp. 18-19. Cf. *id.* at pp. 3, 28.

[88] I.e., such a treaty might play a part in modifying the customary rules of immunity, but, to the extent that it did, this would be an indirect effect of the treaty. See generally *Draft conclusions on identification of customary international law* (2018) (Sir Michael Wood, Special Rapporteur), Conclusion 11 (Treaties): ILC YB 2018, vol. II, Part Two at p. 143. Cf. Conclusion 6(2), ILC YB 2018, vol. II, Part Two at pp. 133.

[89] See further to a Compensation Fund for Ukraine Moiseienko et al at p. 20; Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine,' *Lawfare* (12 May 2022), available at https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine.

Commission shall adopt awards in accordance with rules and procedures it shall have promulgated.

Note (1) It is in the interests of justice that the calculation of compensation for Ukraine, as a State, and for Ukrainian private persons, natural and juridical, take place in orderly fashion.[90] Because Russian assets, public and private, are located in a number of national jurisdictions, it is likely that parties, in the absence of a general claims process, will bring claims in parallel or in competition with one another and under different procedural and substantive rules. Claims brought in such a manner present the risk that courts and tribunals deciding the claims will adopt inconsistent determinations of law or of fact. Claims brought in such a manner also present the risk that courts and tribunals will adopt judgments or awards without regard to the interest that all injured parties receive appropriate compensation. It is with these risks in view that states, in accord with these draft Conclusions, should constitute a Compensation Commission with authority to address all or most relevant claims.

Note (2) International claims practice is familiar with bilateral and multilateral agreements that confer exclusive competence on one national or international body to decide claims. For example, a considerable number of bilateral investment treaties confer exclusive competence on a dispute settlement organ. (In that setting, the dispute settlement organ is often, one that the claimant chooses, and often an international arbitral tribunal). Under the Algiers Accords of 19 January 1981, the United States went further than that, agreeing to 'terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.'[91]

Note (3) Creating an orderly claims process under the Compensation Commission does not preclude incorporating findings of fact reached by other dispute settlement mechanisms. For example, to the extent appropriate, it might be stipulated that findings of the European Court of Human Rights or of relevant UN and other international human rights bodies are either to be adopted as binding in Compensation Commission proceedings or as persuasive authority.

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[90] In their study of possible mechanisms to implement reparation for Ukraine, Moiseienko et al draw attention to the need for an orderly claims process: Moiseienko et al at pp. 4, 30, 33. Moiseienko et al are of the view that the pursuit of reparations or reparations-like claims by private parties in multiple national courts would lead to 'confusion of the process, or at least its considerable complexification.' *Id.* at p. 28.

[91] Declaration of the Government of the Democratic and Popular Republic of Algeria (19 January 1981): General Principles (B.): (1981) 20 International Legal Materials at p. 224. While challenged in national court litigation in the United States (see *Dames & Moore v. Regan,* 453 U.S. 654, 686 (1981, Rehnquist, J.); see also *Roeder v. Islamic Republic of Iran,* 646 F.3d 56 (D.C. Cir. 2011)), the dispute settlement mechanism constituted pursuant to the Algiers Accords—the Iran-United States Claims Tribunal—largely has operated as intended—i.e., as a comprehensive jurisdiction to address claims in the identified categories.

Note (4) As noted above,[92] the Security Council under SC resolution 687 (1991) constituted, together with a Kuwait Compensation Fund, a Compensation Commission to address claims arising out of Iraq's illegal invasion of Kuwait. Known as the United Nations Compensation Commission (UNCC), this body functioned as a subsidiary organ of the Security Council and adopted awards of compensation.[93] Approximately 1.5 million claimants brought claims to the UNCC resulting in awards of compensation. Disbursements in settlement of the UNCC's awards eventually reached $52.4 billion (USD). Funds to satisfy the UNCC's awards were drawn from Iraq's oil revenues under the disposition that the Security Council had adopted in SC resolution 687 (1991).

