NEW LINES INSTITUTE
FOR STRATEGY AND POLICY

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

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Foreword

As Russia's war against Ukraine continues, policymakers around the world have begun to consider the question of reparations. These will be necessary in compensating Ukraine for Russia's invasion and will be vital in the rebuilding of Ukraine's economy and society.

The Multilateral Action Model on Reparations provides a legal process for the collection and distribution of reparations. It is an answer to that previously unresolved question. The model breaks new ground. It has to, because the war of aggression it is intended to compensate is unlike any other in Europe since 1945.

With Russia a member of the United Nations Security Council, a traditional model of reparations ordered by the U.N. would not pass the Russian U.N. veto. Instead, a new solution has to be devised.

The New Lines Institute convened a team of international legal experts, economists, and scholars to devise a new means of reparations.

Their analysis provides a roadmap for lawfully using Russian funds already frozen by the countries that have sanctioned Russia for its war — and provides a detailed, actionable list of possible sources of Russian state funds for use. It also establishes a functional, efficient means of collecting and distributing those funds, so that they might be used to rebuild Ukraine not in the distant future, but as the war continues.

In 13 Draft Conclusions backed by international law doctrine and practice, this model provides a practical, groundbreaking path to making use of seized and frozen Russian assets to compensate and rebuild Ukraine.

This report is focused on the necessary and immediate work of rebuilding Ukraine. But the model has wider applications. It is our hope that it will be used in future conflicts where traditional models of reparations fail, and that its successful use to assist Ukraine will make it another check on and disincentive for countries that would otherwise be willing to begin a war of aggression.

We believe the New Lines model will be a tool to help keep future peace, as well as one that can aid in Ukraine's reconstruction.

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This paper makes the case for developing an effective system for reparations and compensation for the Ukrainian state and Ukrainian individuals and enterprises injured by Russia's war of aggression. It argues in 13 Draft Conclusions, backed up with extensive references from modern state practice, to make a compelling argument for liability of the Russian state and the taking of Russian assets to provide compensation. This paper argues, in order to ensure just and orderly payment of reparations and compensation, that states supportive of Ukraine establish by treaty or similar instrument a means to provide for the identification, freezing, and seizing of Russian assets, and the establishment of an international Ukrainian Compensation Commission, to identify claims and make payments. This can be achieved through multilateral action, including in the frame of the U.N. General Assembly or through a conference of states convened to address the exigent circumstances created by Russia's war of aggression.

At first sight, taking Russian assets to compensate Ukraine and Ukrainians for the damages suffered by Russia's war of aggression appears a radical step. However, the Multilateral Action Model must be considered in light of the challenge it aims to address. Since 1945, there have been few, if any, examples of international law breach as serious as Russia's war of aggression. Through its war of aggression, Russia seeks to erase Ukraine from the map and destroy its people and culture. The violations of international law and disruption of geopolitical order entailed by Russia's aggression are so extreme that they require remedies *in extremis*. International law has created such remedies when circumstances have called for them.

Remedies like this would involve taking Russian assets and holding them in a fund to be distributed to Ukraine and Ukrainians injured by Russian state action. In such an extreme case as Russia's war against Ukraine, the identification, freezing, seizure, and transfer of Russian assets are justified in international law. Action is legally justified to provide reparations and compensation. It is also justified as a means to deter any other state from seeking to begin such a war of aggression. Such an *in extremis* remedy protects the rules-based and pacific objectives of the international order, which are enshrined in Article 2(4) of the U.N. Charter.

There are two key precedents in international law and the practice of states for the seizure, pooling, and distribution of assets of a sovereign state. The first is under the Paris Agreement on Reparation of 1946. This was a multilateral international treaty entered into by the victorious Allied powers at the end of the Second World War. The Agreement provided for the seizure of German public and private property located in the territory of the parties to the Agreement.

Article 6(a) provided that "each 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 the return to German ownership or control and shall charge against its reparation share such assets."

The second precedent is much more recent. It follows on from the 1990 Iraqi invasion of Kuwait. In response to the damage caused by the invasion, the U.N. Security Council constituted the Kuwait Compensation Fund, together with a Compensation Commission (the United Nations Compensation Commission, hereafter UNCC). The UNCC sought to provide a process by which reparations and compensation for the damage suffered could be effectively undertaken. In the over 30 years of its existence, the UNCC directed the Fund to pay out $52 billion in compensation to 1.5 million claimants. The Fund drew income to pay claimants from the revenues of the Iraqi oil industry.

