EXPERT REMARKS: DISCUSSION ON COMPENSATION UNDER INTERNATIONAL LAW WITH A FOCUS ON OPTIONS FOR ENFORCEMENT

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Mr. President, members of the Committee, it is a great honor to address you today on the topic of compensation under internation law with a focus on options for enforcement.

I am a Partner in the International Litigation & Arbitration Department of the law firm Foley Hoag where I represent States in various international law matters. Previously, I was legal counsel in the Canadian Department of Foreign Affairs and International Trade. I have been asked to provide a practitioner's perspective on the topics under discussion.

I wanted to use my time to frame and contextualize our discussion. I will first set out the international legal framework under which compensation claims are determined. Next, I will briefly discuss compliance and enforcement mechanisms across these fora. And finally, I will canvass potential options for further study to aid the Council in its task of finding means to ensure the implementation of the Court's judgments by non-complying States.

I. Compensation under International Law

Let's start with the first issue on how compensation claims can arise in an international case. Broadly, there are three main categories of compensation claims.

The first category is inter-State claims. This involves claims brought by one State against another. There are only a handful of cases by the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), and the International Tribunal for the Law of the Sea (ITLOS) that have resulted in an award of compensation. The remedies most often ordered in inter-State cases have been declarations, restitution, satisfaction, or guarantees of non-repetition.[1] The cases where compensation was awarded dealt with property damage,[2] environmental damages[3], and moral damages.[4]

The second category involves international investment arbitrations. These claims are brought by a foreign investor against a State under a bilateral investment treaty, an investment chapter in a free trade agreement, or a domestic investment law. The practice for awarding damages is more established in investor-State dispute settlement (ISDS) relative to inter-State cases as

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[1] *See*, International Law Commission, Articles on State Responsibility (2001).

[2] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) [2012] ICJ Rep 324.

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation, Judgment) [2018] ICJ Rep 15.

[4] *Lusitania Cases (United States v. Germany)*, Opinion, 7 R.I.A.A. 32, 40 (U.S.-Ger. Mixed Claims Comm'n Nov. 1, 1923).

compensation is often the central motivation for bringing these claims. In my experience as counsel, investors primarily seek compensation for the fair market value of the asset (plus their legal costs) and sometimes also for incidental expenses or moral damages.

The third category relates to human rights claims. This audience will be familiar with claims for violations of human rights protections under human rights instruments. Regional human rights bodies are empowered to order compensation under the governing treaty.[5] Compensation claims may be divided between pecuniary damages (*e.g.*, loss of income, lost property, lost opportunities, medical expenses or legal expenses) and non-pecuniary losses (*i.e.*, moral damages such as psychological harm, anguish, grief, humiliation and reputational harm). Non-monetary remedies such as public apologies, prosecution of perpetrators, building monuments, repeal of laws *etc.* are usually awarded in addition to compensation.

Across all these types of cases, international courts and tribunals have been guided by the same sources and principles of international law. The starting point is the ILC Articles on State Responsibility. The ILC Articles set out the various forms of reparation (Article 34) for internationally wrongful acts, specifically in Article 35 (on restitution), Article 36 (on compensation), and Article 37 (on satisfaction).

The objective of reparation was set out in the Permanent Court of International Justice's seminal *Chorzow Factory* case. It provides that reparation *"must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."* Although restitution is considered the primary remedy, compensation is available in lieu thereof particularly if restitution would not be materially possible and proportionate. The ILC Articles provide that compensation *"shall cover any financially assessable damage"*.[6]

Now, there are straightforward applications of the principle for damage to property such as ships (*e.g.*, sinking of a ship in *I'm Alone case* or damage to ship in *Saiga case*), buildings, or aircrafts. However, it has proven more difficult to apply in practice to other types claims or scenarios.

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[5] The rules empowering regional human rights courts to award compensation are as follows:

- European Convention on Human Rights, Art. 41: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
- American Convention on Human Rights, Art. 63(1): If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
- African Court Protocol, Art. 27(1): If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

[6] International Law Commission, Articles on State Responsibility, Art. 36(2) (2001).

For example, in investment claims, the difficulty traditionally lay in quantifying lost future profits, particularly for assets without a history of operations. Over time, however, practice has developed. Perhaps as a reaction to this, we're starting to see a variation on these claims for the loss of opportunity to make a profit.

In the public international law context, there have been complexities surrounding claims for macro-economic harms. The ICJ has begun to grapple with this in *DRC v. Uganda* case. There have been similar developments with respect to environmental damages. A good example of his was the *Certain Activities case* (*Costa Rica v Nicaragua*). The parties presented competing theories of environmental damages: Costa Rica advocated for an "ecosystem services approach" whereas Nicaragua endorsed a "replacement costs approach". The Court went its own way by adopting an "overall assessment approach" rather than quantifying each head of damage.

