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Transitional Justice in the Context of the War in Ukraine

In the wake of the first anniversary of Russia's invasion of Ukraine, the chances of a peace agreement between the parties to the armed conflict are still very low.¹ However, this does not preclude bringing to the table the issues that should be addressed in a future peace agreement. While transitional justice is often understood as a process that deals with the atrocities² occurred in the past, it also includes other types of measures, like the guarantees of non-repetition, to prevent the recurrence of human rights violations in the future. In the past three decades, 105 peace agreements have included transitional justice measures, ranging from amnesty measures, the establishment of a specific court, creation of truth commissions, release of prisoners, special units for missing persons, to reparation measures for victims, and vetting processes³. This has been the case of Guatemala⁴, South Sudan⁵ or Colombia.⁶ Addressing transitional justice issues in a peace agreement is important as it contributes to promoting sustainable peace for societies in transition.

Transitional justice can be defined as a process by which a state deals with atrocities that occurred in the past

because of an armed conflict or authoritarian regime.⁷ This process may include judicial and non-judicial mechanisms and involves not only legal aspects but also political, socio-logical, economic, and ethical aspects, although here it will be analysed from a legal perspective. While recognizing that each transition is unique and needs to address local needs, it is essential to adopt a holistic transitional justice strategy, including a combination of different transitional justice mechanisms.⁸

At the international level, two relevant instruments developed by the United Nations (UN) in 2005 establish international standards on transitional justice. First is the set of Principles against Impunity, which establish general obligations of states to adopt effective measures to fight against impunity and recognize the right to truth, to justice, reparation and guarantees of non-repetition.⁹ Second is the set of Basic Principles and Guidelines on Reparations adopted by the UN General Assembly, which define the notion of 'victim' and present the different mechanisms and types of reparation, with a clear victim-centred approach.¹⁰ These international standards, although not legally binding, guide states in transition and impose limits related to the fight against impunity.

In Ukraine many efforts at domestic and international level focus on accountability for atrocity crimes and the need to create special courts to investigate and prosecute serious human rights violations. Prosecuting those responsible contributes to strengthening the rule of law by confirming that the perpetrators do not go unpunished. However, these measures must also be accompanied by other mechanisms, such as truth-seeking initiatives, to address the root causes of the armed conflict and to search for the disappeared persons, the establishment of reparations mechanisms with a victim-centred approach, and guarantees of non-repetition measures to prevent future violations of Ukraine's sovereignty and territorial integrity.

1. Truth-seeking measures

The right to truth is an autonomous and inalienable right, related to the duty of the state to protect and guarantee human rights, carry out effective investigations, and guarantee effective remedies and reparation.¹¹ The right to know the truth is generally invoked in a context of serious human rights violations and has an individual

1. Lauterpacht Center for International Law, *Ukraine Peace Settlement Project*, <https://www.lcil.ac.uk/researchcollaborative-projects-housed-lcil/ukraine-peace-settlement-project>
2. The term 'atrocities' is used in a broad sense to include serious human rights violations such as war crimes, crimes against humanity, genocide, enforced disappearances, torture, extrajudicial killings and conflict-related sexual violence crimes.
3. Bell, Christine, Sanja Badanjak, Juline Beujouan, Robert Forster, Tim Epple, Astrid Jamar, Kevin McNicholl, Sean Molloy, Kathryn Nash, Jan Pospisil, Robert Wilson and Laura Wise *PA-X Codebook, Version 6* (2022). The database includes over 1959 agreements in over 140 peace processes. www.peaceagreements.org
4. Comprehensive Agreement on Human Rights between the government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), 29 March 1994, which created a truth commission.
5. Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) of 19 September 2018 which has a specific chapter on 'Transitional Justice, Accountability, Reconciliation and Healing'.
6. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace of 24 November 2016 between the Colombian government and the FARC-EP which creates a 'Comprehensive System for Truth, Justice, Reparations and Non-Recurrence'.

