

Zaichuk O.V.

Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine; Leading Researcher, Department of Civil Law, Vasyl Stefanyk Precarpathian National University

Zaichuck Y.V.

Ph.D., MBA

RECOVERY OF WAR DAMAGE IN UKRAINE - LEGAL ASPECTS

Formulation of the problem. Recovery of war damage caused by the Russian Federation presents a number of formidable legal challenges. The Russian Federation is a sovereign state whose assets are shielded by a universally recognized principle of sovereign immunity. Confiscation of private assets of residents and citizens of the Russian Federation is problematic as well because such confiscation would entail the penetration of legal defenses guaranteed to private property worldwide. Therefore, what are the legal avenues available to Ukraine and its resident legal entities for the recovery of losses caused by the war?

Analysis of recent research and publications. A requirement to pay compensation for violations of international humanitarian law has been expressly laid down as long as 1907 (the Hague Convention on the Laws and Customs of War on Land). Modern legal systems deny private parties a right to compensation from war activities from the aggressor. However, due to the evolved nature of modern warfare, in recent literature (H. Adrahan, R. Crotoft) arguments have been made in favor of granting such right under certain circumstances have been made. Aside from the war in Ukraine, a growing interest in legal history of war reparations emerged due to various conflicts across the planet (i.e. R. Burbaum).

The purpose of this article is to explore and evaluate legal avenues available for the recovery of war losses caused by the Russian Federation in Ukraine.

Presenting the main material. Since the start of the Russian invasion of Ukraine on February 24, 2022, a large number of real estate, industrial, commercial and other assets have been damaged or destroyed by the Russian armed forces. As the war continues, the total value of damages caused by the

Russian Federation is growing daily leading to ever-growing calls for Moscow to pay for the damage.

It would be impossible to find a breakdown of losses in the middle of the war. However, clearly, their size is enormous already and will only grow as the war continues.

It stands to reason based on a self-evident moral principle that evil-doers should pay for their evil deeds. By that logic, Russia owes huge sums of money to Ukraine to compensate for the death and destruction caused over the last century since the occupation of the Ukrainian People's Republic in 1921. At least one million died in 1918-1921 as the Red/Russian Army fought Ukrainian Army struggling to get away from the Russian empire. At least four million Ukrainians starved to death from Russia's Dictator Stalin's policies in the 1930th. Soviet/Russian police massacred ten to forty thousand prisoners in Ukrainian (Soviet) jails. Russian Stalin's incompetent strategy toward Hilter caused an estimated thirty to forty million death in the USSR including more than three million Ukrainians. Comrade Khrushchev mismanaged Ukraine during a post-war famine that killed another million Ukrainians.

As of the date of this essay, various estimates of the total value of damage emerged. Prewar GDP of Ukraine was approx. \$150 billion. Assuming a capital-output ratio of three and assuming that a third of the capital stock will be destroyed, the total amount of damage can reach the same \$150 billion. [] After the first month of the war, the estimate of the cost of reconstruction ranged from \$200 to \$500 billion and was growing every day of the war.[] In May 2022, President Zelensky of Ukraine said that Russia caused \$600 billion in infrastructure damage to Ukraine.[] Russia's prewar GDP was \$1,78 trillion (2021).[] As the war rages on it is conceivable to foresee a situation when the amount of damage caused by the Russian Federation to Ukraine including business losses is likely to reach the size of Russia's GDP.

The Russian Federation is a self-appointed and tacitly accepted successor of the USSR in the United Nations Organization and a current holder of the ex-USSR permanent seat on the UN's Security Council. Aside from a somewhat murky status of the Russian Federation within the UNO, perhaps, the self-appointment of the Russian Federation as a successor of the USSR and numerous indications of its sentiment of restoring the Russian Empire within the borders of the non-existent union of fifteen republics, is an indirect self-recognition of the damage caused by the Russian Federation to Ukraine since 1921? If so, perhaps, Ukraine should request reparations from the Russian Federation for all the damage to its citizens and assets for the period since the occupation of the Ukrainian Republic by the Russian Army in 1921? However,

for the moment, aside from historical harm, the Russian Federation is in the middle of committing war crimes against Ukraine for which it would have to answer in the nearest future.