Note (5) The UNCC consisted of nineteen Panels of Commissioners, which reviewed and evaluated claims. Awards were adopted subject to approval of a Governing Council. Governments, international organisations, companies, and individuals had standing to present claims to UNCC Panels.[94] The Governing Council held its final meeting on 9 February 2022 and at that time declared its mandate fulfilled.[95] It is to be noted that over thirty years elapsed between the constituting of the UNCC and the fulfilment of its mandate. The UNCC was the 'first example of individuals having recourse to seek compensation from an aggressor State.'[96]

Note (6) While it is well-established that the responsibility of a state for injuries that its wrongful acts have caused to another state include responsibility for damage to private natural and juridical persons of the injured state, international law contains no general rule to indicate how or by whom claims for compensation for such damage shall be instituted. Already, as of September 2022, Ukraine has instituted proceedings at the International Court of Justice and the European Court of Human Rights in respect of Russia's legal responsibility for aggression against Ukraine. Individual Ukrainians also have instituted proceedings at the latter court.[97] Full reparation for Ukraine and its nationals, including compensation, will be fostered under a procedure that addresses all relevant claims under agreed procedural and substantive rules. Because international law prescribes no general rule of standing, states constituting such a procedure should indicate expressly which parties or categories of parties shall have standing to institute claims.

Note (7) States designing the Compensation Commission proposed under the present draft Conclusions should consider conferring standing on a broad

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[92] Conclusion VI, *Note (4)*.

[93] See generally David D. Caron & Brian Morris, 'The UN Compensation Commission: practical justice, not retribution,' (2002) 13(1) *European Journal of International Law* 183-199.

[94] Submission of claims was through governments and international organizations: see Provisional Rules for Claims Procedure (6 June 1992), Article 5: S/AC.26/1992/10 at pp. 4-5.

[95] UNCC Governing Council, Decision 277, S/AC.26/Dec.277 (2022), para. 4.

[96] Final Report of the Governing Council of the United Nations Compensation Commission to the Security Council on the work of the Commission, 9 February 2022, S/2022/104, para. 35.

[97] According to the ECtHR, as at 14 January 2021, there were already over 7,000 individual applications pending in regard to events in Crimea, Eastern Ukraine, and the Sea of Azov. See ECHR Press Release 010 (2021).

category of potential claimants. The category of potential claimants might extend to include all natural and juridical persons in Ukraine who present credible evidence that they have suffered injury as a result of Russia's war of aggression. As recalled above,[98] the UNCC (1991-2022) received and settled claims presented by governments, business enterprises, and individuals. However, the interests of procedural efficiency and equity will require states, in designing the Compensation Commission, to consider the matter in holistic fashion. In view of the enormous numbers of Ukrainians injured, group or 'class' claims are a possible procedural device that merits consideration, and other approaches, too, should be considered, including administrative mechanisms subsidiary or accessory to the Compensation Commission.[99]

Note (8) So as to expedite the claims process and to avoid inconsistent decisions, States also may consider stipulating particular factual and legal determinations as settled for purposes of claims presented to the Compensation Commission. Stipulative provisions along such lines have been adopted at international level in the past. Recalling paragraphs 16 and 18 of SC resolution 687 (1991),[100] the general matter of Iraq's liability (i.e., legal responsibility) under international law for the injuries caused by its aggression against Kuwait was stipulated as settled. States, in the multilateral instrument constituting the Compensation Fund and Compensation Commission for Ukraine, should stipulate Russia's legal responsibility for the war of aggression that Russia has conducted against Ukraine and make clear that Russia's legal responsibility is settled for purposes of proceedings and awards of the Compensation Commission. Further matters may also be stipulated, among which the temporal scope of the jurisdiction of the Compensation Commission merits separate remark (see Conclusion XII below). As appropriate, findings of fact reached in other forums, such as the European Court of Human Rights, also might be adopted for purposes of expediting the work of the Compensation Commission (see this draft Conclusion, *Note (3)*).

Note (9) States constituting the Compensation Commission should consider possible mechanisms for governing that body. The Governing Council of the UNCC may be recalled in this regard, though any mechanism that states adopt to govern a Ukraine Compensation Commission would have to function independently of the UN Security Council, given the practical certainty of a Permanent Member veto. International practice supplies many examples of multilateral organs constituted outside the United Nations institutional framework altogether and performing their functions successfully.