7. Juan E Méndez, 'Accountability for Past Abuses' (2017) 1 *Genocide and Human Rights* 429.
8. UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, para. 26.
9. UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.
10. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005.
11. Dermot Groome, 'The Right to Truth in the Fight against Impunity' (2011) 29 *Berkeley Journal of International Law* 175 <<http://scholarship.law.berkeley.edu/bjil/vol29/iss1/5>> accessed 18 March 2023.

and collective dimension. In the Ukrainian peace process, it could be promoted through two types of mechanisms: a truth commission and a special unit for disappeared persons.

Truth commission

The most common non-judicial transitional justice mechanism is the establishment of a truth commission. Hayner defines a truth commission as a mechanism that deals with the past, investigates a pattern of abuses over a certain period of time, is of temporary character, engages broadly with the affected population and is officially authorised by the state.¹² The first truth commission for the search of the disappeared people was established in Uganda in 1974. Since then, more than 50 truth commissions have been created, mainly in Latin America and Africa, among them the well-known truth commission of Argentina¹³ and the Truth and Reconciliation Commission of South Africa.¹⁴ One the most recent and innovative truth commission has been the one set up in Colombia to deal with mass atrocities committed during the internal armed conflict with la *guerrilla* FARC-EP which lasted more than 50 years.¹⁵

In the case of Ukraine, a truth commission could be created with a mandate to study not only the atrocities committed from the Russian invasion in February 2022, but also those in the ongoing armed conflict in the Donbas region since 2014. Some elements would need consideration. The truth commission should be based on a prior and broad public consultation with civil society, human rights organisations, victims and survivors. The independence, impartiality, and competence of its members must be ensured, considering gender and geographic representativity. The ambit of its work should be wide, to address all human rights and humanitarian law violations, including not only civil and political rights, but also economic, social and cultural rights, and paying particular attention to the experience of women, displaced persons and other vulnerable groups. Throughout its work, the commission should establish specific guarantees for the victims to avoid re-traumatisation. The mandate of the truth commission could go further by including the human rights violations occurred in the soviet and post-soviet era. The mandate and functions of the truth commission could be set out in the peace settlement or alternatively, the settlement may include only the general terms of the mechanism

and leave the details of the mandate to be defined later, through the adoption of national legislation.¹⁶

The advantages of a truth commission for Ukraine would be that it could go beyond the mere documentation of the facts and analyse why human rights violations occurred and what should be done to prevent recurrence of these atrocities in the future. The work of a truth commission can significantly contribute to the truth and official recognition of the harm suffered by the victims in the context of the armed conflict. Existing institutions like the Ukrainian Institute of National Remembrance or similar entities can work on initiatives to preserve the collective memory and prevent revisionist and denial arguments.

But to be effective and contribute to reconciliation, the truth commission must include all parties of the armed conflict to avoid exacerbating the ideological divide between Ukrainians and Ukraine and Russia.¹⁷ The truth commission must also have sufficient resources to ensure its independence and to be able to perform its mandate. Finally, institutional support is crucial to fully implement the truth commission's recommendations once the final report is out.

Special Unit for Disappeared Persons

The UN has documented 270 cases of arbitrary detention and enforced disappearance in Ukraine between 24 February and 15 May 2022.¹⁸ Ukraine's police registered more than 9.000 missing persons since the Russia's invasion in 2022¹⁹ but figures could be higher if we include disappearances in the context of the ongoing armed conflict since 2014. The suffering of relatives who don't know the fate and whereabouts of their loved ones amounts to inhumane treatment under the international human rights mechanisms.²⁰ Addressing enforced disappearances can contribute to peace as it alleviates this suffering and contributes to the satisfaction of the rights to truth and reparation. Therefore, it is important to deal with enforced disappearances, not only from a humanitarian perspective, but also from a judicial perspective, through a quick and effective investigation of the facts, prosecution of those responsible, and comprehensive reparation for victims.²¹

12. Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Second Edi, Routledge 2011) at 8.

13. National Commission on the Disappeared (CONADEP), Report Never Again (*Nunca Más*), 1984. More information at: <https://www.usip.org/publications/1983/12/truth-commission-argentina>

14. South African Truth and Reconciliation Commission (TRC), set up by the Government of National Unity to help deal with what happened under apartheid. More information at: <https://www.justice.gov.za/trc/>

15. Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, established in 2017 to deal with atrocities committed during the internal armed conflict with the *guerrilla* FARC-EP, which released the report in July 2022. More information at: <https://comisiondelaverdad.co/>

16. Hayner, n (12)

17. Ilya Nuzov, 'The Dynamics of Collective Memory in Ukraine Crisis: A Transitional Justice Perspective' (2017) 11 International Journal of Transitional Justice 132.

