

Ukraine Options Paper

The conflict between Russia and Ukraine is causing tremendous human and material damage. This affects infrastructure as much as it affects companies facing destruction of their facilities and operations, and individuals suffering immediate and direct injury, death of family members, or other damage.

One or both of Russia and Ukraine is or are likely to demand compensation for the injuries and damage that has occurred. Given the vast level of destruction caused by the conflict, any total monetary calculation of the damage caused by the conflict is likely to be extraordinarily high. Yet, a formal scheme for war reparations of such magnitude may not be a likely outcome of any negotiations. Softer mechanisms to offer redress may need to be considered, perhaps embedded in a broader international effort to assist in the recovery, rehabilitation and, ultimately, reconciliation of Russia and Ukraine.

The author of this options paper is perhaps the leading international law practitioner of our day. He has chosen to be known as Roberto Gentili for the purposes of this publication

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A Russia-Ukraine claims commissions after the armed conflict

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I. INTRODUCTION

1. There will be benefits to both Russia and Ukraine of establishing a ‘claims commission’ as part of a post-conflict peace process. Reference here to a ‘claims commission’ is to a standing international adjudicative body with a mandate to resolve financial claims for damages arising out of an armed conflict. Such a claims commission could decide upon claims for damages brought by the two States themselves, other States, private entities, individuals or a combination of any of these. This analysis sets out how both sides may jointly agree to structure a claims commission that suits their needs.
2. After this introduction and an executive summary (in **Section II**), **Section III** describes key lessons learned from the history of claims commissions. **Section IV** explains the benefits to Russia and Ukraine of creating a claims commission. **Section V** discusses key issues that Russia and Ukraine may wish to consider, should they decide to create a claims commission. **Section VI** describes how Russia and Ukraine can go about establishing a claims commission.

II. EXECUTIVE SUMMARY

3. Russia and Ukraine may wish to establish a claims commission as part of a comprehensive peace plan. A claims commission could resolve the claims of the two States and their nationals (and potentially even third parties) arising out of the armed conflict in Ukraine.
4. A claims commission would bring benefits to both Russia and Ukraine. A claims commission is an apolitical, independent, neutral body that enables reparations to be given by States to claimants in the form of quantified damages. It can help claimants, and their respective States, rebuild mutual confidence, re-integrate States into the community of States by allowing the reaffirmation of commitment to the rule of law without admitting any violation and provide compensation, particularly to individuals, without any admission of a violation of the laws of war as such. It can also demonstrate both States’ commitment to peaceful co-existence and mitigate animosity that has developed between their civilian populations. The findings of a claims commission can serve reparative justice, without assigning criminal wrongdoing. And

parties to a claims commission can agree that that process is the only process that they or their nationals can use to seek any form of reparations from each other, thus drawing a line under that aspect of their relationship and providing legal and diplomatic “closure” for each of them.

5. Russia and Ukraine could structure a claims commission to address concerns, such as limiting the total amount of potential damages; encouraging out-of-court settlement of particularly sensitive claims; and confidentiality of evidence and proceedings.
6. If Russia and Ukraine establish a claims commission, they should pay careful attention to:
 - a. Whether the commission will decide claims against one or both States;
 - b. How to select neutral commissioners;
 - c. Who can bring claims (e.g., only the two States; other States; private entities; nationals (and perhaps even others));
 - d. Whether a claims commission will consider either State’s liability for unlawfully initiating the armed conflict (*jus ad bellum*) or be limited only to claims arising out of conduct during the war (*jus in bello*);
 - e. The evidentiary burden of proof and the standard of proof, bearing in mind the difficulties of obtaining evidence in an armed conflict;
 - f. Ensuring there are funds to pay for the administration of the claims commission and also the claims commission’s awards, including enabling other actors in the international community to donate to a compensation fund; and
 - g. Clarity as to whether the claims commission is the only avenue available to them and their nationals to seek reparations from either State.
7. History shows that, to be successful, a claims commission must have an unambiguous mandate, effective procedures and a way to ensure that its awards are paid.

8. After considering all these issues, a claims commission can be created with a clear mandate, with suitable administration and funding, and an indication of its scope, location and duration.

