

**REVIEW**  
**OF**  
**NATIONAL**  
**AND INTERNATIONAL**  
**MECHANISMS**  
**OF PROPERTY RIGHTS**  
**PROTECTION**  
**VIOLATED DUE TO THE**  
**RUSSIAN AGGRESSION**

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## SUMMARY

- In international law, it is possible that various ways of compensating damages caused by the armed aggression of another state are developed through **judicial** or **quasi-judicial** mechanisms, which are mostly not mutually exclusive or mutually dependent. Some claims for compensation for material damages can be brought to national courts and the European Court of Human Rights, the International Court of Justice, some - to investment arbitration tribunals, courts of foreign countries, some - to specially created funds or commissions.
- The main indicator for choosing one or another compensation mechanism is how **effective** it is. That is, the decision of the court or of another competent authority must be actually enforced, the violated right must be restored, and legal entities must receive fair compensation for the losses incurred. Currently, there is no universal effective mechanism in place to actually compensate damages (through legal entities receiving proper compensation) caused by armed aggression against Ukraine.
- Currently, there are certain impediments as regards the mechanism of receiving compensation for property damage based on the decisions **national courts**. First, real responsibility of the defendant in the lawsuit (citizens of the Russian Federation, the Russian Federation as the state). In particular, jurisprudence related to compensation for damage caused by the armed aggression of the Russian Federation in Crimea and the Donetsk and Luhansk regions has shown that although the damage to the property of enterprises is caused by illegal actions of citizens of the Russian Federation, it is practically impossible to get such persons to physically appear before a Ukrainian court, and it is even more so as regards enforcing a court decision on paying compensation to Ukrainian entrepreneurs. Regarding the responsibility of the Russian Federation, despite that there is practice to limit the jurisdictional immunity of a foreign state in cases having to do with compensation for damage caused by the military actions of the Russian Federation in Ukraine, experts clearly state that it is necessary to amend the national legislation as to limiting Russia's waiver of jurisdictional immunity. Secondly, it is necessary to have sufficient funds to enforce the decision of the national court, including from seized/confiscated Russian assets in Ukraine.
- Theoretically, it is possible to **enforce decisions rendered by national courts outside of Ukraine** from the Russian Federation's assets in other countries by introducing the idea of limiting sovereign immunity. However, this requires amendments to national legislation and the legislation of other countries, as well as close cooperation with other countries and respective

interstate agreements (for example, agreements on mutual recognition of judgments, agreements on legal assistance).

- As of now, in Ukraine, there is no **administrative procedure** to compensate for damages caused because of military aggression. In accordance with international standards, such a procedure provides for a mechanism (it may be a special commission to consider mass claims) to carry out a formal assessment of damages and ensure that requirements for compensation from the state budget of Ukraine are met.
- If there is no national out-of-court reparations procedure or a respective international mechanism in place, the number of lawsuits filed by business owners whose property has been destroyed/damaged because of war may increase significantly. It is obvious that since the judiciary is currently overloaded and understaffed, it will be extremely difficult to deal with all the claims for damages effectively and efficiently.
- So far, there is no clear legal way to set up an effective mechanism to that end and ensure real compensation for the damage incurred, an out-of-court mechanism can be used to **legally record the amount of the losses** and the fact that they were caused by Russia's armed aggression. In the future, such a formally legalized consolidation by Ukraine of losses incurred to individuals, legal entities, territorial communities, state-owned enterprises and institutions may become **a procedural part** of compensating losses via international legal mechanisms.
- **The European Court of Human Rights** is one of the most accessible ways to protect a violated right. However, when expecting to get compensation based on an ECtHR judgment, the following should be taken into account: 1) protracted court proceedings, 2) Russian Federation refusing to enforce ECtHR judgments, which makes it virtually impossible to get compensation. Although, according to experts, enforcing ECtHR judgments can become part of a wider mechanism created within the framework of an international agreement.
- Recourse to **investment arbitration tribunals** has increased significantly after Crimea was annexed by the Russian Federation in 2014. The subject-matter of the claim was often Russia nationalizing or confiscating property on the territory of Crimea. Although it can be seen after analysing the work and decisions made by investment arbitration tribunals that companies or individuals who had investments on the territory of Ukraine can file a claim against Russia to compensate the damage caused to investments because of the armed conflict, it remains to a large extent uncertain as to jurisdiction of investment arbitration tribunals during Russian Federation's armed aggression taking place now.

- Other international compensation instruments include the International Court of Justice and foreign courts. However, since the International Court of Justice was established, it only rendered judgments on financial compensation 4 times, of which only once was the case related to armed activities. As regards foreign courts, it is possible to obtain a positive judgment of a foreign national court and enforce it from Russian property, but only under certain conditions provided for in the legislation and jurisprudence of a foreign country, in particular, regarding overcoming jurisdictional immunity.
- At present, for legal entities to get fair compensation by having recourse to national and international mechanisms currently in place is unlikely. In view of the global challenges and the political and legal lay of the land, it is highly probable that it would be necessary to introduce a multi-mandate institutional model of compensating damages. The most feasible model seems to be the one in which compensating damages is mostly arranged at the state level from Russian Federation's funds, under the judgment of an international court (Commission) or a peace treaty, as well as partially from financial contributions from other countries, international organizations, funds.