18. OHCHR, 'Ukraine: High Commissioner Updates Human Rights Council | OHCHR' (Geneva, 5 July 2022) <<https://www.ohchr.org/en/statements/2022/07/ukraine-high-commissioner-updates-human-rights-council>> accessed 18 March 2023.

19. Council of Europe Commissioner for Human Rights, *Memorandum on the human rights consequences of the war in Ukraine*, 8 July 2022.

20. Marthe LOT Vermeulen, 'Living beyond Death': Torture or Other Ill-Treatment Claims in Enforced Disappearances Cases' (2008) 1 *Inter-Am. & Eur. Hum. Rts. & Eur. Hum. Rts* 159.

21. Elisenda Calvet Martínez, *Desapariciones Forzadas y Justicia Transicional* (Tirant lo Blanch 2018).

This mechanism has been used in other peace processes in the Balkans,²² Nepal²³ and Colombia.²⁴

A peace agreement for the Ukrainian conflict could create a special unit or commission for disappeared persons. The mandate would be to determine the fate and whereabouts of the disappeared and, in case of death, to return the remains to relatives so that they can bury them according to their traditions and beliefs and mourn the death of their loved ones. This mechanism could coordinate its work with the International Commission on Missing Persons, which currently has a program supported by the EU, Canada, Germany, and US, to locate and identify the missing and the disappeared from the war in Ukraine.²⁵

2. Accountability Measures: Fighting against Impunity

States have an obligation to investigate serious human rights violations promptly and effectively according to international law. To guarantee the right to justice, it is important to adopt a victim-centred approach and ensure the right to an effective remedy. At the same time, investigations should be conducted by independent and impartial bodies and prosecute crimes committed by all parties in the armed conflict. It is also relevant to adopt a gendered approach because conflict-related sexual violence crimes frequently remain invisible, perpetuating impunity.²⁶

Amnesty Laws

The adoption of amnesty laws is probably one of the most controversial aspects of negotiating a peace settlement. Some consider amnesty laws to be an obstacle for justice, while others consider amnesty measures essential for a sustainable peace. In international law, amnesty laws are not prohibited, but they cannot prevent the investigation and prosecution of serious human rights violations such as war crimes, crimes against humanity or genocide. Therefore, blanket or general amnesties are not accepted under international law as they contribute to the impunity of atrocity crimes.²⁷

In the context of Ukraine, the Minsk Agreement I (2014) and Minsk Agreement II (2015) included an amnesty clause by establishing the adoption of a 'law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the

Donetsk and Lugansk regions of Ukraine'. While these provisions do not necessarily violate international law, a future peace settlement, especially if UN sponsored, should expressly exclude any type of amnesty or pardon for persons responsible for atrocity crimes that would prevent their investigation and prosecution. If amnesty is considered necessary to promote peace and reconciliation, it has to be as limited as possible by, for example, excluding the 'most responsible' and the most serious crimes, and not simply providing immunity for certain groups of individuals.²⁸

Coordination Mechanism to Document Atrocity Crimes

Documentation is a vital component of transitional justice. It paves the way for accountability for perpetrators, reparation for victims, memorialization, and institutional reforms that help prevent the recurrence of serious human rights violations. It also contributes to a clearer narrative and helps survivors deal with the aftermath of the conflict. Historically, transitional justice processes have been delayed, evidence destroyed, and witnesses have died. As we face unprecedented efforts to document atrocities occurring in Ukraine, it is important to stress the need to avoid re-traumatization of victims and duplication of evidence.