War reparations are as old as war itself. France paid European countries for the damage caused by Napoleon. A century later, France and the UK demanded reparations from Germany for deaths and destruction caused by Germany in WWI. The USSR demanded reparations from Germany after WWII. The allies in the Gulf War collected reparations via the UN Compensation Commission which ceased its activities on February 22, 2022, two days prior to the start of the war in Ukraine.

According to Article 231 of the Treaty of Versailles (1919), Germany was required to accept responsibility for «all the loss and damage» inflicted on the Allies which became the basis for the Allies to demand reparations at \$33 billion (equivalent to \$423 billion in 2019 USD).[] Germany was already in deep economic trouble at the end of WWI and entered into a deep economic crisis after the war. In the end, the reparations were canceled at the Lausanne Conference in 1932 while, some historians claim, being instrumental in providing Hilter with an opportunity to assume control over the country which eventually led to another war where Germany and its allies were defeated again. According to the Protocol of proceedings of the Potsdam Conference (1945), Germany was to pay compensation to the Allies in kind where claims of the USSR were to be met by removal of assets from the Soviet Zone of occupied Germany whereas claims of other Allies were to be met by the removal of assets from other zones.[] German reparations after WWII stopped in 1953. Obviously, forcing any country into paying post-war reparations would require a decisive defeat in war while in-kind removal of assets would need territorial occupation - both preconditions are somewhat unlikely at the moment. It is not even clear what a «clear decisive defeat» of the Russian Federation in the War in Ukraine may look like.

On April 1, 1979 the people of Iran voted in a national referendum to become an Islamic Republic. The vote led to the seizure of the U.S. Embassy in Tehran on November 4, 1979. The Khomeini regime held fifty-two U.S. diplomats, hostage, for 444 days. In response, the US froze billions of dollars of Iranian assets, imposed sweeping sanctions on transactions with Iran, and authorized judicial attachment of Iranian assets in the U.S.. The settlement with Iran was eventually mediated by senior Algerian officials and led to the release of US diplomats, termination of litigation against Iran in US courts, return of frozen assets, payment of outstanding bank loans, and settlement of outstanding property and contractual claims of U.S. nationals by a special

bi-lateral tribunal seated in the Hague (Netherlands).[] The Iran-United States Claims Tribunal (IUSCT) was established by the Algiers Accords, an international agreement between the U.S. and Iran in 1981 to resolve the hostage crisis. The tribunal received over 4,700 claims and ordered payments totaling over US\$3.5 billion - around US\$2.5 billion by Iran to U.S. nationals and more than US\$1 billion by the U.S. to Iran. The IUSCT was one of the most significant arbitral bodies in the history of jurisprudence and, to this day, its decisions are considered influential in the areas of investor-state arbitration and state responsibility.[] Two sovereign states submitted their claims and claims of their nationals to binding third-party arbitration. Members of the tribunal were appointed and the Tribunal conducted its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and was a historical success.[] However, unlike paying post-war reparations, in this case, two sovereign states were not at war and settled their claims in a civilized matter which, of course, is not quite the same as settling claims with a country that sent its army to kill your citizens and keep dropping bombs and long-distance missiles on civilians. It is next to impossible to imagine a third-party tribunal to settle post-war claims between Ukraine and the Russian Federation. At the same time, the creation of a third-party body to look into post-war claims, in principle, can be a viable approach.

Westphalian sovereignty is a fundamental principle and a foundation of contemporary public international law. Article 2 of the UN Charter states that the United Nations Organization shall act in accordance with the principle of sovereign equality of all its members. The same article states that all UN members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state. []

On 23 December 2008, the Federal Republic of Germany instituted proceedings against the Italian Republic in the International Court of Justice to declare that Italy had failed to respect the jurisdictional immunity that Germany enjoys under international law by allowing civil claims to be brought against it in the Italian court seeking reparation for injuries caused by violations of international humanitarian law committed by the Third Reich during the Second World War. The principle of sovereign immunity from private claims has been outlined in the submission of the Federal Republic to Germany as follows: «The general relationship between the European nations continues to be governed by general international law. Every Member State of the European Community/European Union is obligated to respect the general rules of international law vis-à-vis the other members unless

specific derogations from that regime have been stipulated. In respect of the dispute in the instant case, however, no such derogation has been agreed upon. Jurisdictional immunity belongs to the core elements of the relationship between sovereign States. Outside the specific framework established by the treaties on European integration, the 27 European nations concerned continue to live with one another under the regime of general international law. It should be added, in this connection, that the special framework of judicial cooperation that enables individuals to obtain the execution of judgments rendered in one member State of the European Union in other member States of the Union does not comprise legal actions claiming compensation for loss or damage suffered as a consequence of acts of warfare.»[]