## INTRODUCTION

Because of the armed aggression of the Russian Federation against Ukraine, enormous damage is caused to the property of individuals, legal entities, territorial communities, and the state.

The Cabinet of Ministers of Ukraine has established a Special Commission to account damage caused by military aggression, there will be regional commissions created at the level of communities which will fill out a document containing information on the type of damage; there was a unified form to record losses approved; there is a unified accounting estimate of the cost of damages being developed.<sup>1</sup>

According to some non-governmental estimates<sup>2</sup>, direct losses caused Ukraine suffered because of military aggression constitute almost USD 100 billion, and the total losses of Ukrainian economy because of the war (decline in GDP, termination of investments, outflow of labour, extra costs directed at defence and social support) range from USD 564 to 600 billion.

Recording and assessing damage and losses caused because of Russian Federation's armed aggression, as well as their further compensation, is an acute legal problem that calls for a clear legal solution and its further practical implementation.

Practical implementation of the right to get material compensation for destroyed and damaged property, lost profit is multidimensional as it concerns a whole set of aspects/stages that the entity affected must go through in order to achieve the result - to actually get compensation for real losses.

For individuals, the state is already developing a so-called administrative procedure - an out-of-court procedure for getting compensation. The Parliament has in the first reading adopted draft Law on compensation for damage and destruction of certain categories of real estate objects because of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation<sup>3</sup> (Registration No. 7198 dated 24.03.2022).

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<sup>1</sup> <https://www.kmu.gov.ua/news/promova-premyer-ministra-ukrayini-denisa-shmigalya-na-zasidanni-uryadu-14-06>

<sup>2</sup> <https://www.epravda.com.ua/news/2022/05/19/687210/>

<sup>3</sup> <https://itd.rada.gov.ua/billInfo/Bills/Card/39283>

It is expected that this draft law will set out the legal and institutional framework as regards the state providing compensation for damage and destruction of certain categories of immovable property because of hostilities, terror attacks, sabotage caused by the military aggression of the Russian Federation from the date of entry into force of the Decree of the President of Ukraine dated February 24, 2022 No. 64 "On declaring martial law in Ukraine."

This means that a citizen whose home or certain categories of immovable property has been damaged or destroyed as because of military aggression will be able to bring the matter to local authorities (a Commission set up specially to consider issues pertinent to providing compensation). To that end, a person will need to fill out respective application, provide evidence of damage caused; the person will be able to get funds through respective procedure.

There are numerous comments and suggestions of parliament and non-parliament experts regarding the mechanism set out in the draft law, but the principal aspect is that the draft law concerns providing compensation:

- only to natural persons who are citizens of Ukraine;
- for certain residential real estate objects,
- which were destroyed or damaged after February 24, 2022.

At the same time, it is extremely important to have in place a mechanism to protect property rights of both individuals (including foreigners, stateless persons residing in Ukraine legally) and legal entities.

Thus, looking for possible ways to compensate for business losses is extremely urgent. In view of the above, the report is focused on analysing compensation mechanisms available or, if established, may be available to legal entities.

Currently, there is no clear, unambiguous answer to the question of which court or which competent authority it is advisable to have recourse in order to get real compensation. Due to this uncertainty, this report is not meant to analyse or comprehensively summarize the mechanisms in place or to outline their advantages and disadvantages. The scale, nature, entities involved and other circumstances make it impossible to institutionalize this or that mechanism.

Instead, this report provides an overview of the potential mechanisms through which claims for compensation for material damages caused by an aggressor's military actions can be filed.

## I. NATIONAL MECHANISMS FOR PROPERTY RIGHTS PROTECTION

- Mechanisms in place

### NATIONAL COURTS

The national legislation provides for civil and criminal remedies to protect violated property rights, in particular, by lodging complaints with law enforcement bodies about the fact that criminal offenses were committed; filing civil lawsuits for damages in court.

The law guarantees for legal entities the right to go to court to compensate damage caused by armed activities. Legal entities can exercise the right to compensation for damage caused by via filing a lawsuit against the following defendants:

damage caused to the property of an individual or a legal person shall be compensated in full by the person who caused it (Article 1166(2) of the Civil Code of Ukraine);

Damage caused to an individual or legal person by illegal decisions, action or omission of a state authority, an authority of the Autonomous Republic of Crimea or a local self-government body in the exercise of their powers shall be compensated by the state, the Autonomous Republic of Crimea or a local self-government body regardless of whether these authorities are at fault (Article 1173 (1)). In this regard, it also has to do with the obligation to compensate for damages caused by offenses related to illegal actions during martial law, as well as damages from criminal offenses, including when it is impossible to compensate the damages from other sources.

At the same time, there is no promising jurisprudence related to compensating damage caused by the armed aggression of the Russian Federation in Crimea and the Donetsk and Luhansk regions. It is obvious that since the damage to business' property is caused by illegal actions of citizens of the Russian Federation, it is unlikely that such persons will physically appear before the Ukrainian court, and even more so they will not enforce the court's decision on compensation for damages to Ukrainian entrepreneurs.