In Security Council Resolution 687/1991, the Council reaffirmed:

> … 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 the unlawful invasion and occupation of Kuwait.

Underpinning both these precedents is the principle that every internationally wrongful act of a state entails the international responsibility of that state: i.e., that the state committing the wrongful act attracts liability under international law for its conduct that breaches international law. Where a state has such international responsibility, it is under a general obligation to make full reparations and compensation for the injury caused by its internationally wrongful act. There is no requirement for the state with such an international responsibility to make reparations and compensation to grant consent before any reparation or compensation is made.

Traditionally, the law of state responsibility emerged governing relations among sovereigns. In other words, any obligation would be owed only to another sovereign. However, modern international law provides for an obligation on a state to make full reparations and compensation to individuals as well. This is reflected in modern practice in the decision of the Security Council in establishing the UNCC.

The New Lines Institute's Multilateral Action Model (MAMOR) envisages the creation of a fund and Compensation Commission modeled on that of the UNCC. A Russian veto in the U.N. Security Council is inevitable, so this report argues that the fund and commission for Ukraine should be created by an international treaty or similar

instrument concluded by willing states. Such an instrument could be concluded and presented to the U.N. General Assembly for possible adoption as a General Assembly resolution and then opened for signature, or concluded in a free-standing diplomatic conference. It would set up the fund and Compensation Commission modeled principally on the structures and processes of the UNCC. Signatory states would commit to seize Russian assets within their jurisdiction, in accordance with their national and constitutional requirements, and place them into the fund, for subsequent distribution by the Compensation Commission.

Considering that the current Russian aggression against Ukraine is a continuum and expansion of the original invasion, occupation, and annexation of parts of Ukraine that commenced in February 2014, claims would be received from the Ukrainian state and Ukrainians dating from February 2014.

Just as with the UNCC, the Ukrainian international Compensation Commission would operate on the principle that the issue of the liability of Russia, the wrongdoer state, is settled. No issue of liability would be open to be argued before the Commission. The Commission would operate solely as a claims restitution forum. The Ukrainian state, Ukrainian individuals, and Ukrainian private and public entities would provide proof of damage. The Commission would then undertake a verification of the evidence. Having verified the evidence, it would then make an assessment on quantum and authorize a payment. Given the scale of potential claims, it is likely that there will be millions of claims from individuals and entities — as well as state claims. It is likely that the Compensation Commission will have to develop a mass claim system in terms of process and quantum for particular types of claims in bulk.

The number and aggregate size of potential Ukrainian claims will significantly exceed the $52 billion paid out by the UNCC to victims of the Iraqi invasion of Kuwait. Therefore, an additional question is whether there are sufficient Russian public or private assets held outside the territory of the Russian Federation to be identified, frozen, seized, and transferred into the Ukrainian fund. One major asset group is the frozen funds of the Russian Central Bank, held by Western institutions, amounting to approximately $300 billion. But not every Western government will, for reasons of constitutional or national law, be able to make those assets fully available. The scale of injury to Ukraine and Ukrainians is likely to be significantly greater than $300 billion.

One option, following the UNCC precedent, would be to place a charge on Russian oil and gas revenues, which would then be paid into the Ukrainian fund. This should certainly be considered and would provide a significant additional source of revenue

for compensation. But even this, given the scale of the potential damage inflicted on Ukraine and Ukrainians, is insufficient. Other sources should be considered.

A further source is a broad range of Russian assets held in the West. Under Vladimir Putin, Russia has developed into a fully "criminal gang state," where the courtiers and leading supporters of the Kremlin leadership have been permitted to plunder the state finances. This plundering has continued for over 20 years. Furthermore, the Russia that has been plundered is one of the world's largest petrostates, which every day produces in the order of 11 million barrels of oil, of which approximately 6 million barrels a day (mbd) are sold on international markets.

These large revenues from international oil sales have been substantially recycled by Putin's criminal gang state into the West. It is difficult to put a value on the scale of hidden capital flows out of the Russian Federation over the last 20 years. Anders Aslund estimated that open capital flows from Russia into the U.S. alone amounted to approximately $1 trillion. Karin Dawisha, in her book *Putin's Kleptocracy*, drew upon work by Transparency International to estimate that the annual level of bribery in Russia amounted to approximately $300 billion. Even if only one-third of bribery revenues were exported annually, this would suggest a capital transfer to the West over two decades of over $2 trillion. While it is impossible to calculate at this stage Russian assets held in the West, the scale of assets is likely to run into the low trillions of dollars. All of these Western-held assets are potentially subject to forfeiture and able to be placed, following seizure, into the Ukrainian fund.