«In its Judgment rendered on 3 February 2012, the Court first examined the question whether Italy had violated Germany's jurisdictional immunity by allowing civil claims to be brought against that State in the Italian courts. The Court noted in this respect that the question which it was called upon to decide was not whether the acts committed by the Third Reich during the Second World War were illegal, but whether, in civil proceedings against Germany relating to those acts, the Italian courts were obliged to accord Germany immunity. The Court held that the action of the Italian courts in denying Germany immunity constituted a breach of Italy's international obligations. It started in this connection that, under customary international law as it presently stood, a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict. The Court further observed that assuming that the rules of the law of armed conflict which prohibited murder, deportation, and slave labor were rules of jus cogens, there was no conflict between those rules and the rules on State immunity. The two sets of rules addressed different matters. The rules of State immunity were confined to determining whether or not the courts of one State could exercise jurisdiction in respect of another State. They did not bear upon the question of whether or not the conduct in respect of which the proceedings were brought was lawful or unlawful. Finally, the Court examined Italy's argument that the Italian courts were justified in denying Germany immunity because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. The Court found no basis in the relevant domestic or international practice that international law made the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.»[]

The International Court of Justice looked specifically at whether attaching claims to property belonging to Germany located on Italian territory and

concluded that attaching such claims to entirely non-commercial property violated Germany's immunity.

There is no doubt that the Russian Federation is in the process of committing a crime of war against Ukraine. The armed forces of the Russian Federation committed already numerous acts that, no doubt, would fall under the definition of war crimes. Some of these acts caused extensive damage to businesses in Ukraine and, no doubt, more damage will be caused. However, it is also clear that under international law these acts and damage caused by these acts fall under the umbrella of sovereign immunity against assets of the Russian Federation, a principle that is universally recognized and enforced across the planet. Therefore, recovery of private business damages caused by the Russian Federation which remains a sovereign state presents a fundamental legal challenge. Private business entities in Ukraine have no legal mechanism for the recovery of their losses from the aggressor.

On March 20, 2022, the Cabinet of Ministers of Ukraine passed Decree #326 «On the approval of calculation of damage caused to Ukraine by the armed aggression of the Russian Federation».[] Paragraph 14, of the decree, provides for the determination of losses caused to private business which includes direct and indirect losses and is quite comprehensive in its scope. On April 29, 2022, the Cabinet of Ministers of Ukraine passed decree No. 505 providing for the creation of a centralized computerized register of assets destroyed and damaged as a result of the armed aggression of the Russian Federation.[]

On April 21, 2022, the Verkhovna Rada of Ukraine passed law No7194 which provided for the confiscation of assets owned by the citizens (residents) of the Russian Federation and the Republic of Belarus that were instrumental or contributed to the aggression of the Russian Federation against Ukraine.[] In theory, each and every citizen and resident of the Russian Federation and the Republic of Belarus contributed to the aggression of the Russian Federation against Ukraine by the virtue of their existence whether they paid taxes or supported the policy of Putin's regime. The war of aggression and war crimes are being committed by the Russian Federation which is a sovereign state whose existence is recognized by public international law as it stands today as separate from its residents and citizens. According to Article 41 of the Constitution of Ukraine, assets can be confiscated in Ukraine only based on a decision of a court. Article 79 of the law of Ukraine «On International Private Law» (No.32, 2005) provides for sovereign immunity of assets of the Russian Federation in Ukraine. Therefore, the legality of the approach chosen by Ukraine toward private assets of Russian and Belorussian citizens (residents)

is clearly not perfect while a legal basis for private and public claims against the assets of the Russian Federation whether located in Ukraine or elsewhere does not exist at the moment.