Also, it is only possible to file a lawsuit for damages against the Russian Federation in a national court if Russia itself agrees because under Art. 79 of the Law of Ukraine “On Private International Law” any foreign state has absolute judicial immunity and immunity in respect of property on the territory of Ukraine. This means that it is only possible to file a lawsuit against a foreign state in a Ukrainian court, to seize its property or levy a penalty on it with the consent of the foreign state.

If the state is a defendant in a case, the lawsuits against the government of Ukraine also remained largely unsatisfied because of the lack of an effective legislative mechanism that would determine the procedure for such compensation to enterprises, institutions, organizations and respective funds from the state budget.

The armed aggression on the entire territory of Ukraine has significantly changed the state's approaches and possible responses to compensate for damages to legal entities.

First of all, jurisprudence regarding the Russian Federation's judicial immunity as regards compensation for damage caused by the aggressor state is changing. National courts are beginning to shape the practice of limiting jurisdictional immunity of a foreign state in cases as to compensating damage caused by the hostilities of the Russian Federation in Ukraine. Thus, the Supreme Court, although in a civil case on the claim of an individual, drew the conclusion that “the Court of Ukraine, considering a case where the defendant is the Russian Federation, has the right to ignore the immunity of this country and to consider cases as to compensating the damage caused to an individual as a result of armed aggression of the Russian Federation upon a claim filed against this foreign country”.

At the same time, despite such a vector of development in jurisprudence, experts clearly state that it is necessary to introduce amendments to the national legislation as regards limiting Russia's waiver of jurisdiction immunity (being able to initiate court cases, immunity) and immunity from enforcement (being able to enforce such court decisions) in the category of cases as to compensating damage to property, life and health because of Russia's armed aggression (hence Russia was recognized as an aggressor state).

Moreover, the legislative framework regarding the seizure and confiscation of the assets of the aggressor state is changing significantly. The law has been adopted<sup>4</sup> the enforcement of which allows to seize in compulsory manner in favour of Ukraine property rights objects of the Russian Federation, its residents, individuals who are citizens of the Russian Federation, persons who are not citizens of the Russian Federation, but have a close connection with the aggressor (have a place of residence or are engaged in the main activity), legal entities operating in Ukraine, but whose beneficiary is the Russian Federation and legal entities in Ukraine in which the Russian Federation directly or indirectly owns a share in the capital or is the founder or beneficiary.

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<sup>4</sup> <https://zakon.rada.gov.ua/laws/show/2116-20#Text>

Also, a law was adopted<sup>5</sup> introducing making it possible to collect assets belonging to individuals or legal entities, as well as assets that they can directly or indirectly dispose of in order to strengthen the defence capability and capacity to restore Ukraine as state income. In fact, according to national experts<sup>6</sup>, the scope of the law can be extended to any persons who by their actions put in danger national security, sovereignty or territorial integrity of Ukraine (including through armed aggression or terrorist activity) or significantly contributed (including through financing) to other persons committing such actions.

Russian assets in Ukraine are already being confiscated in practical terms because on May 12, 2022, the Parliament approved the Decree of the President of Ukraine “On the decision of the National Security and Defence Council of Ukraine dated May 11, 2022 “On the forced seizure in Ukraine of objects of property rights of the Russian Federation and its residents”<sup>7</sup>.

It can be assumed that seized objects and confiscated assets specified can become a source for providing monetary compensation for certain losses. However, given the ongoing aggression and the significant amount of funds spent by the state during martial law, it is more likely to assume that the funds derived from confiscated assets will be used for the military needs. This assumption is confirmed by officials’ statements<sup>8</sup> that it is currently impossible to compensate damages for destroyed or damaged housing from the state budget because all the funds are directed to defence and social benefits.

Thus, given legislative amendments and changes in jurisprudence, it seems practicable that businesses can receive positive court decisions on compensation for damages by bringing the matter before a national court. At the same time, it is difficult to predict whether there will be sufficient funding to enforce the decision of the national court at the expense of seized/confiscated assets in Ukraine.

Theoretically, it is possible to assume that national court decisions outside of Ukraine will be enforced from the assets of the Russian Federation in other countries by introducing the idea of

<sup>5</sup> <https://itd.rada.gov.ua/billInfo/Bills/Card/39275>

<sup>6</sup> <https://www.epravda.com.ua/publications/2022/05/12/686976/>

<sup>7</sup> <https://zakon.rada.gov.ua/laws/show/2249-20#Text>

<sup>8</sup> <https://www.kmu.gov.ua/en/news/promova-premyer-ministra-ukrayini-denisa-shmigalya-na-zasidanni-uryadu-14-06>

limiting sovereign immunity. However, for this to happen, it is necessary to amend national legislation and legislation of other countries, as well as to have close cooperation with other countries and respective interstate agreements (for example, agreements on mutual recognition of judgments, agreements on legal aid). After all, lifting the immunity of the Russian Federation in Ukraine will in no way solve this problem in other countries where there is property of the Russian Federation which will still be protected by immunity.