While states have primary responsibility to prosecute perpetrators of atrocity crimes, the participation and support of the international community can be important to prevent impunity. In the context of the conflict in Ukraine, there is concerted effort to investigate these crimes from different jurisdictions. At the state level, the Ukrainian authorities have opened more than 71.000 investigations of large-scale war crimes and 276 individuals have been charged.²⁹ Other states, such as Estonia, France, Germany, Latvia, Lithuania, Norway, Poland, Slovakia, Spain, Sweden and Switzerland have initiated or stated the interest in initiating criminal investigations into war crimes and crimes against humanity committed in the context of the war in Ukraine, based on the universal jurisdiction principle.³⁰

At the international level, the UN Human Rights Council has created an Independent International Commission of Inquiry on Ukraine (IICIU) to investigate violations of human rights and international humanitarian law in the context of the aggression against Ukraine.³¹ In addition, the International Criminal Court (ICC) has been investigating

22. ICMP, 'ICMP International Commission on Missing Persons' <<https://www.icmp.int/>> accessed 18 March 2023.

23. CIEDP, 'Commission of Investigation on Enforced Disappeared Persons' set up based on the 2006 Peace Agreements between the government and Maoist forces <<https://ciedp.gov.np/en/home/>> accessed 18 March 2023.

24. UBPD, 'UBPD - Unidad de Búsqueda de Personas Dadas Por Desaparecidas' <<https://ubpdbusquedadesaparecidos.co/>> accessed 18 March 2023.

25. ICMP, 'How the International Commission on Missing Persons Works in Ukraine' (2022) <<https://www.icmp.int/news/icmp-dg-op-ed-how-the-international-commission-on-missing-persons-works-in-ukraine/>> accessed 18 March 2023.

26. UN Security Council meeting, 'Sexual Violence 'Most Hidden Crime' Being Committed against Ukrainians, Civil Society Representative Tells Security Council | UN Press' (2022) <<https://press.un.org/en/2022/sc14926.doc.htm>> accessed 18 March 2023.

27. UN Secretary-General, (n 8)

28. L Mallinder, 'Can Amnesties and International Justice Be Reconciled?' (2007) 1 International Journal of Transitional Justice 208.

29. Stephanie Van den Berg and Anthony Deutsch, 'Explainer: How Are War Crimes in Ukraine Being Investigated?', Reuters (2023) <<https://www.reuters.com/world/europe/how-are-war-crimes-ukraine-being-investigated-2023-02-23/>> accessed 18 March 2023.

30. Yvonne M Dutton, 'Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?' (2022) Case Western Reserve Journal of International Law <<https://papers.ssrn.com/abstract=4235676>> accessed 18 March 2023.

31. Human Rights Council, *Situation of human rights in Ukraine stemming from the Russian Aggression*, Resolution 49/1, UN Doc. A/HRC/RES/49/1, 3 March 2022.

past and present allegations of war crimes, crimes against humanity or genocide committed on Ukrainian territory by any person from 21 November 2013 onwards.³² On 17 March 2023, the ICC issued two arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova for the unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation, which (if proven) constitute war crimes under the Rome Statute.³³ The international cooperation of the State Parties to the Rome Statute in the enforcement of the arrest warrants will be essential to proceed with future trials, as the ICC cannot judge *in absentia*. However, issues of immunity *ratione personae* may arise, as Putin is a Head of State in office. As experienced in the case of the ex-President of Sudan Omar al-Bashir, many difficulties arise when non-State parties and State parties to the Rome Statute are called on to detain Heads of State.³⁴ The fact that Putin and Lvova-Belova are nationals of a non-State party to the Rome Statute can also be a controversial issue, because some States, like the US, have strongly opposed the ICC's exercise of jurisdiction without a Security Council referral of the situation or the consent of the State concerned.³⁵ There may also be concerns regarding the impact of these arrest warrants and the opening of investigations by the ICC on an eventual peace settlement.

Moreover, the EU, the US and the UK have created the Atrocity Crimes Advisory Group for Ukraine to support the War Crimes Unit of the Office of the Prosecutor General of Ukraine.³⁶ At the same time, EU Member States, third countries and the ICC have joined the EU Joint Investigation Team (JIT) coordinated by Eurojust.³⁷ The JIT, composed of judges, prosecutors and law enforcement officials, is a mechanism of international criminal cooperation, in which Eurojust assists national investigating and prosecuting authorities who have initiated investigations into core international crimes in the context of the war in Ukraine.³⁸ In March 2023, Ukraine, ICC and EU created a coordination mechanism called the Dialogue Group on Accountability for Ukraine that will offer a platform to states, international organisations and civil society to

discuss and align national and international accountability initiatives regarding the crimes committed in Ukraine.