On February 22, 2022, V. Nebenzia, a representative of the Russian Federation in the United Nations Organization and a President of the UN Security Council for February 2022, drew attention to a draft resolution submitted by the United Kingdom (document S/2022/136) and a letter dated February 10, 2022, from the President of the Governing Council of the United Nations Compensation Commission (document S/2022/104). The same day, the UN Security Council unanimously adopted resolution 2621 (2022) deciding that the Compensation Commission fulfilled its mandate under resolutions 687 (1991) and 692 (1991) and other relevant resolutions of the Security Council. In thirty-one years since its inception, the Commission investigated 2.7 million claims seeking US\$352 billion in compensation from Iraq. A total of US\$52.4 billion in compensation was awarded to 1.5 million claimants representing approx. 15 percent of the total claimed.[] A special fund used as a source of funds to pay the claims received a percentage of the proceeds generated by the export sales of Iraqi petroleum and petroleum products.

Historically, recovering the war damage from the aggressor has been modestly successful, and only in those cases when the aggressor lost the war and has been forced into accepting a post-war settlement with the victors. The Russian economy is based mostly on the export of commodities where crude petroleum has been responsible for the bulk of export revenue. In theory, Russian export can be made subject to a special «war damage recovery» surcharge. However, first, the Russian Federation has to lose the war and, second, accept a post-war settlement that can take years to achieve. Assets belonging to the Russian central bank fall clearly under the sovereign immunity principle of international law and, so far, Western allies of Ukraine have been reluctant to violate it. It stands to logic that if the Russian Federation is responsible for the damage as a sovereign state, then, a legal basis of confiscating private assets of Russian citizens or residents would become a somewhat problematic affair. If, for example, any of these private assets are confiscated for whatever reason, then, why should they go toward recovering war damage caused by the Russian Federation to private business in Ukraine? What would be the legal basis for such use of these assets?

As an old saying goes, «making predictions are difficult especially about the future». The outcome of the war of the Russian Federation against Ukraine is unknown and is next to impossible to predict. Historically, two world wars ended with a defeat of Germany which started both of them and lost both wars.

The Iran-United States settlement was a unique case where the countries did not go into open war and maintained an ability to act in a rational manner. The Russian Federation started a war for reasons which are still murky and unclear to a rational third-party observer. It still insists on an unconditional submission of Ukraine to its illegal demands while losing the war at the same time. Obtaining any reparations from the Russian Federation which may go toward repaying losses to business in Ukraine would entail forcing a post-war settlement on the Russian Federation, which, of course, may or may take place at some time in the future.

Our analysis points us clearly toward setting up a post-war international body in charge of settling claims against the Russian Federation. The Russian Federation as a sovereign state and a member of the United Nations Organization presents a number of challenges from the international law perspective. Article 23 of the UN Charter states that the Security Council, the only binding decision-making body of the UN, consists of fifteen members but only ten of them are elected while China, France, the USSR, the UK, and the US are permanent members of the Security Council whose votes are required for any decision taken by the council. The Russian Federation «assumed» a seat of the USSR in the UN and declared itself a successor of the USSR which ceased to exist in 1990. It stands to reason that upon dissolution of the USSR its seat had to be vacated or transferred to one or more of the successor states of the USSR, including Ukraine and other ex-USSR republics, in a clear, legal, and logical manner. There is no procedure for the removal of a permanent member from the UN Security Council. However, as Ukraine has pointed out, there is no evidence of the Russian Federation replacing the USSR on the UN Security Council in the first place, or, at least, there were no publicly available documents to that effect.[] As several petitions to remove the Russian Federations from the UN Security Council are gaining support across the planet, we may eventually see this issue taken seriously by the UN whose effectiveness has been compromised for years due to its inability to unwind its decades-old structure based on the unanimous vote of the permanent members of the Security Council.[] However, as of the date of this essay, the Russian Federation is still a permanent member of the UN Security Council which makes it unlikely, if not impossible, to see any action leading to the recovery of any damage from the Russian Federation centered on the United Nations whose efficiency in solving any security issues across the planet has been problematic for decades.

The structure of the United Nations and the Security Council is clearly outdated. It is widely known and accepted within the international legal

community that the UN Security Council is in urgent need for reform. However, multi-year discussions regarding the structure of the updated Security Council never led anywhere and, therefore, an alternative to the United Nations and its Security Council may emerge after the war in Ukraine.