Another possible way to get real compensation for damages based on the judgment of the national court is to receive funds from the state based on a judgment, which state should in turn receive funds from Russia's assets abroad and funds of international partners. In such a case, national court proceedings and resulting judgments may be part of a more comprehensive mechanism to compensate damages.

Under such circumstances, it is currently impossible to say that prospects of national court decisions on compensation for damages are promising in terms of their enforceability; however, such court decisions can serve the purpose of documenting the legal facts of the damages incurred and their assessment.

- [Potential mechanisms](#)

#### ADMINISTRATIVE PROCEDURE – OUT-OF-COURT MECHANISM

Under international standards, in order to protect the property rights of individuals and legal entities, it is particularly important to set up a mechanism for submitting property claims which should be easily accessible and include procedures providing for a flexible standard of proof and enable applicants and others in a similar situation to restore their property rights and to receive compensation for the loss of the opportunity to exercise them.

Also, under the European Court of Human Rights (ECtHR) jurisprudence, according to which countries in conflict must take responsibility for destruction and compensate damages and at least provide for a reasonable compensation system.

However, despite the fact that Ukraine has already suffered from Russia's military aggression on part of its territory in 2014-2015, the state has not created an effective mechanism to compensate damages caused to citizens and businesses. Article 19(1) of the Law of Ukraine "On Combating

Terrorism" However, despite the fact that Ukraine has already suffered from Russia's military aggression on part of its territory in 2014-2015, the state has not created an effective mechanism to compensate damages caused to citizens and businesses. Article 19(1) of the Law of Ukraine "On Combating Terrorism", which provided for compensation for damages caused to citizens by a terrorist attack from the state budget in accordance with the law, with a further demand of the state addressed to the offender to compensate the damage. In turn, Article 19(2) provided that the damage caused to an organization, enterprise or institution by a terrorist attack shall be compensated in accordance with the procedure established by law.

However, there was not adopted a respective law which would provide for the procedure and mechanisms to compensate damage to citizens or business entities.

International human rights organizations have repeatedly recommended the Government of Ukraine to draw up and introduce - in accordance with international standards - a mechanism (perhaps a special commission to consider mass claims) to carry out a formal assessment of damages and ensure that claims for compensation from the state budget of Ukraine are fulfilled<sup>9</sup>.

As mentioned above, the armed aggression on the entire territory of Ukraine has significantly changed the approaches of the state and possible responses to compensation for damages to legal entities.

Therefore, it is even more urgent to draw up a state program and set up a mechanism according to which individuals and legal entities will be able to bring to authorities claims for compensating damages, evidence that the damages were incurred and, via relevant procedure, they will be able to get funds.

It should be noted that in the absence of a national out-of-court procedure to compensate damages or an appropriate international mechanism, there may happen significant increase in the number of cases opened based on claims filed by business owners whose property was destroyed/damaged because of the war. It is obvious that since the judiciary is currently overloaded and understaffed, it will be extremely difficult to effectively and efficiently deal with the entire set of damages cases filed.

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<sup>9</sup> [https://www.globalprotectioncluster.org/wp-content/uploads/nrc-study\\_pursuing-compensation-for-damaged-or-destroyed-property\\_ukr.docx.pdf](https://www.globalprotectioncluster.org/wp-content/uploads/nrc-study_pursuing-compensation-for-damaged-or-destroyed-property_ukr.docx.pdf)

At the same time, the experience of other foreign countries that suffered destruction because of the war mostly shows that compensations were paid on the basis of government decisions and in accordance with state programs drawn up specially to that end<sup>10</sup>.

At the beginning, putting in place an out-of-court procedure for receiving compensation involves drawing up a program document that will provide details on the legal framework and set out the main features on how such a mechanism will function (the composition of the relevant body that can be created in the form of a mass claims commission, its powers, procedural aspects of work and funding).

The drawing up legal, organizational and financial frameworks is an extremely complex and sensitive issue.

Experts point out that it is perhaps material forms of compensation that represent the biggest challenges, especially when they are carried out via mass state programs. Difficult issues include the following: who is among the victims entitled to compensation, what amount of compensation should be awarded, what types of damages are covered, how damages should be quantified, how different types of damages can be compared and compensated, and how compensation should be allocated.<sup>11</sup>

According to the most feasible structure, the out-of-court mechanism provides for monetary compensation for all entities that suffered losses - individuals, legal entities, territorial communities.

As state representatives now note, “during the war and the post-war period, the state has limited financial resources. At the same time, there are quite a lot Ukrainian citizens who need compensation for damaged/destroyed individual real estate objects. Therefore, in the draft law (this is Draft Law No. 7198 - п.а.) we provided for compensation exclusively for housing. However, we do not rule out that further on compensation will also cover other categories of persons when there is financial opportunity in place”<sup>12</sup>.