Creation of Specific Justice Mechanisms with an International Component

Since the investigation and prosecution of atrocity crimes is very complex and difficult, as they are often committed in a systematic manner, it may be necessary to establish a specific transitional justice mechanism to deal with these crimes with the support of the international community. There are different options on the table: the establishment of a hybrid criminal tribunal for the investigation and prosecution of atrocity crimes; the establishment of a hybrid prosecutor office to work together with the Ukrainian Prosecutor General Office; the establishment of an *ad hoc* criminal tribunal to investigate the crime of aggression, as the ICC does not have jurisdiction over this crime in the situation of Ukraine.³⁹

The main advantages of a hybrid court or prosecutor are that these mechanisms are composed of international and national personnel. The presence of international staff helps protect the mechanism from political interference and increases its independence. Working with national staff generates institutional capacity building and contributes to strengthening the national judicial system and rule of law.⁴⁰ One of the main drawbacks is the likely lack of judicial cooperation between Ukraine and Russia for the investigation and prosecution of atrocity crimes. If Russia refuses to engage with any of these mechanisms presented above, it will be very difficult to hold accountable those responsible.

Another important issue is what kind of perpetrators are going to be brought to justice (high, middle, or low-ranking officials) and the ability of these accountability mechanisms to charge based on command responsibility. Another question that arises is where should these mechanisms be established: in Ukraine where the crimes occurred or in a third country? While the Ukraine option is the best in terms of victims' access to justice and access to evidence, a mechanism outside of Ukraine could also be more independent and impartial, especially if it had jurisdiction over the crime of aggression.

Indeed, there has been strong advocacy in favour of the creation of a special criminal tribunal for aggression to prosecute President Putin and Russian high-ranking officials. However, there are a number of complications, such as the issue of the immunity of serving and former officials from prosecution, the high cost of establishing

32. ICC, 'Ukraine | International Criminal Court' <<https://www.icc-cpi.int/ukraine>> accessed 18 March 2023.

33. ICC, 'Statement by Prosecutor Karim A.A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova | International Criminal Court' (2023) <<https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>> accessed 18 March 2023.

34. Ntombizozo Dyani-Mhango, 'South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir' (2017) 26 Washington International Law Journal 535.

35. Miles Jackson, 'The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova. An Outline of Issues' (EJIL: Talk!, 2023) <<https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/>> accessed 23 March 2023.

36. United States Department of State, 'Creation of Atrocity Crimes Advisory Group for Ukraine' (2023) <<https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/>> accessed 18 March 2023.

37. Eurojust, 'Eurojust and the War in Ukraine | Eurojust | European Union Agency for Criminal Justice Cooperation' (2023) <<https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine>> accessed 18 March 2023.

38. Julia Crauford, 'Ukraine, ICC and Eurojust: How Will That Work?' *Justiceinfo.net* (2022) <<https://www.justiceinfo.net/en/91763-ukraine-icc-eurojust-how-will-that-work.html>> accessed 23 March 2023.

39. See the contribution to this volume by Federica D'Alessandra (page 54).

40. See for example the case of the International Commission against Impunity in Guatemala (CICIG), which acted as an international prosecutor office and worked together with the domestic prosecutors. See further Andrew Hudson and Alexandra W Taylor, 'The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms' (2010) 8 Journal of International Criminal Justice 53.

a new *ad hoc* tribunal,⁴¹ and the question of selectivity of international criminal justice by prioritising criminal investigations efforts in the context of Ukraine and not in other similar contexts.⁴² Still, some steps have been taken with the creation in March 2023 of the Center for the Prosecution of the Crime of Aggression against Ukraine (ICPA), which will be based in The Hague and be part of the JIT coordinated by Eurojust.⁴³ The ICPA aims to collect evidence and prepare the prosecution for future trials, whether national or international, on the crime of aggression in the context of Ukraine.