There is discussion to be had about the distinction between public and private assets from Russia. Clearly Russian state assets, such as the Russian Central Bank, and assets held by state-owned corporations such as Gazprom, Rosneft, and Rosatom, are potentially subject to forfeiture. In establishing a Compensation Fund to hold forfeited Russian state-owned assets and a Compensation Commission to pay those assets out to Ukraine, participating states should draft the international instrument creating the Fund and Commission in a manner appropriate to the rules and procedures of each state for the conclusion and entry into force of treaties or, as the case may be, of other agreements. Each state participating in this Multilateral Action Model will need to implement the Model in accordance with its own national law and constitutional rules applicable to the forfeiture that the international instrument will call for.

In national law or national constitutional law, there are likely to be greater difficulties in relation to the seizure of private property. In addition, for European states, there is also the application of the right to property contained in Article 1 of Protocol No. 1 of the European Convention of Human Rights. Although German private assets were seized

after World War II under the Paris Agreement, such an approach to seizure of private assets is likely to be more difficult to undertake in 2022 than in 1945, given modern treaty law, national constitutional law, and, where applicable, case law precedent.

This issue of private versus public property needs to take into account the Russian reality of a plundering "criminal gang state." Although private mechanisms and vehicles have been used to transfer assets to the West, the nominal "owners" of those assets came to have custody over them only because of their close relationships to the Kremlin. The connection to power and control or access to assets is underlined by Russian oligarch Petr Aven's deposition to the Investigation Into Russian Interference in the 2016 Presidential Election in the United States (Mueller Investigation), in which Aven explained that 50 Russian oligarchs met quarterly with Vladimir Putin to receive instructions, and they understood they would have to follow them. Given that those oligarchs held their assets at the behest of the Russian state, and deployed their assets on the instruction of the Russian state, such assets should be subject to forfeiture.

Annex 1 to the present report considers further the issue of what counts as Russian state assets and argues that a range of nominally "private" asset owners, including Russian oligarchs who take instruction from the Kremlin; Russians who use their connection to the Russian state to plunder the tax system, as in the Magnitsky case; or Russian officials who hold assets abroad far beyond the capacity of their official salaries all should be subject to asset forfeiture.

This issue of what counts as a public Russian asset leads to a further question for an international treaty establishing a Ukrainian fund and Compensation Commission. In addition to the mechanisms for the fund and Compensation Commission within the treaty, signatory states, if they are to take hold of Russian private assets for purposes of reparations, would also have to agree to freeze those assets and later undertake what will amount to a triage of private assets. It will be necessary to identify what counts as genuinely private assets and what counts as assets only available to the ultimate private holder of the assets due to their connection with the Russian system of power in order to assure due process rights of all asset-holders.

As to Russia's state assets, some commentators are likely to express concern that measures taken to, in effect, suspend Russia's sovereign immunity would supply a precedent, opening the door to future erosion of sovereign immunity — including the sovereign immunity of states that have participated in the seizure and forfeiture of Russian assets in accordance with the proposals in this report. Such concern is fundamentally misplaced. It must be emphasized that seizure and forfeiture in this context is a remedy *in extremis* and in wartime. The harm that the remedy addresses

results from an act of international aggression of a kind and scope with 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 II. 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.

Therefore, the present situation is readily understood as unique and, it is to be hoped, will not have analogues in future state practice. A central objective of the international response to Russia's aggression is to deter and prevent Russia or any other state from launching a future act of aggression of this kind. This is also a goal of the Multilateral Action Model on Reparations.

Reparations for Injuries to Ukraine: A Path to International Action

Draft Conclusions in Regard to Russian Assets Abroad

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 reparations 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-defense. 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 reparations, 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 U.N. and the largest country in Europe, has no right to exist, prosecutes a war of annihilation against Ukraine and its people. A failure to implement full reparations 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 reparations. 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 13 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 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 intergovernmental 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 a 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 its aggression. The Reparations Study Group presents this report and Draft Conclusions as a starting point to assist governments in that pursuit.

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 reparations for injuries resulting from Russia's aggression.

Conclusion III: Reparations for injuries resulting from Russia's aggression shall include, to the extent practicable, restitution reestablishing the state of affairs that existed before the commencement of Russia's aggression.

Conclusion IV: Reparations 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 establishes 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 Conclusions.