<sup>10</sup> [https://publications.iom.int/system/files/pdf/property\\_restitution\\_compensation.pdf](https://publications.iom.int/system/files/pdf/property_restitution_compensation.pdf)

<sup>11</sup> <https://rm.coe.int/recognition-of-civil-documentation-ukr/1680a0c5e2>

<sup>12</sup> <https://sud.ua/ru/news/publication/240258-otsinka-obyektiv-znischenikh-i-poshkodzhenikh-vnaslidok-viyskovoyi-agresiyi-yak-vona-bude-vidbuvatisya>

Thus, whether it will really be possible to provide such payments will depend on sources from which compensation is paid and whether there will be sufficient financial resources for that. Currently, the state does not have the financial resources to actually make payments under any compensation mechanism. There are comments regularly published by national<sup>13</sup> and foreign statespersons<sup>14</sup> about possible sources from which to pay compensations, in particular, but not limited to funds from the state budget of Ukraine, seized currency reserves of the Russian Federation (placed abroad), other blocked assets of the aggressor state in Ukraine and abroad, assets of individuals and legal entities associated with Russia in Ukraine and abroad; financial contributions of other countries, international organizations, funds, organizations, voluntarily paid reparations, etc.

However, even as long as there is no clear legal way to set up an appropriate effective mechanism and real compensation for the losses incurred, an out-of-court mechanism can be used to legally record the amount of losses and the fact that they were caused by Russia's armed aggression. In the future, such a formally legalized consolidation by Ukraine of losses incurred to individuals, legal entities, territorial communities, state-owned enterprises and institutions may become a procedural part of compensating losses via international legal mechanisms.

Finally, it should be noted that even if an out-of-court mechanism is set up and effectively used, going to court to protect one's violated rights and get compensated for damages cannot be excluded. That is, legal entities must have the right and opportunity at their own discretion to either apply an out-of-court mechanism (state program, state commission) or try to get compensation for damages in court.

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<sup>13</sup> <https://minjust.gov.ua/news/ministry/denis-malyuska-treba-zmusiti-rosiyu-zaplatiti-za-zavdani-ukraini-zbitki>

<sup>14</sup> <https://www.pravda.com.ua/news/2022/05/20/7347358/>

## II. INTERNATIONAL MECHANISMS FOR PROPERTY RIGHTS PROTECTION

- Available mechanisms

### a) European Court of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms provides a mechanism for protecting the right to peaceful possession of property (movable and immovable, property rights, the law of expectation, profit, etc.).

The applicant can be both an individual and a legal entity. By applying to the European Court of Human Rights ("the Court"), the applicant must identify the State responsible for the violation of his/her right. According to the case law of the European Court of Human Rights, the defendant may be the state that exercised **“effective control”** over the territory where the violation took place. In particular, such a state may be the aggressor state which has violated the property rights of individuals and / or legal entities in the territory of another state.

The court must establish its jurisdiction to consider an application. As a rule, the general position of whether the Court has jurisdiction to consider an application is formed while considering intergovernmental applications (for example, Ukraine v. Russia, Georgia v. Russia). Subsequently, the Court applies its position when considering individual applications.

The advantage of using this mechanism is consideration of the application by an independent and competent court. There is no fee for applying to the ECtHR. Having considered the application, the Court may award just satisfaction.

The first disadvantage is the considerable duration of the procedure. First, consideration of cases by ECtHR itself is quite considerable (from several years to several decades).

At present, enforcing judgments by European Court of Human Rights against Russia is unlikely or almost impossible. Secondly, the Russian parliament adopted the law on non-enforcement of judgments by the European Court of Human Rights issued after March 15, 2022. Moreover, only compensation enforcing ECHR’s judgments issued before March 15 will be paid only in rubles and only to account holders in russian banks.

Thus, ECtHR mechanism is quite protracted, and enforcing a judgment by the ECtHR that has been issued following consideration of the application is unlikely or even practically impossible.

Still, experts claim<sup>15</sup> that enforcing ECtHR's judgments can become the part of the bigger mechanism established by potential international agreement.

#### b) Investment Treaty Arbitration

The legal basis for investment treaty arbitration is both ICSID Convention (a treaty ratified by 157 Contracting States including Russian Federation) and bilateral treaties on investment protection (such as one concluded between Ukraine and Russia).

Following Russia's annexation of Crimea in 2014, many investment treaty arbitrations were brought by foreign nationals in relation to their investments affected in Crimea. These arbitrations related primarily to Russia nationalizing or seizing assets in Crimea and involved an array of sectors, including energy, oil and gas, financial services, air transportation, and real estate.

Usually, there are three stages of investment treaty arbitration: *a) tribunal establishes its jurisdiction over the case; b) tribunal assesses responsibility; c) tribunal defines compensation or other relevant remedy.*

If an armed conflict leads to a change of de facto control over a territory, the control-taking State (potentially Russia) must apply its existing treaty obligations to investors in the acquired territory. Investment treaties frequently provide that losses incurred by foreign investors resulting from requisitioning or destruction during armed conflict shall be compensated promptly, adequately and effectively. The losses may include not only damages arising from the destruction of physical property, but also lost profits from disrupted business operations.

Thus, companies or individuals with investments in Ukrainian territory may have treaty claims against Russia (on the basis of de facto control) for harm to those investments arising from the conflict.