3. Reparations and Guarantees of Non-Repetition

Societies in transition must address remedies for victims of serious human rights violations. To this end, the courts and, increasingly, truth commissions, have a fundamental role when it comes to recognizing a right to victims' reparation and in directing reparation measures. The UN Principles against Impunity recognises as a general principle that 'any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and the possibility for the victim to seek redress from the perpetrator'. The victim is the essential focus, thus overcoming traditional conceptions of reparation centred on the relationship between state and perpetrator. This evolution is reflected in the UN Basic Principles and Guidelines on Reparations, which seeks to codify the norms and principles of protection of human rights from the perspective of the victim. Traditional reparations are framed within the framework of the international responsibility of states, in which the main subjects are the states, while international human rights law has developed an approach based on the victims and the right to an effective remedy and to obtain reparation. Both types of reparations can be addressed in a future settlement.

Reparations within the Framework of State Responsibility

Under international law, states have an obligation to repair the damage when they commit an internationally wrongful act. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARIO) adopted by the International Law Commission in 2001, provides in article 31(1) that '[t]he responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act'.⁴⁴ According to

the DARIO, which reflect customary international law, the damage caused includes both material and moral damage. The foundations for reparations were set out in the Chorzow Factory Case, in which the Permanent Court of International Justice determined that it is well-established in general international law that a state which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the damage caused by that act to the injured state.⁴⁵

Russia's invasion of Ukraine is an act of aggression which violates the principle of prohibition of the threat or use of force enshrined in the UN Charter. This principle constitutes a peremptory norm, which means that its breach not only affects Ukraine but the whole international community. Besides, the violations of international humanitarian law and international human rights law that occurred in the context of the armed conflict in Ukraine also entail international responsibility of the state parties in conflict.

There are different options to determine reparations within the framework of international responsibility of states. One possibility is to create a Russian-Ukraine Claims Tribunal, an International Mass Claim Commission, which is an *ad hoc* tribunal set up for resolving large-scale violations of international law arising from a conflict.⁴⁶ In the past four decades there have been only three such claims commissions: the Iran-United States Claims Tribunal established in 1981,⁴⁷ the United Nations Compensation Commission (UNCC), and the Eritrea-Ethiopia Claims Commission. The other option is to seek reparations through judicial proceedings, for instance, by instituting a claim before the International Court of Justice (ICJ). In the *Armed Activities case (Democratic Republic of the Congo (DRC) v. Uganda)*, the Court awarded to the DRC the compensation for damage on persons, properties and related to natural resources a total of US\$325 million.⁴⁸

The disadvantage of inter-state reparations mechanisms is that they do not always take into consideration or cover the victim's needs, since they are determined at the state level. The option of a Russia-Ukraine Claims Tribunal could be included in a future peace agreement, although it will much depend on how the armed conflict unfolds. One of the main problems will be how to get Russia to pay for the damage, as the freezing of sanctioned assets does not automatically mean that those assets can be seized and put towards a reparations scheme.⁴⁹

41. Kevin Jon Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea - *Opinio Juris*' (7 March 2022) <<https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>> accessed 18 March 2023.

42. 'The ICC at 20: Elusive Success, Double Standards and the "Ukraine Moment" - JusticeInfo. Net' <<https://www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html>> accessed 23 March 2023.

43. Oleksandra Drik, 'New Tribunal Announced to Prosecute Russian Crime of Aggression in Ukraine * Visegrad Insight' (8 March 2023) <<https://visegradinsight.eu/new-tribunal-announced-to-prosecute-russian-crime-of-aggression-in-ukraine/>> accessed 18 March 2023.

44. UN International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by General Assembly resolution 56/83 of 12 December 2001.

45. Permanent Court of International Justice, *The case concerning the factory at Chorzow*, Series A. - No. 9 July 26th, 1927

46. Lea Brilmayer, 'Understanding "IMCCs": Compensation and Closure in the Formation and Function of International Mass Claims Commissions' (2018) 43 *The Yale Journal of International Law* 274.

47. Iran-United States Claims Tribunal established in 1981 under the Algiers Accords, which also ended the hostage crisis at the US embassy in Tehran. <https://iusct.com/about/>

48. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, decision of reparations of 9 February 2022.

49. See the contributions in this volume by Régis Bismuth (page 8), Anton Moiseienko (page 33) and Leanna Burnard & Mira Naseer (page 22).