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 77 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-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 preexisting 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 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 U.N. Security Council to act under U.N. 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 interstate boundaries (e.g., India's use of force to integrate Portugal's colonial exclaves into India did not concern settled interstate 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 reparations for injuries resulting from Russia's aggression.

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 reparations for the injury caused by its internationally wrongful act.[17] In other words, the general obligation to make full reparations inheres in the international responsibility of the state; it is not necessary that the state independently consent to make full reparations. 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 reparations for the injury caused by its internationally wrongful act, includes an obligation to make reparations 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., intergovernmental relations — modern international law entails the obligation on a state to make full reparations 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 on Feb. 28, 2022 instituted proceedings at the Court against Russia; the Court on March 1, 2022, granted urgent interim measures requiring that Russia cease its use of armed force in Ukraine, and on March 4, 2022, granted further interim measures addressing requests that individual Ukrainians have instituted against Russia. Russia's expulsion from the Council of Europe,[23] nonparticipation in international dispute settlement procedures, and noncompliance with international judgments and awards cast 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 U.N. 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 reparations of their own, opposable against Russia, or whether the right to full reparations for their injuries is to be derivative of the rights of Ukraine as a state. However, international practice strongly supports providing for full reparations 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 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

Reparations for injuries resulting from Russia's aggression shall include, to the extent practicable, restitution reestablishing the state of affairs that existed before the commencement of Russia's aggression.

Note (1) As the general obligation to make full reparations 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 nonrepetition), 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 reestablish 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.

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 reparations 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 favor 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 reparations 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 reparations. As the ILC commented, restitution "comes first among the forms of reparation."[39]

Conclusion IV

Reparations 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 reparations 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 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 reparations] 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 nonmaterial interests. Nor is compensation punitive.[45] The obligation to make reparations 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 with respect to 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; and 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 reparations to the injured state.[52] Satisfaction, when it is awarded, typically consists of an acknowledgment 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 reparations may be adopted as satisfaction.[53] Such reparations 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 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 reparations 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 Russia's consent in order to provide that Ukraine and its citizens receive full reparations.

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 II, 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 Jan. 14, 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 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 II 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 II, 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 with respect to their property in the U.K. 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]

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 reparations 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 II, states today participating in the reparations 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 that 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 II. 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.

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 Feb. 27, 2022, the first of its kind in 40 years, calling the General Assembly to convene under the "Uniting for Peace" procedure, and leading to the adoption by the General Assembly on March 2, 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 U.N. procedure and those U.N. 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]

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 that 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 U.N. 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 intergovernmental 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 U.N.[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 resolution 687 of April 8, 1991, having provided, *inter alia*, for the substantial disarmament of Iraq and ongoing 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 U.N. 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 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 Jan. 19, 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 U.N. and other international human rights bodies are either to be adopted as binding in Compensation Commission proceedings or as persuasive authority.

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 19 Panels of Commissioners, which reviewed and evaluated claims. Awards were adopted subject to approval of a Governing Council. Governments, international organizations, companies, and individuals had standing to present claims to UNCC panels.[94] The Governing Council held its final meeting on Feb. 9, 2022, and at that time declared its mandate fulfilled.[95] It is to be noted that over 30 years elapsed between the constituting of the UNCC and the fulfillment 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 with respect to Russia's legal responsibility for aggression against Ukraine. Individual Ukrainians also have instituted proceedings at the latter court.[97] Full reparations 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 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 U.N. 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.

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 establishes 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 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 overcompensated and others undercompensated, 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 (Feb. 9, 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 15 years of operation of the UNCC, the Governing Council took stock 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 claims.[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 reparations 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 reparations 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 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 with respect to 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 March 27, 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 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 U.N. General Assembly on March 27, 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 Feb. 27, 2022, the General Assembly on March 2, 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 seen to identify the *spatial* scope of Russia's aggression to include *at least* all areas within Ukraine's internationally recognized borders in which Russia's military forces are present. The spatial scope encompasses areas within Ukraine's internationally recognized borders that 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 Feb. 27, 2022, was adopted under the "Uniting for Peace" procedure first articulated in GA resolution 377A(V) of Nov. 3, 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 40 years.[124] SC resolution 2623 (2022) expressly identifies the "question contained in document S/Agenda/8979" as the question that 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 Feb. 28, 2014, from Ukraine's Permanent Representative addressed to the President of 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 Feb. 28, 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, Feb. 28, 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 centers 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 nongovernmental stakeholders, as well as governments, participate. The U.N. General Assembly may consider adopting a resolution recommending that all states join or support the agreement.