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[98] Conclusion VII, *Note (3)*.

[99] ECtHR jurisprudence furnishes examples of administrative mechanisms, including in regard to compensation and restitution, which contain elements that, *mutatis mutandis,* might be applied to deal with large numbers of claims in Ukraine. See, e.g., the Immovable Property Commission in northern Cyprus, constituted in order to implement the ECtHR's judgment in *Xenides-Arestis v. Turkey,* application no. 46347/99, 14 March 2005. Cf. *Broniowski v. Poland* [GC], application no. 31443/96, 22 June 2004.

[100] See above Conclusion VI, *Note (4)*.

Note (10) The multilateral instrument constituting the Compensation Commission should confer authority on the Compensation Commission to adopt rules of procedure appropriate to the conduct of its proceedings and to amend such rules from time to time as needed.

Conclusion VIII

In awards that it adopts, the Compensation Commission shall establish for each claimant whether Russia's aggression has caused financially assessable damage and, where it has established that Russia's aggression has caused such damage, the amount of compensation.

Note (1) While it is proposed in these draft Conclusions that certain substantive and factual matters would best be settled by multilateral disposition and stipulated as settled for purposes of all subsequent proceedings and awards of the Compensation Commission,[101] other matters would require separate determination for each claim (or category of claim). In particular, the Compensation Commission will be called upon to verify the identity of claimants, the merits of the claims that they present, and, for meritorious claims, award quantum.

Note (2) States constituting a Ukraine Compensation Commission might again turn to the UNCC as the relatively recent international claims procedure in which claims of similar kind and in similar volume were addressed. Under the UNCC's Provisional Rules of Procedure, each claimant was responsible for submitting documentary and other evidence to demonstrate that a particular claim or group of claims was eligible for compensation. UNCC claims panels determined the admissibility, relevance, materiality, and weight of the evidence submitted.[102] To facilitate processing of the very large number of claims anticipated, the UNCC required claims to be submitted on claims forms.[103] States could adopt similar modalities for the Ukraine Compensation Commission.

Conclusion IX

In promulgating its rules and procedures and adopting awards, the Compensation Commission shall have due regard for the interest in a just and orderly distribution of compensation to all claimants to whom the Compensation Commission has established that Russia's aggression has caused financially assessable damage.

Note (1) One of the chief reasons that states should consider constituting a Compensation Commission to address claims arising out of Russia's aggression against Ukraine is that such a body would serve to foster the orderly and

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[101] See above Conclusion VII, *Note (7)* and below Conclusion (XII).

[102] Provisional Rules for Claims Procedure (6 June 1992), Article 35(1): S/AC.26/1992/10 at pp. 18-19.

[103] *Id.* at Article 4, Article 6(1): S/AC.26/1992/10 at pp. 4, 5.

efficient conduct of the claims process. In order to assure that the Compensation Commission in practice serves that purpose, the states constituting it should direct it to promulgate rules and procedures and to adopt awards with a view to the range of claimants injured by Russia's aggression and the funds available for compensation. The concern that this approach would address is that some claimants might be over-compensated and others under-compensated, if the organ determining award quantum failed to keep in view the entire body of anticipated claims and likely limits of the Compensation Fund.[104]

Note (2) The UNCC supplies the most salient example of a body having a mandate of similar scope and kind as that which the proposed Ukraine Compensation Commission would be called upon to discharge. The UNCC Governing Council, in its final report (9 February 2022), noted that, prior to the commencement of the UNCC's work, the key issue already had been settled of legal responsibility and liability of Iraq for the losses and damage that Iraq's aggression had caused. According to the Governing Council, the UNCC…

'was thus neither a court nor a tribunal with an elaborate adversarial process. Rather, it was created as a claims resolution facility that could make determinations on a large number of claims in a reasonable time.'[105]

The UNCC was assisted by the Governing Council which, for example, developed criteria for assessing claims for personal injury, mental pain and anguish and for individual business losses.[106] The Governing Council adopted measures to avoid multiple recoveries by claimants.[107] In international practice, historically, the focus of concern in regard to multiple recoveries had been the interest of respondent States.[108] By contrast, in constituting a process to award and disburse compensation from a finite pool of financial assets to the victims of international aggression, it is to be submitted that the focus of concern shifts to the interest of the victims.