III. KEY LESSON LEARNED FROM THE HISTORY OF CLAIMS COMMISSIONS

9. The most important lesson learned from previous claims commissions is that they are most effective if they have an unambiguous mandate, effective procedures and a means of ensuring payment of their awards.
10. Two early examples of claims commissions are found in the 1794 Jay Treaty between Great Britain and the United States. It was signed to avert armed conflict between the two States, following the American Revolutionary War. That treaty established: (a) a commission to award damages to British creditors; and (b) a commission to award damages to either country's nationals for the seizure of ships at sea. The first commission failed because its mandate was ambiguous. The second commission was more successful.
11. Claims commissions have been established after many subsequent armed conflicts. This includes the 1883 Chile-Peru Mixed Claims Commission and the 1884 Bolivia-Chile Mixed Claims Commission, both established after the 1879-1884 Saltpetre War; the 1919 Reparations Commission of the Treaty of Versailles, established after World War I; and 1923 Mexico-US General Claims Commission, established after the 1910-1920 Mexican Revolution.
12. Many of these historical claims commissions were not successful either in reducing tensions between the States involved or in providing reparations. Their mandates were unclear. Their procedures were complex. Awards were not paid. Thus, claims commissions had fallen out of the favour of States by the end of World War II. In place of compensation commissions, after World War II, the defeated Axis States were required to make lump sum payments to other States as reparations.
13. In the modern era, claims commissions have had a revival and are considered successfully to have reduced tensions between States and provided reparations. Learning from the past, States have ensured that recent compensation commissions'

mandates are clearer, their procedures are more effective and they have means to ensure payment of awards. This includes:

- a. The Iran-US Claims Tribunal, established after Iran-US relations collapsed following the 1979 Iranian revolution;
- b. The United Nations Compensation Commission, established after Iraq's 1990 invasion of Kuwait;
- c. The Eritrea-Ethiopia Claims Commission, established after the 1998-2000 Eritrea-Ethiopia conflict; and
- d. The Commission for Real Property Claims of Refugees and Displaced Persons, established after the 1992-1995 Bosnian War.

IV. THE BENEFITS TO RUSSIA AND UKRAINE OF ESTABLISHING A CLAIMS COMMISSION

14. Russia and Ukraine could structure a claims commission to address their individual concerns, such as limiting the total amount of potential damages; encouraging out-of-court settlement of particularly sensitive claims; confidentiality of evidence and proceedings; and contributions to a compensation fund from the international community. A post-armed conflict claims commission would have potential benefits for Russia and Ukraine, including:

- a. Creating an apolitical, independent, neutral body that enables reparations to be given by both States to claimants in the form of quantified damages without political rhetoric;
- b. Demonstrating both States' commitment to peaceful co-existence and the rule of law;
- c. Rebuilding mutual confidence;
- d. Re-integrating into the international community by a mutual reaffirmation of their commitment to the rule of law;

- e. Enabling compensation to be paid, particularly to individuals, in a balanced, even-handed and fair way;
- f. Reducing animosity between civilian populations;
- g. Providing reparative justice without any admission of criminality;
- h. Providing financial assistance to the payment of compensation by enabling contributions to a compensation fund to be made by members of the international community; and
- i. Allowing certainly that the claims commission is the only process that they or their nationals can use to seek any form of reparations from each other.

15. Russia and Ukraine can structure a claims commission to address sensitive concerns each might have. For example:

- a. They can ensure that the selected commissioners are mutually acceptable and neutral individuals;
- b. They can define the type of claims that can be brought, so as to ensure that claims they or their nationals might want to bring will be heard;
- c. Total compensation can be limited or modified, or paid in instalments, to prevent it from being onerous;
- d. Claimants can be required or encouraged to attempt consultations or amicable settlement before final proceedings, which is useful to resolve sensitive cases;
- e. The evidence, procedures and awards can be kept confidential, in whole or in part; and
- f. Russia and Ukraine can renounce any other method of seeking reparations for themselves or their nationals.

V. KEY ASPECTS OF A CLAIMS COMMISSION THAT BOTH RUSSIA AND UKRAINE COULD CONSIDER WHEN CREATING ONE FOR THEMSELVES

16. Key aspects of a claims commission include: (a) whether one or both States should be subject to the commission and in relation to what scope of claims; (b) the selection of neutral commissioners; (c) potential classes of claimants; (d) determining liability for illegal conduct during the armed conflict (*jus in bello*) and/or illegally starting the armed conflict (*jus ad bellum*); (e) the burden of proof and the standard of proof in light of the difficulty of gathering evidence in armed conflict; and (f) ensuring there will be funds to pay the commission's awards.