Therefore, we may **conclude** as follows:

1. Any recovery of losses caused by the Russian Federation during the war in Ukraine would become possible only if the Russian Federation would decisively lose the war and accept the terms of peaceful settlement which would provide for a mechanism for such a recovery.

2. The principle of sovereign immunity protects Russia's state assets from war and any other claims despite the fact that the Russian Federation has stated the war and its armed forces caused enormous loss of life and property damage. Therefore, as it currently stands, there is no internationally recognized legal mechanism for confiscating Russia's assets outside its borders. Whether such a mechanism can emerge and how it may work is unknown at the moment.

3. Ukraine appears to follow the only viable approach to work toward the recovery of war losses known from historical conflicts of the past, namely, a centralized government-based recovery of damages based around an official register of damage and loss of assets. In principle, an ad-hoc international claims body can be used to investigate claims individually but this appears to be unlikely at the moment.

4. Based on post-WWI and post-WWII attempts of recovering losses from the losing side, we may observe that in both cases only a modest share of losses was ever recovered. Therefore, in our opinion, despite a strong moral case and sentiment in favor of punishing the aggressor for its evil deeds, perhaps, a more productive approach would be making post-war Ukraine a fast-growing investment-friendly country on its way to joining a more slowly growing economy of the EU to «recover through development» rather than «place all the eggs in one basket» and spend all the effort on trying to extract hundreds of billions of dollars from the Russian Federation. Both approaches can be used at the same time for maximum effectiveness.

Under international law, Ukraine is entitled to full reparations from Russia for the war damage. The Russian Federation openly acted in defiance of international law, including the ruling of the International Court of Justice that ordered that the Russian Federation cease the invasion. As of the day of this essay, only frozen Russian assets overseas can be realistically used to compensate Ukraine. Alternatively, taxpayers in Ukraine and in the West would have to pay for the recovery. However, there is no legal mechanism in place to confiscate these assets and hand them over to Ukraine at the moment.

There are formidable legal challenges in the way of converting the temporary freezing of Russian and Russia-linked assets into their permanent seizure and conversion into compensation to Ukraine. State-owned assets are protected from confiscation by sovereign immunity rules which are firmly entrenched in international law. Confiscation of private assets gives rise to constitutional and related legal concerns. These challenges are known and recognized by major sanctioning powers and pillars of the existing world order, namely, the US, the EU, and the UK. A number of countries are developing laws and policies to allow for the confiscation and repurposing of frozen Russian assets. However, as of the date of this essay, these initiatives did not lead to the creation of appropriate legislation with the exception of, perhaps, Canada.

Our analysis points strongly toward the creation of a post-war international compensation body similar to the UN Compensation Commission for Iraq. Unfortunately, having the Russian Federation on the UN Security Council as a permanent member made it impossible to use the UN Security Council as a founding body for such a body. Either Russia would have to be removed from the UN Security Council or, alternatively, the compensation body would have to be created outside the United Nations Organization whose ability to perform its statutory functions was compromised for decades.

Is there any other legal mechanism that can be pursued by Ukraine in trying to recover war damage from Russian and Russia-linked assets frozen in the West? In desperation to save itself from the impending defeat, aside from violating each and every rule of war, the Russian Federation deployed what can only be described as «acts of terror» at a state level, including dropping bombs and missiles on civilians and large destruction of civilian infrastructure far away from military targets and with no hope of ever capturing these locations militarily. There is no universally recognized definition of terrorism in international law. However, a large number of jurisdictions across the planet, including all the allies of Ukraine in the West, have laws for the confiscation of terrorists' assets in place. In principle, it is hard to make a convincing legal or even political argument against placing the Russian Federation on the list of «terrorist states». Once the Russian Federation joins Iran and North Korea on this list, then, its removal from the UN Security Council and confiscation of frozen assets would eventually follow. However, we can only speculate whether the US and other major allies of Ukraine would follow this avenue as it would lead to the eventual decline and even may result in the disintegration of the Russian Federation whose possession of the ex-USSR nuclear arsenal complicates the situation. Other than the nuclear arsenal, it is hard to see why the Russian Federation which demonstrated zero respect toward world

economic, political, and humanitarian order should be treated any better than Iran or North Korea. At the same time, most likely, any political or legal development in this regard would have to wait till the end of the war in Ukraine.

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Key words: War reparations, sovereign immunity, property rights, United Nations Organization.