Note (3) Further noteworthy in the practice of the UNCC Governing Council, the organ carried out a sort of claims triage, giving priority to the most serious claims of personal injuries or deaths and to smaller pecuniary claims (claims under $100,000 USD).[109] The UNCC had recourse to 'a variety of internationally recognized mass claims processing techniques,' which it employed to deal with the extremely large number of claims it was called upon to address.[110] After some fifteen years of operation of the UNCC, the Governing Council took stock

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[104] Avoidance of over-compensation is a policy, as well as legal, goal, and it is reflected in a number of international instruments. See, e.g., ARSIWA Article 38 (Interest), Comment (11): p. 109.

[105] S/2022/104, para. 32.

[106] *Id.* at para. 33.

[107] *Id.* at para. 34.

[108] See, e.g., *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, 11 April 1949*,* ICJ Rep. 1949 p. 174 at 186: 'International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.'

[109] *Id.* at para. 35.

[110] *Id.* at para. 36.

of the Compensation Fund's financial resources and, finding that the Fund had more money than anticipated, lifted the compensation ceiling on certain categories of claim.[111] A Ukraine Compensation Fund would function under its own rules and governance, constituted to address the particular challenges arising in the claims process for full reparation for Russia's aggression. However, the experience of the UNCC suggests, in a general way, how a claims process can adapt in order to assure equitable disbursement of funds among claimants, including adapting to reflect changes in available financial resources in the compensation fund over time.

Conclusion X

The Compensation Fund shall distribute compensation to claimants in accordance with the awards that the Compensation Commission adopts.

Note (1) The proposed Compensation Fund and Compensation Commission (see above Conclusions VI and VII) are to function together to achieve the aim of full reparation for Ukraine and its nationals. The Fund is to receive and hold financial assets that states have seized from the Russian state and Russian nationals and entrusted to the Fund; and, then, disburse funds as compensation to Ukraine, Ukrainian individuals, and Ukrainian enterprises and other organizations, in implementation of awards that the Compensation Commission has adopted.

Note (2) Technical modalities for the operations of the Compensation Fund, including modalities for the disbursement of funds in satisfaction of awards, can be adopted with reference to past examples of international trusts and compensation funds.[112]

Note (3) States participating in constituting the Compensation Fund and Compensation Commission may agree to promulgate national law and procedures for assisting in the disbursement of funds.[113]

Conclusion XI

Every State accepting these Draft Conclusions shall recognize and give effect in its national law to the authority of the Compensation Fund to

[111] UNCC Governing Council Final report, S/2022/104 at para. 57.

[112] See regarding payment mechanisms and processes, UNCC Governing Council Final report, S/2022/104 at paras. 53-56, 59-64. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda),* Judgment, 9 Feb. 2002, ICJ Rep. 2002 p. 107 para. 408. The DRC's Agent undertook that compensation paid by Uganda 'will be fairly and effectively distributed to victims of the harm, under the supervision of organs whose members include representatives of victims and civil society and whose operation is supported by international experts'.

[113] Disbursement through national government organs has the advantage that such organs are in a position readily to apply existing national law and procedures to address disputes that might arise after the Compensation Commission has awarded a party financial compensation. See, e.g., *Roshdy (formerly Sultan) v. Sultan,* 200 D.L.R. (4th) 161 (Ontario Court of Appeal, 2 April 2001) (settling a dispute between divorcees over a UNCC award).

distribute compensation to claimants in accordance with the awards that the Compensation Commission adopts and shall accept such awards as final, enforceable, and without challenge or appeal.