A. Whether one or both States should be subject to the commission and in relation to what scope of claims

17. Under public international law, every State should pay full compensation for any breach of international law for which it is responsible.¹ However, a State cannot be forced, without its consent, to appear before a tribunal or pay its award, including a claims commission. States can therefore lawfully limit the scope and power of a claims commission as conditions of their consent. This can include which of the States that is creating the claims commission will appear as a respondent and what are the scope of claims that can be brought against each.

18. Russia and Ukraine can decide whether one or both of them should be subject to a claims commission and in relation to what claims. Only Iraq was required to face claims for damages at the United Nations Compensation Commission. Both Eritrea and Ethiopia faced claims, under different categories of claim only certain of which were actually mutual, at the Eritrea-Ethiopia Claims Commission.²

B. The selection of neutral commissioners

19. To be effective and legitimised for both States, a claims commission needs to have commissioners who are (a) genuinely knowledgeable about public international law;

¹ See Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001, Article 34.

² See Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea ("**Algiers Agreement**"), 18 June 2000, Article 5(1).

(b) have experience in managing complex litigations and arbitrations; and (c) understand economic quantum valuation.

20. Russia and Ukraine may wish to ensure that all the commissioners are neutral and independent. Or they may wish only the presiding commissioners to be so.³ It is usually too complicated politically for States to agree to a specific list of names for commissioners but this might be possible. They may also delegate the task of selecting commissioners to an international entity, like the UN Secretary-General⁴ or the International Court of Justice or a third State in which both have confidence.

C. Potential classes of claimants

21. Russia and Ukraine can define the classes of claimants entitled to bring claims to the commission. One option is for each State to raise all claims against the other directly. This is what Eritrea and Ethiopia decided to do. Alternatively, to help diffuse inter-governmental tensions, Russia and Ukraine can allow their own nationals to bring claims against the other State directly.⁵ The Iran-US Claims Tribunal heard both types of claims.⁶ Most expansively, third States and the nationals of third States may also be permitted to raise claims, if Russia and Ukraine thought that this was desirable.⁷

D. Liability for illegal conduct during the armed conflict (*jus in bello*) and illegally initiating the armed conflict (*jus ad bellum*)

22. Russia and Ukraine can decide the legal standards under which the claims commission can award compensation. In particular, the two States can limit the claims commission's mandate to awarding compensation for unlawful acts in the conduct of war (*jus in bello*) without allowing the commission to decide whether the armed conflict as a whole constituted unlawful aggression (*jus ad bellum*).

³ See Iran-US Claims Tribunal Rules of Procedure, adopted 3 May 1983, Article 6(4).

⁴ See, for example, United Nations Compensation Commission Provisional Rules for Claims Procedure, adopted 26 June 1992 (“UNCC Rules”), Article 18(1); Algiers Agreement, Article 5(2) and (3); Dayton Peace Agreement (“DPA”), Bosnia and Herzegovina, Croatia and Yugoslavia, signed 14 December 1995, Annex 7, Article IX.

⁵ See UNCC Rules, Article 5(1).

⁶ See Claims Settlement Declaration, Iran-US, signed 19 January 1981, Article II(2).

⁷ See UNCC Rules, Article 5(2).

23. Limiting the mandate of a claims commission to awarding damages to claimants who were harmed by unlawful conduct committed during the war (i.e., for military acts that violated international humanitarian law (*jus in bello*)) protects either State from being assigned blame for being the unlawful aggressor in the armed conflict. In such instances, only claimants who have suffered damage as a result of military activities that were in themselves unlawful will receive compensation. Claimants whose damage arose from military activities that were not unlawful *per se* but resulted from the prosecution of an allegedly unlawful war will be unable to claim compensation. This will necessarily limit the number of claimants who will receive compensation.

E. Burden of proof and standard of proof in light of the difficulty of gathering evidence in armed conflict

24. Two important aspects of international litigation proceedings are the burden of proof and the standard of proof. These mean which party must prove something and what kind of (and how much) evidence a claimant must provide to prove its case. Because claims arising out of armed conflicts are of “exceptional gravity”, i.e., they involve allegations of the most disreputable crimes, the International Court of Justice has held that the must be proved by “evidence that is fully conclusive”.⁸

25. On the other hand, States creating a compensation commission can set out in the relevant constitutional documents the commission’s burdens and standards of proof. This allows flexibility for claimants, in recognition of the difficulty for claimants to gather evidence during and after an armed conflict. Thus, there are examples of claims commissions with a nuanced approach to issues of the burden of proof and the standard of proof, often adopting lighter “plausibility” standards.⁹

26. If States participating in a claims commission process so choose, they can agree that all or certain categories of claims can be processed in a simplified way. This can be done either for individual claims or by taking all individual claims in a given category and making them mass claims. An example of the first type would be to agree that all claims to compensation for damage to personal real estate (housing) in urban areas (as

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 43, February 26, paragraph 209.