We can perhaps expect similar claims to arise in relation to climate change harms. The recent *Kilma* decision by the Grand Chambers' shows this is relevant here.[7] And it may become particularly relevant in context of various climate change advisory opinions before ITLOS, ICJ and IACtHR. And given current events, international adjudicators may also soon be faced with quantification of damages for mass atrocities, genocide, and from armed conflict.

International courts and tribunals have responded to these difficulties with quantification by resorting to equitable considerations. For example, in the *Armed Activities case* (*DRC v Uganda*), the Court resorted to the concept of "global sum".

In the human rights context, evidence may be even more difficult to obtain so courts must exercise their discretion. Some courts have used detailed tables while others resort to some proxy such as the minimum wage in the respondent country, annual income per acre, or per capita estimates. In other systems (like the Inter-American Court), a particular amount is not specified and the matter is referred back to the relevant State to determine the proper amount of compensation.

This can be compared with the approach in investment arbitration. When tribunals are faced with uncertainty due to insufficient evidence typically with respect to lost future profits, they will opt for sunk costs rather than the DCF method. That's because an investor will usually be able to substantiate its investment costs even if it cannot establish its cash flow projections to the requisite degree of certainty.

II. Observations on Compliance with Compensation Awarded by International Courts & Tribunals and Mechanisms for Enforcement

Now, I want to briefly turn to the topic of compliance and enforcement under these three regimes. As we will see, each system takes a different approach to enforcement -- ranging from

[7] The Grand Chamber in evaluating breaches under Articles 8 (right to private and family life) and 6(1) (access to court), found that the Swiss government had failed to comply with its positive obligations under the ECHR to combat climate change, by failing to reduce greenhouse gas emissions. *See, Verein KlimaSeniorinnen Schweiz and Ors v Switzerland* (application no. 53600/20).

diplomatic pressure to formal legal mechanisms -- which reflects varying philosophies by which a State should be compelled to adhere to such awards.

Let's start with the ICJ. These awards are binding under Art. 94(1) of the UN Charter.[8] So, States are expected to comply with awards. If a State has not complied, a party may have recourse to Security Council under Article 94(2). However, the Council's powers are limited to making recommendations or deciding on measures to take.

What about domestic courts? That question arose in the US in the case *Medellín v. Texas*.[9] The Supreme Court determined that ICJ judgments were not self-executing and could not be directly enforced in US courts without implementing legislation from Congress.

This contrasts quite sharply with investment cases. Most countries comply with investment awards despite some notable exceptions by a handful of States.[10] That's because of the applicable legal rules. Article 53 of the ICSID Convention provides that awards are binding and each party must comply with its terms. This means that a State must recognize and enforce ICSID awards as if it were a final judgment of a court of that State. Execution of the award is governed by the laws of the State where execution is sought.

For non-ICSID cases, the New York Convention may be applicable depending on where enforcement is sought and the seat of arbitration. After the arbitral award has been recognized and enforced, the investor will have to identify specific State property that is free from immunity and can be used for the execution of the decision.

As for human rights awards, there are varying levels of compliance across regional bodies. In the Inter-American Court system, compliance rates are reported to be 28%[11] or 34%.[12] The rate of full compliance of African Commission decisions is 14%.[13] The European Court of Human

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[8] UN Charter, Art. 94:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

[9] *Medellín v. Texas*, 552 U.S. 491 (2008).

[10] E. Gaillard and I.M. Penushliski, "State Compliance with Investment Awards, *ICSID Review - Foreign Investment Law Journal*, Vol. 35(3) (2021).

[11] D. Hawkins and W. Jacoby, "Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights", *Journal of International Law and Relations* 35 (2010).

[12] C. Hillebrecht, Human Rights Tribunals and the Challenges of Compliance, in HUMAN RIGHTS TRIBUNALS AND THE CHALLENGE OF COMPLIANCE (2013), p. 11.

[13] F. Viljoen and L. Louw, State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights: 1994-2004, Vol. 101(1) *American Journal of International Law* 5 (2007).

Rights has the highest implementation rate which according to some measures at 49%.[14] Interestingly, compensation is the form of reparation which States most often comply with.[15]

There is no enforcement mechanism *per se*, but rather human rights courts encourage compliance by various means such as:

- Making case documents and decisions public;
- Instituting a reporting system of non-compliance. For example, the IACtHR submits report to the General Assembly of the Organization of American States specifying which States haven't complied with their judgments;[16]
- Establishing a supervising body to review the status of compliance. This is the system adopted here where the Committee of Ministers was established to supervise the execution of ECtHR judgments.[17]
- Imposing additional costs on States that fail to implement reparations within a specified period.[18]

III. Options to ensure execution of Court's judgments by States

I would like to now conclude with some potential options to ensure the implementation of the Court's judgments. And, I present this with the caveat that these are ideas that warrant further study to assess their suitability and practicality.