Note (1) According finality to Compensation Commission awards is in line with international practice. Decisions taken by the Governing Council of the UNCC, for example, 'were final and not subject to appeal or review.'[114]

Note (2) A control machinery may be embedded in the Compensation Commission or put in place as a separate intergovernmental organ, serving as did the Governing Council in respect of the UNCC. Such control machinery may be vested with a quality-checking function, awards of the Commission being made subject to its approval.[115]

Conclusion XII

For purposes of the establishment and valuation of injuries, the temporal scope of Russia's aggression shall extend from the commencement of Russia's armed actions against Ukraine in February 2014 to a future date at which Russia's armed forces have been established to have ceased to be unlawfully present in and to have ceased to operate against Ukraine.

Note (1) In international claims practice, the identification of the temporal scope of claims subject to jurisdiction aids in addressing and settling claims in an orderly and efficient manner.[116] While a claims settlement organ on which states have conferred appropriate authority and jurisdiction itself may determine temporal scope where the relevant constitutive instrument has not identified it, omission of terms identifying scope gives rise to the possibility of inconsistent outcomes across different claims and to a question that the claims settlement organ otherwise would not need to expend time and procedural resources to determine.

Note (2) As a factual matter, the Russian Federation initiated armed aggression against Ukraine in February 2014. States and others at the time said as much. For example, the European Union (on 27 March 2014 in the General Assembly) 'strongly condemn[ed] the clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian armed forces.'[117] The United States at the same time referred to 'unilateral confrontation and

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[114] S/2022/104, para. 47.

[115] As to quality control for international awards in the investment dispute settlement, see Symposium Co-Organised by ICSID, OECD and UNCTAD, *Improving the System of Investor-State Dispute Settlement: An Overview,* paras. 5-56 (Paris: OECD, 2005).

[116] See generally Sean D. Murphy, 'Temporal Issues Relating to BIT Dispute Resolution,' (2022) 37 *ICSID Review—Foreign Investment Law Journal* 51-84; Zachary Douglas, 'When Does an Investment Treaty Claim Arise? An Excursus on the Anatomy of the Cause of Action,' IAI Series No. 8 (Juris Legal Information: November 2017).

[117] Mr. Mayr-Harting (European Union), 27 March 2014, A/68/PV.80, p. 5.

aggressive acts.'[118] Canada referred to 'Russia's aggression in Crimea.'[119] States and international organizations also substantiated, as a matter of fact and law, that Russia initiated armed aggression against Ukraine at that time.[120]

Note (3) The UN General Assembly on 27 March 2014 implicitly acknowledged that Russia had commenced an armed attack against Ukraine in violation of multiple binding commitments[121] and that the object of Russia's armed attack was 'the partial or total disruption of the national unity and territorial integrity of Ukraine, including… attempts to modify Ukraine's borders through the threat or use of force or other unlawful means.'[122] Called into Emergency Special Session by Security Council resolution 2623 of 27 February 2022, the General Assembly on 2 March 2022 adopted resolution ES-11/1, in which it '*[d]eplore[d]* in the strongest terms the aggression by the Russian Federation against Ukraine' and '*[d]emand[ed]* that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.'[123] GA resolution ES-11/1 thus may be see to identify the *spatial* scope of Russia's aggression to include *at least* all areas within Ukraine's international recognized borders in which Russia's military forces are present. The spatial scope encompasses areas within Ukraine's internationally recognized borders which Russia's military forces invaded starting in February 2014. Having identified the spatial scope of Russia's aggression against Ukraine in this way, the General Assembly may be seen to have identified February 2014 as the starting point of Russia's aggression against Ukraine.

Note (4) The Security Council action calling the General Assembly into Emergency Special Session also strongly suggests that Russia's aggression against Ukraine began in February 2014. SC resolution 2623 of 27 February 2022 was adopted under the 'Uniting for Peace' procedure first articulated in GA resolution 377A(V) of 3 November 1950 as a mechanism for addressing a threat to the peace, breach of the peace or act of aggression, where the veto of a Permanent Member has prevented the Security Council from exercising its primary responsibility for the maintenance of international peace and security. SC resolution 2623 (2022) is the first 'Uniting for Peace' resolution in forty years.[124] SC resolution 2623 (2022) expressly identifies the 'question contained in document S/Agenda/8979' as the question which the Security Council decided to call the General Assembly into emergency special session to examine. S/Agenda/8979, in turn, incorporates by reference a Letter dated 28 February 2014 from Ukraine's Permanent Representative addressed to the President of

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[118] Ms. Power, id. at p. 6.