Acknowledgments

The Group thanks Dr. Anton Moiseienko, Associate Fellow of the Royal United Services Institute (RUSI) and Lecturer in Law at the Australian National University, for observations and reflections on the Group's work; and the International Lawyers Project and Spotlight on Corruption for their study (with Dr. Moiseienko) *Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options* (June 2022), which the Reparations Study Group consulted in preparing these Draft Conclusions. The Group also thanks Ingrida Kulikauskaite, independent scholar, for her expert advice throughout the process.

Annex 1

What Counts as Russian State Assets?

This brief annex seeks to identify what may constitute state assets in the Russian context. The argument here is that what counts as a Russian state asset is much wider than would ever be possible in a Western state. The very development of Russian state asset allocation, creation, and transfer exists to frustrate Western legal categorization. The approach, it is argued here, should be to identify what can properly be said to originate from state sources, and then ensure measures are enacted to ensure all such actual state assets are properly identified, and from that point can then be frozen, seized, and transferred to the Compensation Fund.

What Are Russian State Assets?

This is not an obvious question, as it looks. Classically state-owned enterprises such as Gazprom or Rosneft, where the Russian state owns a majority of the shares and controls the direction of the company, constitute state assets. However, Russia is not the United Kingdom, the Netherlands, or even France. One has to take account of the system of power, the kleptocratic dynamic, and the ownership structures set up to evade Western scrutiny.

We can identify a number of types of asset owners, sources of assets, and practices that could generate state assets claims. These include:

Oligarch Tenants

This is the system of power that revolves around President Putin and his inner circle. Individuals may hold "private" assets, but they do not control those assets. If they are deemed disloyal, those assets can be removed; they are mere tenants of assets, not their real owners. An example is Sergei Pugachev, who was close to Putin and helped his rise to power. According to Catherine Belton's "Putin's People," Pugachev did not oppose Putin. He in essence wanted to retire from the Kremlin power system. This proved impossible. Not only were many of his assets in Russia stripped from him, he was also subject to further harassment in the U.K. and in France, with further attempts to strip him of his remaining wealth. Equally, oligarch Petr Aven, in his testimony to the Mueller inquiry, explained that the major oligarchs (approximately 50) met quarterly with President Putin and were given instructions, with the understanding that there would be consequences for their wealth if they did not follow through on those instructions. The assets many oligarchs hold, which can be removed from them at any time, and are subject to regular government instruction as to how they are to operate, cannot be deemed in any real sense "private" assets.

Tax Fraudsters

It is also clear that many actors in the oligarchic class, and those connected to the Kremlin, are using their authority and connections to plunder the state. This may be, as in the Magnitsky case, through tax fraud that permits them to plunder the tax authorities. That case involved a tax fraud of $230 million, made by stealing the corporate seals of a Hermitage capital firm. The Magnitsky case was not unique. Bill Browder, in his book "Freezing Order," writes that the fee paid to Putin in the Magnitsky case was apparently $800,000. This fee is not exorbitant, therefore indicating a significant number of tax frauds and other scams from which the head of state takes a small percentage (and from which other actors through the power system each receive a small percentage).

Looting Contractors

Another source of Russian funds is the looting of state-owned enterprises like Gazprom and Rosneft. The overinvestment, for example, by Gazprom is not principally about building additional geopolitical pipelines to undermine Ukraine or to provide a new route into the Chinese market. The principal objective, as explained in Sberbank's own report "Tickling Giants," is contract looting. The report states that entities connected to the Kremlin plundered Gazprom and Rosneft for tens of billions. A route to China could have been provided using existing gas fields in Western Siberia. This would have cost less than $10 billion. Instead, Gazprom sought to build the Power of Siberia pipeline from greenfield gas fields in Eastern Siberia, and the cost was $50 billion. The greater scale of the project increased costs, and it made no economic sense. Gazprom would not make a return on capital in the next 30 years. Instead, it is alleged that the project was inflated to allow for more theft. The contractors, in this and other instances, are thus stealing from the Russian state. The assets of these contractors are therefore state assets, which can be included in the MAMOR formula, on the grounds that (a) they are stolen assets, and (b) they are Russian state assets.

Improbably Rich Civil Servants

Another group are improbably rich civil servants. These are public officials with apartments in, for example, Manhattan and Mayfair, huge holdings in investment trusts and U.S. Treasuries, and significant commercial property holdings around Wall Street and the city of London — which are not compatible with their formal salaries. These assets are, in fact, state assets appropriated from the Russian state.