The key question for the tribunals at these cases were: *a) is Ukraine-Russia BIT applicable to an occupying state in unrecognized possession of occupied territory? b) what is the moment of*

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<sup>15</sup> <https://www.ejiltalk.org/launching-an-international-claims-commission-for-ukraine/>

*applying principle of extraterritoriality? c) was there an investment in the meaning of BIT in each case? to specify: were investments made within the respondent contracting party's territory?*

In *Ukrnafta et al.*, the tribunal confirmed jurisdiction over Ukrainian investments in Crimea under the Russia-Ukraine Bilateral Investment Treaty (BIT). The Swiss Federal Supreme Court rejected Russia's set-aside application and confirmed that Ukrainian investments in Crimea became protected under the Russia-Ukraine BIT through the change of de facto control. In addition, there are several unpublished decisions confirming jurisdiction in arbitrations against Russia over Ukrainian investments in Crimea under the Russia-Ukraine BIT in the cases *Belbek Airport*, *Privatbank*, *Everest Estate*, and *Lugzor*.

The question which remains open is to what extent investment treaty arbitrations would differ for the cases occurred after 24 February 2022. Also, an open question is whether the change of de facto control itself can already be regarded as a measure—for example, if that change leads to the investor being exposed to sanctions such as SWIFT. Another open question is also whether, after control was established, investors can bring claims in respect of measures taken before control was established.

The key advantage is that the legal framework required for enforcing arbitral awards is in place.

Experts remain sceptical as to applying that mechanism for protection of property damaged after 24 February 2022. Tribunals might find problematic to establish their jurisdictions and even if decision would be positive, it would be complicated to enforce the decision against Russian property (as shown by *Yukos* case).

At the same time, investment arbitration is a very costly and timely procedure.

Investor Treaty Arbitration might serve as a mid/long-term solution for big businesses. Yet many experts claim that newly established mechanisms, such as described below, might be more efficient.

### c) INTERNATIONAL COURT OF JUSTICE

According to Chapter VII of the UN Charter, the UN Security Council has the mandate to take action in relation to threats to the peace, breaches of the peace and acts of aggression. Within such mandate, a multilateral commission or mechanism may be established to manage reparations process.

At the same time, Russia's veto power as a permanent member of the UN Security Council makes this mechanism virtually non-viable.

However, an authority competent to consider, in particular, the matter of compensation for damages may be the International Court of Justice that considers interstate disputes. On February 26, 2022, Ukraine filed a lawsuit with the International Court of Justice regarding Russia's violation of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>16</sup>. Furthermore, in its statement, our state asks to oblige Russia to pay full reparations for the damage caused by Russian aggression. Ukraine will indeed insist on compensation for all damage caused to individuals, legal entities, territorial communities, and the state. At the same time, the issue of reparations and damages will be considered at later stages of the proceedings.<sup>17</sup>

It should be understood that since it commenced its operations, the International Court of Justice only rendered decisions on financial compensation 4 times, of which only once was the case related to hostilities. In February 2022, the International Court of Justice issued a judgment in Armed Activities on the Territory of the Congo<sup>18</sup>. After oral hearings in April 2021, on 9 February 2022, the International Court of Justice issued its judgment on reparations, awarding USD \$225,000,000 for injuries caused to people, USD \$40,000,000 for property damage, and USD \$60,000,000 for damage related to natural resources. Also, the International Court of Justice ruled that the total amount due must be paid in five annual instalments of \$65,000,000 starting on September 1, 2022; if the payment is delayed, any overdue amount after the judgment was rendered will be subject to 6 percent interest.

In this regard, it is worth noting that the amount of compensation awarded constituted only 3% of the 11 billion dollars claimed; in particular, Congo's claims for compensating macroeconomic damage to the state were rejected because of the failure to prove a causal link between the armed activities and the damage to the Ugandan economy.

<sup>16</sup> <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>

<sup>17</sup> <https://www.ukrinform.ua/rubric-politics/3431664-sud-u-gaazi-rozglane-pitanna-sodo-viplati-rosieiu-reparacij-ukraini.html>

<sup>18</sup> <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf>

As can be drawn from other countries' experience, proving the damage suffered with proper evidence base, establishing the total amount of damage caused, proving the cause-and-effect relationship between the damage caused and the actual damage suffered, as well as enforcing the judgment by the International Court of Justice are quite complex in terms of their practical implementation. Enforcing a possible judgement to be rendered by the International Court of Justice against the background of the positions of certain states during their voting in the UN Security Council and the UN General Assembly is particularly relevant.

#### d) COURTS OF FOREIGN COUNTRIES

As it has already been mentioned, a sovereign state has full immunity on the territory of another country - filing a lawsuit and other legal actions against the state and its property, including foreclosure on such property, can only be allowed with the consent of the competent authorities of that state.

That is, as a rule of thumb, foreign courts do not have the right to consider claims by Ukrainian applicants to recover damages caused by the Russian Federation; the property of the aggressor state is protected by absolute immunity from the enforcement of a court decision and is not subject to seizure or forced sale without Russia's consent.

In such circumstances, in order to recover compensation for the damages caused from Russia, the entity that suffered must overcome jurisdiction and enforcement immunities by directly filing with the national court of the respective state a claim for compensation of damages as per the rules of the respective procedural legislation. No matter how complex the situation is, it is theoretically possible to obtaining a positive decision by a foreign national court and enforce it from the Russian property, but only under certain legislative framework and jurisprudence of a foreign country.