Seeking a judicial process of reparation before the ICJ or another international court can be another option. Ukraine has already issued a claim against Russia on the grounds of the 1948 Genocide Convention and has requested that the ICJ adopt provisional measures to suspend the military operations of Russia that started on 24 February 2022.⁵⁰ One of the advantages of this strategy is that the ICJ has addressed in the past similar cases of serious human rights violations and adopted decisions on reparations. However, as Russia has rejected the ICJ's jurisdiction on the Allegations of Genocide Case issued by Ukraine, it may also reject the jurisdiction of the court for future settlement on reparations. Moreover, these proceedings can take a long time and often do not offer full redress to victims as they have a State-centric focus.

Victim-oriented Reparations

The UN Basic Principles and Guidelines on Reparations establish that full and effective reparation for the harm suffered must include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The capacity of existing domestic mechanisms to obtain reparation for victims is often limited, and individual reparations can be difficult to grant without financial support from the international community. In this context, collective reparations addressing the harm suffered at the community level can be a solution and can contribute to restorative justice. These collective reparations should be based on an inclusive approach, include moral reparation and recognition at the community level, and ensure victims access to public resources and services.

At the international level, one option is the establishment of a multilateral mechanism to deal with individual claims like the UN compensation Commission established in the aftermath of the Iraqi war of 1991.⁵¹ This mechanism was a subsidiary organ of the UN Security Council and was funded by the UN Compensation Fund, which received a percentage of proceeds from the export of Iraqi petroleum and petroleum products. Another possibility is the reparations awarded by the ICC in the cases under investigation in the context of the war in Ukraine. In this case, reparation will be linked to the prosecution of the perpetrators of the international crimes committed in the war in Ukraine and limited to the evidence of the harm established in the criminal proceeding by the Court. Eventually, the reparation could be covered by the Trust Fund for Victims.⁵²

At the domestic level, a national program of reparations can also be established by creating a specific mechanism with international financial support. Examples that illustrate the inclusion of reparation mechanisms in peace agreements are the 1996 Comprehensive Peace Agreement of Guatemala which established a 'State body responsible for public policy regarding compensation for and/or assistance to victims of human rights violations and present a compensation programme',⁵³ and the Sudan Peace Agreement of 2020 which includes a Compensation and Reparations Fund in Darfur and details its composition and functioning.⁵⁴

The inclusion of mechanisms to deal with reparations in a future peace settlement is essential and needs to adopt a victim-centred approach, providing for compensations, but also other forms of reparation. Reparation programs should especially focus on refugees, the return to their homes and restitution of their land and housing. International financial support will be crucial to help Ukraine recover from war and repair the damage suffered by its population. The establishment of a reparation's mechanism similar to the UN Compensation Commission seems unlikely as the UN Security Council is currently blocked by the Russian veto power. Eventually, this mechanism could be created by the by other UN bodies, like the General Assembly.

Guarantees of Non-repetition

Guarantees of non-repetition (GNR) include all measures that a state must adopt to reduce the likelihood of recurrence of serious violations of human rights.⁵⁵ The institutional reforms undertaken in transitional justice processes are understood as means to prevent this recurrence. Within the framework of the international responsibility of states, article 30 (b) of the DARIO provides that the state responsible for the internationally wrongful act must 'offer assurances and guarantees of non-repetition, if circumstances so require'.⁵⁶ The GNR aim at the restoration of confidence between the injured State and the State responsible for the internationally wrongful act.⁵⁷ The GNR are necessary when the injured state has a reason to believe that a return to the previous situations will not be

50. ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, 27 February 2022. <https://www.icj-cij.org/case/182>

51. Established in 1991 by the UN Security Council through Resolution 687(1991) to process claims and pay compensation for losses and damage suffered because of Iraq's invasion of Kuwait in 1990. <https://uncc.ch/compensation-fund>

52. The Trust Fund for Victims is not part of the ICC and was created in 2004 by the Assembly of State Parties of the Rome Statute. One of its functions is to implement the reparations ordered by the Court. See further: <https://www.icc-cpi.int/tfv>

53. 1996 Agreement on a Firm and Lasting Peace between the government of Guatemala and the URNG. Available at: <https://www.peaceagreements.org/view/254>