The Wallets

These are people specifically used to protect Putin and his inner core of supporters from political exposure and Western sanctions and legal systems. A number of mechanisms have been developed to protect assets and disguise ownership. One of these mechanisms is the "wallet" system, whereby regime loyalists hold assets on behalf of the Kremlin leadership. One case is that of the Russian violinist Sergei Roldugin, a person close to Vladimir Putin, who controlled approximately $2 billion in assets. Nothing in his career as a musician could have resulted in a fortune of such a scale. Other Kremlin wallets hold significant assets for regime members. Given that these assets do not belong to their owners, and they are holding these assets for regime leaders, a case could be made that this wealth comprises state assets ripe for seizure.

More difficult are the assets generated from:

Business Expropriation

Another example includes attacks on Russian private business by those with connections to and authority within the state. This can involve the coercion of increasingly large payments by the private business executives to the outright theft of businesses. The owner might receive nominal payment, or they may not. This is not an uncommon practice. In 2014, there were more than 200,000 business-related criminal cases opened. Only 46,000 of these cases reached the courts the following year. However, 83,000 of the 200,000 business owners lost their businesses. No formal criminal charges had to be laid before the courts. Instead, the sales were caused by intimidation and the threat of the loss of all assets and a long time in prison. This intimidation and expropriation can only happen because of the access and use of state power by the eventual purchasers. Such assets obtained by expropriators are (a) stolen, and (b) stolen with assistance of state power. Given the scale of the operations against private business, this is no small category of theft by Kremlin-connected actors, and thus, a significant possible source of state assets for seizure.

Bribery

This was highlighted by Karen Dawisha in her book "Putin's Kleptocracy." Drawing upon work by Transparency International, Dawisha estimated that approximately $300 billion is paid annually in Russia, in various forms of rent extraction, below-cost sales and acquisitions, embezzlement, and bribes. This sum is equivalent to total annual Russian public expenditure. The bribe system does not include tax fraud and contractor looting, as described above. However, below-cost sales of state products, and acquisitions of state products and padding of deals involving state actors, also fall within the broad scope of bribery.

There is a compelling argument for the following to be deemed state assets:

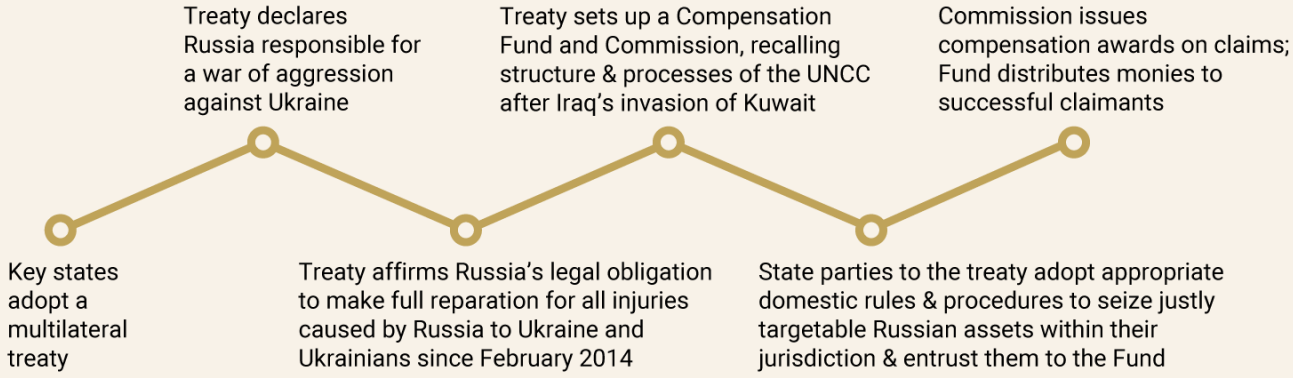
- "Oligarch" tenant assets where there is evidence of instruction from the Russian state. That evidence of instruction plus the capacity to remove assets from the state should be sufficient to deem the assets as state assets. In most jurisdictions, there may need to be legislation to clarify this issue, but as a source for possible state funds for reparations, this is notable.
- Tax fraud. State-owned assets are the ones that are being plundered. For legislators, the challenge will be to develop rules that make these assets easier to identify, freeze, and seize.
- Improbably rich civil servants. This can be investigated with some preexisting legislation — for example, unexplained wealth orders. Russian state officials with apartments in Manhattan or Mayfair and vast commercial holdings should be able to be held to account by freezing orders that require proof of source of funds. If they cannot provide proof of source of funds when their salaries are no more than $50,000, the assets should be able to be deemed state assets. Legislation would be necessary in many jurisdictions to create such a legal presumption.
- Contractor fraud. Where this occurs with respect to state companies, this is principally a state assets issue. To identify these assets, legislators must improve broader transparency and the capacity to freeze and seize assets. There is a relatively small circle of elite plunderers, upon whom law enforcement can focus.
- Wallet assets. Assets of wallets for the Kremlin leadership should be capable of being deemed state assets, even if they have no connection to the state other than being personal followers of senior members of the regime. These assets do not belong to the wallets, who hold them for the regime leadership. The source of those assets can be deemed to be the capacity of the regime leadership to steal state assets.