Thus, some foreign courts (Italy, Greece, South Korea) issued decisions on limiting the immunity of aggressor states (Germany, Japan) on the grounds that granting immunity would lead to injustice, denial of justice, or abuse of sovereign rights. Moreover, in recent decades, more than 10 countries in the world have adopted their own foreign immunity laws which define a functional approach to immunity (mostly in commercial relations) and cases where foreign states and their property do not enjoy absolute immunity. For example, US immunity legislation contains the so-called counterterrorism clause, which allows one to file lawsuits with US courts against foreign countries related to international terrorist attacks.

Thus, introducing legislative amendments to limit Russia's immunity as an aggressor state in each individual country and/or favourable jurisprudence theoretically enable direct bringing the matters before national courts of the respective country with claims for damages. The challenge is that even if the necessary legislative amendments are introduced, which is a rather lengthy and complicated process, in practice potential applicants will have to spend a lot of money and time to successfully exercise their right to legal protection and get a positive court decision.

As it has already been to some extent noted, a more realistic option to get compensation in court may be enforcing judgements by Ukrainian courts in foreign countries. According to experts<sup>19</sup>, It is feasible for Ukraine to introduce new procedural mechanisms at the legislative level, which will enable setting long statutes of limitations (for example, 30 years) for lawsuits against Russia as regards compensation for damage caused by its armed aggression against Ukraine, and for the enforcement of decisions of courts and investment arbitration tribunals against the Russian Federation (for example, 15 years). At the same time, even the changes indicated will be effective only if foreign countries amend their own legislation, allowing recognition and enforcement of interim orders and judgments of Ukrainian courts (as well as awards of investment arbitration tribunals) on compensation for damage caused by Russia's armed aggression in Ukraine.

- **Potential mechanisms**

a) **Special mechanism (Claims Commission based on bilateral/international treaties, International Funds etc.)**

In May 2022 President Zelenskiy invited partner countries to sign a multilateral agreement and set up a mechanism through which each and every one who has suffered from Russia's actions will be able to receive compensation for all losses. Under such an agreement, Russian funds and property under the jurisdiction of partner countries must be seized or frozen, and then confiscated and directed to a specially created fund from which all victims of Russian aggression can receive appropriate compensation.<sup>20</sup> In addition, President invited partners to become founders of such a fund, as well as

<sup>19</sup> <https://www.eurointegration.com.ua/articles/2022/06/8/7140806/>

<sup>20</sup> <https://www.president.gov.ua/en/news/proponuyemo-derzhavam-partneram-viznati-sho-rosiya-povinna-p-75221>

members of a special international commission that will consider lawsuits, i.e., claims by both individuals and legal entities.

2 days before, on the 18<sup>th</sup> of May, the special working group on drawing up and implementing international legal mechanisms to compensate for damage caused to Ukraine as a result of the armed aggression of the Russian Federation was established. Its task is to draw up and make proposals on means and legal instruments to compensate the damage and losses caused to Ukraine because of armed aggression by the Russian Federation, including reparations, confiscations, contributions, as well as steps for their implementation given international legal mechanisms, international experience and case law.

The working group included 20 Ukrainian and international experts among which are: Andrii Yermak, Head of the President's Office (head of the group); Serhii Vlasenko, Member of the Verkhovna Rada from the Batkivshchyna All-Ukrainian Association faction; Emine Dzhaparova, First Deputy Minister of Foreign Affairs; Markiyan Kliuchkovskiy, Member of the Advisory Council of the School of Law of the Ukrainian Catholic University, Founder of the Asters Law Firm Bar Association; Anton Korynevych, Ph. D. in Law, Associate Professor of the Department of International Law of the Institute of International Relations of the Taras Shevchenko National University of Kyiv; Andrii Kostin, Chair of the Parliamentary Committee on Legal Policy; Iryna Mudra, advisor to the Minister of Justice; Andrii Sybiha, Andrii Smyrnov and Rostyslav Shurma, Deputy Heads of the President's Office; Halyna Shevchenko, Head of the Head's Office of the President's Office; Andrew Roman Mac, advisor to the President; Patrick Pearsall, International Claims and Reparations Project, Director at Columbia University School of Law; Harold Hongju Koh, Academic Advisor, Yale University Professor of International Law; Jeremy Sharpe, Senior Fellow of the International Claims and Reparations Project at Columbia University School of Law, Independent Arbitrator; Dapo Akande, Professor of Public International Law at Oxford University, Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict; Alison Macdonald QC, Essex Court Chambers Barrister (UK bar category); Amal Clooney, Doughty Street Chambers Barrister, Senior Fellow, Columbia University Institute for Human Rights; Chiara Giorgetti, Senior Fellow of International Claims and Reparations Project at Columbia University School of Law, University of Richmond Professor of Law; Jean-Marc Thouvenin, Academic Adviser, Secretary General of The Hague Academy of International Law, Professor of Law at the Paris Nanterre University.

Recently members of the working group published an article in which they shared their view<sup>21</sup> why they consider claim commission based on international treaties to be a viable option.