⁹ *See* Rules of Procedure for the Claims Resolution Process of the Claims Resolution Tribunal for Dormant Accounts, adopted 15 October 1997, Article 22.

may be defined) would be determined on an individualised yes-or-no basis as requiring substantially complete rebuilding at a fixed lump sum or as requiring partial rebuilding at a lesser fixed lump sum. An example of the second type would be to agree that all claims to real property damage in urban areas (as may be defined) would be collected by each State and presented *en masse* to the compensation commission on a cumulative total basis using the same fixed lump sums as above.

27. If Russia and Ukraine opted for such a simplified claims processing system, they could also agree to a simplified standard of proof for certain or all categories of claim. They could also choose to agree that certain categories of claim should be fast-tracked. For example, claims related to rebuilding homes or civilian long-term medical care might be prioritised.

F. Ensuring there will be funds to pay the commission's awards

28. Russia and Ukraine can discuss how to ensure that there will be funds to pay a claims commission's awards. They might also seek external assistance from the international community, to help in providing a pool of funds against which successful claimants can draw.

29. One way to do so is to create an established account for such payments, into which funds are deposited. Funds for such accounts may come from:

- a. Voluntary payments;¹⁰
- b. Mandatory periodic payments from both States concerned;
- c. A percentage of a State's oil and gas export profits (such as Iraq's in the case of the United Nations Compensation Commission);¹¹
- d. Third party States or otherwise from the international community (although this might be unlikely to be sufficient for a large-scale conflict);¹²

¹⁰ See DPA, Annex 7, Article XIV.

¹¹ See UNSC Res 705 (12 August 1991) UN Doc S/RES/705; UNSC Res 1956 (15 December 2010) UN Doc S/RES/1956, paragraph 3.

¹² See DPA, Annex 7, Article XIV.

e. A portion of seized or frozen assets, perhaps in exchange for a return or unfreezing of the remainder.

30. If Russia and Ukraine agreed to allow voluntary contributions into a compensation fund from the international community, they could thereby facilitate more fulsome compensation particularly to individual civilians in a way that reduced the burdens on their own State finances. It may also assist in diffusing various issues of blame, which might otherwise impede constructive dialogue about reparations. Indeed, if sufficient financial support were elicited from the international community, Russia and Ukraine might agree that they would both make significant contributions into a compensation fund initially and thereafter periodically topping up along with voluntary committed contributions from the international community.

31. Additionally, if one State owes debts to the other, those debts could be set off against any compensation awarded against the latter State in favour of the former. Of course, Russia and Ukraine could alternatively agree that the awards of the claims commission must be paid when issued as a matter of international law, without establishing an account with funds to do so.

32. Claims commissions can also be authorised to award restitution (or return) of property¹³ and satisfaction (i.e., apology for the wrongful act).

VI. HOW RUSSIA AND UKRAINE CAN CREATE A CLAIMS COMMISSION

33. If they decide to do so, Russia and Ukraine can create a claims commission through an international treaty.

34. Ideally, the treaty would clearly establish forth the mandate, administrative secretariat, location, duration, funding, and terms for conclusion and all other details. The treaty can (but does not need to) set out details of the claims commission's procedures, such as:

- a. How to file a claim;
- b. How claims will be processed administratively;

¹³ See DPA, Annex 7, Article XI.

- c. How claims will be managed once they are placed on the docket, including early dismissal of patently unmeritorious claims;
- d. The order in which claims will be processed, taking into account factors such as size and urgency;
- e. Whether and when and to what extent proceedings will be confidential;
- f. What will happen to the documents collected by the claims commission once its mandate ends; and
- g. Whether it is possible and, if so, how to appeal, interpret, revise, challenge or modify awards.¹⁴

¹⁴ See International Centre for Settlement of Investment Disputes Convention, signed 18 March 1965, entered into force 14 October 1966, Articles 50, 51 and 52.