In relation to business expropriation and bribery, identification and seizure will depend on the nature of the transaction. There may be a clear state element, in which the transaction amounts to the acquisition of state-related assets. A form of financial triage operation would be required, in which suspect assets would be frozen and scrutinized to see if they were obtained in some part through state support, connection, or blessings.

NEW LINES INSTITUTE
FOR STRATEGY AND POLICY

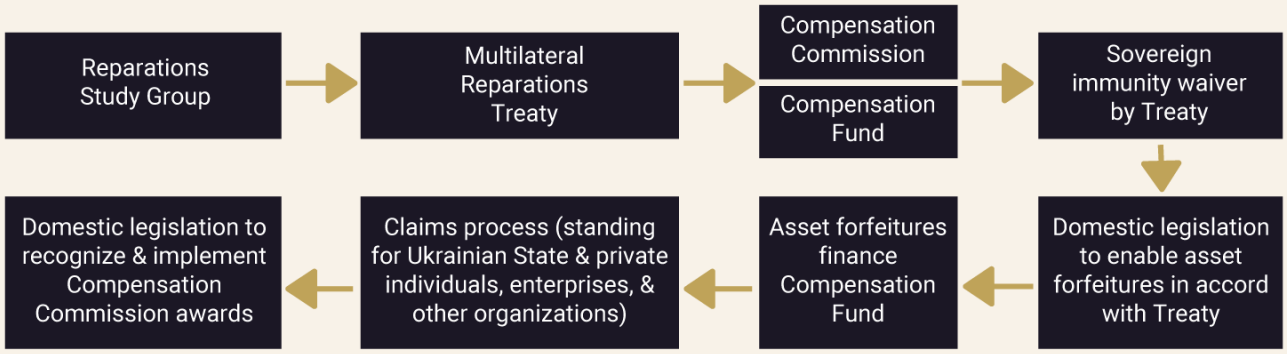
Multilateral Action Model on Reparations

Why create a treaty*-based action model on Reparations?
- **Russia is unlikely to accept that it wronged Ukraine**
- **UNSC is unlikely to mandate Reparations**



The action model does not establish any precedent for future erosion of sovereign immunity. Asset seizure and forfeiture against Russian targets is justified by the magnitude and character of Russia's aggression, unprecedented in the U.N. Charter era. It is a remedy *in extremis* created by treaty to achieve full reparation on behalf of Ukraine and the Ukrainian people.

New Lines Institute will convene a Reparations Study Group, comprising experts in international law, international finance, and post-conflict reconstruction.



We propose a multilateral plan for the forfeiture of Russian assets and their entrustment to a Compensation Fund; and a Compensation Commission to carry out a claims process to benefit Ukraine and injured Ukrainians. The Commission process will be designed to achieve an orderly resolution of claims covering financially assessable damage that Russia's aggression has caused since February 2014.

Russian Assets

Distinguishing between private and public assets

1) Identify assets that in fact have originated from state sources 2) Enact measures to ensure that all state assets are properly identified 3) Freeze and seize state assets and transfer them to the compensation fund.

Russian Central Bank | Oligarch Tenants | Looting Contractors | State-owned Enterprises: Gazprom, Rosneft | Improbably Rich Civil Servants | Tax Fraudsters

*The term 'treaty' is used here without prejudice to other forms of international agreement better suited to national accession procedures.