Firstly, international claims commissions are [flexible instruments typically established to resolve mass claims](#) arising from international crises. They can provide a forum for resolving a broad array of possible claims under international economic and humanitarian law by a diverse group of injured parties, including States, international organizations, and legal and natural persons.

Secondly, states may establish international claims commissions when deemed to be a) necessary to ensuring effective reparations for loss or damage, particularly following large-scale disruptions that generate mass claims; b) feasible under certain circumstances, particularly when there is money available to pay resulting awards; c) politically useful, including to serve broader interests in helping restore or maintain international peace and security; d) better than any existing alternatives.

According to the abovementioned article, the Government of Ukraine recently endorsed a proposal for a Commission to secure reparations from Russia for damage caused by Russia's unlawful acts. The Commission could serve three primary purposes: (i) adjudicating claims for compensation; (ii) preserving or collecting Russian assets to be used for paying awards; and (iii) providing a means of enforcing awards on compensation. To that end, the international agreement establishing the Commission could provide the legal framework to allow contracting States to transfer blocked assets to a fund from which compensation will be paid. Ukraine and interested States could lay the groundwork for concluding an international agreement to establish the Commission through diplomatic channels and through a conference convened to discuss and negotiate the principles underlying an international agreement. At the same time, Ukraine and its partners could work within existing international organizations to adopt resolutions recognizing Russia's breaches of international law and supporting the establishment of the Commission.

According to the Ministry of Justice of Ukraine, such negotiations are in progress. Recently Iryna Mudra, Deputy Minister of Justice of Ukraine took part in hearings on international legal protection of property rights and future reparations and restoration of Ukraine within the European Parliament's Committee on Legal Affairs.<sup>22</sup>

<sup>21</sup> <https://www.ejiltalk.org/launching-an-international-claims-commission-for-ukraine/>

<sup>22</sup> <https://minjust.gov.ua/news/ministry/irina-mudra-ukraina-mae-otrimati-dostup-do-zablokovanih-milyardiv-dolariv-reparatsiy-dlya-vidnovlennya-derzavi>

Besides, members of the working group expressed their vision on the way how the Commission can be established. In their opinion, an international agreement establishing the Commission could be short, flexible, and definite. This approach would emphasize consensus and efficiency over drawn-out negotiations among the contracting States.

#### **a. The Claimants**

The Commission could consider claims by States and natural or legal persons (regardless of nationality) against Russia arising from loss or damage suffered under international law (including international humanitarian law, jus ad bellum, and international economic law), as well as claims arising from investments, contracts, expropriations, or other measures affecting property rights.

#### **b. The Commission**

The Commission would have jurisdiction to consider claims of different categories. The categories could have different bases — for example, the identity of the claimant(s) (whether individuals, legal entities, or States); subject-matter of claims (such as those for personal injury, economic injury, or other types of injury, such as environmental harm); or claims that will be adjudicated on a case-by-case basis versus claims that will be adjudicated on a collective/mass claim basis.

Building on the success of the United Nations Compensation Commission, each category could be divided into sub-categories or classes that would be of different priority and procedural rules. For example, certain claims could be expedited and resolved as mass claims. The framework of the international agreement would establish and clarify basic procedural rules and due process rights.

The Commission could also have jurisdiction over claims of third States and non-Ukrainian individuals and entities. Accordingly, the international agreement could make it clear that the Commission's jurisdiction over such claims is exclusive or has priority.

#### **c. The Fund**

The Fund can be financed in two principal ways: (i) assets of Russia and related entities and individuals that are frozen/seized by States; and/or (ii) direct contributions by Russia and other entities.

Making it possible to use frozen assets will be key to giving the Commission support and potentially bringing Russia to the negotiating table. The contracting States could, for example, commit to financing the Fund using frozen Russian assets.

The international agreement could identify other matters related to the Fund that will need to be resolved. For instance, the agreement would need to address how the Commission will establish and manage the Fund itself, how it will liquidate frozen assets, and other operational concerns.

#### **d. Enforcement**

To the extent possible, enforcement of awards should be made from the Fund. Insofar as the money in the Fund is sufficient to satisfy the awards issued by the Commission, the awards should be self-enforcing via direct payments from the Fund. Additionally, the international agreement could establish a simplified procedure to provide an “on-ramp” to enforce decisions of other international bodies in connection with Russian invasion of Ukraine (e.g., judgments of the ICJ, European Court of Human Rights, International Criminal Court, or a possible special tribunal for the crime of aggression).

Should the Fund not have sufficient money, successful claimants could potentially enforce the Commission’s awards in courts of the contracting States.

On the whole, it is obvious that implementing such a compensation mechanism is a long and complicated process as it will require complex negotiations at the level of foreign delegations, as well as a number of internal procedures related to amendments in national legislation. Another challenge will be to establish a legal basis the confiscate of seize Russian assets in order to direct them at enforcing the decisions of the Commission, to resolve the issue of limiting the sovereign immunity of both the state and its assets.

However, it is worth agreeing that given the current lay of the land, establishing such an international claim commission has the biggest perspective to ensure effective compensations for damage caused by Russian aggression.