54. Juba Agreement For Peace In Sudan Between The Transitional Government of Sudan and the Parties to Peace Process, 30 October 2020. Available at: <https://www.peaceagreements.org/viewmasterdocument/2325>

55. A Mayer-Rieckh, 'Guarantees of Non-Recurrence. An Approximation' (2017) 39 *Human Rights Quarterly* 416.

56. In the ICJ *Lagrand* case, the US had detained two German nationals, who were tried and sentenced to death without having been informed of their rights, as is required under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 1963. Germany requested general and specific assurances and guarantees from the US as to the means of future compliance with the article 36 of the Vienna Convention, as it considered that apologies were not a sufficient measure of reparation. ICJ, *LaGrand Case (Germany v. United States of America)*, Judgment, 27 June 2001.

57. UN International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at p. 89, article 30 (9).

a sufficient measure to protect it from future harm. So, the main purpose of GNR is not just looking at past wrongs but to prevent future breaches of international law: they are forward-looking measures.⁵⁸ These measures are aimed at society as a whole, while truth, justice and reparation are rights that belong to victims and their families, and only ultimately to society.⁵⁹ In the context of the Russia-Ukraine war, a future settlement should include some type of GNR measures aimed at the prevention of future violation of Ukraine's sovereignty and to give assurance that its territorial integrity will be respected. The mere restoration of the situation before the invasion of Russia in 2022 is not enough as Ukraine already suffered the violation of its sovereignty with the *de facto* annexation of Crimea by Russia in 2014 and the ongoing conflict in the Donbas Region of Ukraine. Therefore, some positive measures will be required from the Russian side to guarantee the non-recurrence of the violation of these international obligations in relation to Ukraine.

Beyond the inter-state dimension of the conflict, it is difficult at this moment to foresee the GNR that could be included in a future peace settlement. Such measures normally focus on the security sector reform and the need for disarmament, demobilization, reinsertion, and reintegration of armed groups. In the context of the Russia-Ukraine war, these measures may include the guarantee of civilian control of military and security forces as well as intelligence agencies; human rights training for public officials and employees, military, security, police, intelligence, and judicial sectors, and vetting of public officials personally responsible for atrocity crimes. However, these programs, focused on the security sector most of the time, must not be carried out to the detriment of victims and survivors and need to make sure that vulnerable groups such as women, children, refugees and displaced people are not excluded.⁶⁰

58. Christian J Tamst, 'Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility' (2002) 27 *The Yale Journal of International Law* 441.

59. Méndez (n 7).

60. Th Van Boven, 'Reparative Justice- Focus on Victims SIM Lecture 2007' (2007) 25 *Netherlands Quarterly of Human Rights* 723.

As GNR take time and imply institutional reforms which need broad consensus and public participation, they require more concerted efforts in comparison to other transitional justice mechanisms, such as truth commissions, which are temporary and have limited impact. The advantages of including GNR in the future peace settlement is that they help build trust not only between Russia and Ukraine, but also for the whole international community.

This being said, it is difficult to imagine what types of measures exactly Russia could commit to in order to ensure the non-repetition of the breaches of international law. All the more so that the levels of trust between Russia and Ukraine are understandably low.

4. Final remarks

Transitional justice measures do not only address past atrocities but are also forward-looking. They aim to prevent the recurrence of human rights violations by addressing the root causes of the armed conflict. There is no transitional justice template that states need to comply with, but studies show that the combination of non-judicial and judicial mechanisms contribute to the protection and respect of human rights.⁶¹

As the armed conflict in Ukraine is ongoing and atrocities continue to be committed systematically, it is important to keep documenting the human rights violations in a coordinated manner not only for accountability purposes, but also to know the truth of what happened and help determine the type and form of reparations. Different options have been presented in this contribution to serve as a guide for a future peace settlement. The inclusion of transitional justice issues in a peace agreement is important as it represents the commitment of the parties to the armed conflict to promptly address the atrocities that have occurred and places the victims and survivors at the center of the agreement.

61. Tricia Olsen, Leigh Payne and Andrew Reiter, 'The Justice Balance: When Transitional' (2010) 32 *Human Rights Quarterly*.