Annex 3

Contributors

This report has been produced with the contributions of, and upon consultation with, numerous independent experts, including the following who have agreed to be identified publicly:

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Dr. Thomas Grant is Principal Author of this report and Lead Counsel of the Reparations Study Group. He has been a Fellow of Wolfson College in the University of Cambridge and Fellow of the Lauterpacht Centre for International Law in the University of Cambridge since 2002. Dr. Grant has acted as legal adviser and advocate to governments for over twenty years on international law matters, including in cases before the International Court of Justice, Law of the Sea Convention system, and before ICSID, SCC, and ICC arbitral tribunals. Dr. Grant's published works have addressed, among other topics, state immunity, state succession, international boundaries, international organizations, international dispute settlement, international financial crime, and Russia's aggression against Ukraine. He served as Senior Advisor for Strategic Planning in the Bureau of International Security and Nonproliferation at the U.S. Department of State (2019-2021).

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The Honorable Irwin Cotler is the International Chair of the Raoul Wallenberg Centre for Human Rights, an Emeritus Professor of Law at McGill University, former Minister of Justice and Attorney General of Canada and long-time Member of Parliament, and an international human rights lawyer. A constitutional and comparative law scholar, Professor Cotler is the author of numerous publications and seminal legal articles and has written upon and intervened in landmark Charter of Rights cases in the areas of free speech, freedom of religion, minority rights, peace law and war crimes justice.

Ambassador Kelley Currie is a human rights lawyer who has served as U.S. Ambassador-at-Large for Global Women's Issues (2019 - 2021) and US Representative to the United Nations Economic and Social Council (2017 - 2019). Throughout her career in foreign policy, Ambassador Currie has specialized in human rights, political reform, development and humanitarian issues. She is currently an Adjunct Senior Fellow at the Center for New American Security and Senior Non Resident Fellow at the New Lines Institute.

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Brooks Newmark is a businessman, philanthropist, politician, and social reform campaigner. Brooks was the Member of Parliament for Braintree (2005-2015). He served in the Coalition Government as Minister for Civil Society, with responsibility for charities, the voluntary sector and youth (2014), having previously served on the Treasury Select Committee (2012-2014 and 2006-2007) and as a Government Whip and Lord Commissioner HM Treasury (2010-2012). In Opposition Brooks also served as a Whip (2007-2010).

Professor John Packer is the Neuberger-Jesin Professor of International Conflict Resolution in the Faculty of Law and Director of the Human Rights Research and Education Centre at the University of Ottawa. For over 20 years he worked for intergovernmental organizations (UNHCR, ILO, OHCHR, UNDPA, OSCE) which included investigations of serious violations of human rights notably in Iraq, Afghanistan, and Burma/Myanmar. He is a former Senior Legal Adviser and the first Director of the Office of the High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe.

Ambassador Allan Rock is President Emeritus and Professor of Law at the University of Ottawa. He practiced for 20 years as a trial lawyer in Toronto before his election to Parliament, where he held multiple Cabinet posts. He later served as Canadian Ambassador to the United Nations in New York, where he led the successful Canadian effort to secure the unanimous adoption by UN member states of The Responsibility to Protect.

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Ambassador David J. Scheffer is the International Francqui Professor, KU Leuven, and was the first US Ambassador at Large for War Crimes Issues (1997 - 2001). Scheffer participated in the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the Khmer Rouge tribunal. He also led the U.S. negotiating team in United Nations talks on the International Criminal Court. Scheffer is Clinical Professor Emeritus and Director Emeritus of the Center for International Human Rights at Northwestern Pritzker School of Law.

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Robert Tyler is a Senior Policy Advisor at New Direction – Foundation for European Reform, a Brussels-based think tank founded by Margaret Thatcher in 2009 as the official foundation of the European Conservative Movement. Prior to working for New Direction, he worked as policy adviser in the European Parliament, focused on foreign policy and counterterrorism.

Endnotes

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.

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 2000, 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 with respect to 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 frontiers 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.

13 Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law* (Palgrave Macmillan, 2015), pp. 31-32, quoting observations of the Russian Federation with respect to 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.

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.

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: Moiseienko 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 nonparticipation, see PCA Press Release dated 30 March 2016, available at https://www.italaw.com/sites/default/files/case-documents/italaw7185.pdf.

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.

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.

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.

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.

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.

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.

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

68 See Moiseienko 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. For 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.

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 II. 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.

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.

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 an agreement, whether in treaty form, MOU, or other format, might play a part in modifying the customary rules of immunity, but, to the extent that it did, this would be an indirect effect. 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.

90 In their study of possible mechanisms to implement reparations 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.

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 of 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).

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)*.

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.

104 Avoidance of overcompensation 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.

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).

114 S/2022/104, para. 47.

115 As to quality control for international awards in the investment dispute settlement, see symposium co-organized 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.

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]).

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.