In my view there is very much a spectrum of measures that could be considered here collectively or individually.

1. Role of Civil Society

At one end of the spectrum is enhancing the role of civil society organizations. Many CSOs already play an important role in supporting the Court's work by monitoring and putting pressure on State parties. They could continue to advise the Court on a State's implementation of its decisions. But they can also engage with international processes which I will come back to later.

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[14] C. Hillebrecht, Human Rights Tribunals and the Challenges of Compliance, in HUMAN RIGHTS TRIBUNALS AND THE CHALLENGE OF COMPLIANCE (2013), p. 11.

[15] African Court on Human and People's Rights, COMPARATIVE STUDY ON THE LAW AND PRACTICE OF REPARATIONS FOR HUMAN RIGHTS VIOLATIONS (2019), p. 55.

[16] American Convention on Human Rights, Art. 65.

[17] European Convention on Human Rights, Art. 46(2).

[18] *See e.g., Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR, Judgment (Merits, Reparations, Costs), Aug. 2010.

2. *Compensation Mechanism*

Another approach would be to set up a compensation mechanism such as the Register of Damages for Ukraine.[19] This concept was approved by Council of Europe last May. It will record evidence and claims for damage, loss, or injury caused to all natural and legal persons concerned, as well as to the State of Ukraine, by Russia's acts. This could serve as a model for outstanding monetary awards against the Russian Federation.

3. *Domestic Enforcement of Human Rights Decisions*

In terms of domestic enforcement, there is nothing analogous to the New York Convention in the human rights context. And, in any case, it is inconceivable that the Russian Federation would sign on to such an initiative.

In the human rights world, enforcement has traditionally been confined to non-judicial institutions. However, States may choose to allow for domestic enforcement. Two States, for example, have enacted laws that allow for enforcement of human rights decisions against it:

- Peru has a specific law that makes judgments for damages by international courts against it enforceable under domestic law.[20]

- Costa Rica similarly has an agreement with the IACtHR, which recognizes resolutions issued by the Court as enforceable as if they were issued by Costa Rican courts.[21]

4. *Reform Human Rights Instruments*

Human rights instruments could also be reformed to compel domestic courts to enforce compliance with judgments of the court similar to investment arbitration. This would also likely necessitate amending national laws. And, this would be a forward-looking measure.

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[19] Council of Europe, Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, information available at: https://rd4u.coe.int/en/.

[20] Law 27.775 (which regulates the procedure for the enforcement of judgments issued by supranational courts), June 27, 2002, article 1: It is declared of national interest the enforcement of the judgments issued in the processes followed against the Peruvian State by International Courts constituted by Treaties that have been ratified by Peru in accordance with the Political Constitution.

Law 27.775, article 2: The judgments issued by the International Courts constituted according to Treaties to which Peru is a party, which contain an order to pay a sum of money as compensation for damages payable by the State or are merely declaratory, shall be executed in accordance with the following rules of procedure [...].

[21] Agreement between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights (Sept. 9, 1983), Article 27: The resolutions of the Court and, as the case may be, of its President, once communicated to the corresponding administrative or judicial authorities of the republic, shall have the same enforceable and executory force as those issued by the Costa Rican courts.

5. Access UN Procedures

And finally, there may be scope for utilizing UN processes. To give just two examples:

- CSOs, Council or victims can highlight the non-compliance of State parties through bodies like the UN Human Rights Council through its universal review and/or complaints procedure.

- Collective economic sanctions could be authorized by the Security Council (e.g., Rhodesia in 1966 and South Africa in 1977). Even in the face of a veto, the issue could still be raised before the General Assembly with the "veto initiative". So, there may still be some value in shining a spotlight on Russia's non-compliance. I understand that Professor Fikfak and Professor Paparinskis will address the issue of sanctions in greater detail in their remarks.

IV. Conclusions

So, to summarize, compliance with monetary awards in ECtHR judgments has been generally good. A range of soft measures have been used traditionally to encourage compliance. However, Russia poses a unique challenge that merits a bespoke approach. To this end, I have canvassed a range of possible options. Apart from this discussion -- which is a positive step forward -- the Council may also consider engaging a working group of experts to examine these issues.

I'll end my remarks here. I thank you for your kind attention.