[119] Mr. Rishchynski, id. at p. 9.

[120] Cf. the Statement of the Heads of State or Government on Ukraine, referring to the Russian Federation's use of force as 'unprovoked' and purported 'referendums' in Ukraine's Crimean area as 'illegal': (6 March 2014)

[121] GA res. 68/262, 27 March 2014, preambular paras 3, 4.

[122] GA res. 68/262, 27 March 2014, para. 2.

[123] GA res. ES-11/1, 2 March 2022, paras. 2, 4.

[124] See Security Council Press Release, SC/14809 (27 Feb. 2002) (SC 8980th meeting (am)).

the Security Council, in which the Permanent Representative refers to 'the deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine, which threatens the territorial integrity of Ukraine.' The timing of the 28 February 2014 letter and the reference to it by the Security Council in resolution 2623 (2022) further support the inference that the relevant date, for purposes of identifying the temporal scope of claims arising out of Russia's aggression, is in February 2014.

Note (5) Notwithstanding the factual evidence that the Russian Federation initiated armed aggression against Ukraine in February 2014, and notwithstanding the implicit acknowledgment by the General Assembly and Security Council of that evidence, clarity would be gained, and unnecessary forensic and fact-finding incidents avoided, if states in a multilateral instrument constituting a Compensation Commission and Compensation Fund stated explicitly, and in terms binding on the Commission and Fund, that the assessment of injuries to Ukraine by Russia's aggression shall encompass all injuries caused by Russia's aggression since, at the latest, 28 February 2014. Adopting a finding of fact and law to this effect at the constitutive level—e.g., in a multilateral instrument constituting the Commission and Fund—would settle the matter and thereby serve the general interest in an orderly and efficient claims process.

Conclusion XIII

A legally binding multilateral agreement shall be pursued in accordance with and in furtherance of these Draft Conclusions.

Note (1) In the past, when seeking to assure payment of reparations by an aggressor state, states have constituted multilateral mechanisms for receiving claims, assessing damages, and distributing financial sums under adopted awards. Such mechanisms have supplied a practical solution that fosters an orderly implementation of the international legal responsibility of the aggressor state.

Note (2) It was under the Chapter VII authority of the Security Council that a United Nations Compensation Commission (UNCC) was constituted in 1991 to implement the international legal responsibility of Iraq for that state's aggression against Kuwait. Constituting an organ in this manner requires a substantive majority in the Security Council. Presumably, there would be no substantive majority in the Security Council for constituting a claims mechanism to address Russia's aggression against Ukraine, as Russia would exercise its power of veto as a Permanent Member to block a resolution drafted to do so.

Note (3) For purposes of implementing reparations, States have constituted multilateral mechanisms independently of any standing intergovernmental organization. Among examples salient for states today considering steps to implement Russia's international legal responsibility for aggression against

Ukraine, the Paris Agreement on Reparation, adopted in 1946, has already been noted.[125]

Note (4) In pursuing a legally binding multilateral agreement on reparations, including a mechanism for receiving claims, assessing damages, and distributing financial sums under adopted awards, the largest possible participation by states should be sought. Priority should be given to the participation by states containing the world's main financial centres and largest quantities of Russian state and private assets.[126]

Note (5) The legally binding multilateral agreement proposed in these Conclusions may be drafted in a diplomatic conference in which relevant non-governmental stakeholders, as well as governments, participate. The UN General Assembly may consider adopting a resolution recommending the treaty for signature by all states.

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[125] See above Conclusion V, *Notes (3), (4),* and (*6).*

[126] Also of importance would be the participation of Ukraine itself and of other States 'tangibly and adversely impacted by Russia's war in Ukraine': Moiseienko et al at p. 19.