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Peculiarities of the compensation for damage caused by military actions: New realities of international judicial practice

Особливості відшкодування шкоди внаслідок воєнних дій: нові реалії міжнародної судової практики

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Abstract

The military actions of the Russian Federation against Ukraine cause considerable losses to the Ukrainian people: the military and civilian population die, infrastructure and housing are destroyed, and cultural heritage is destroyed. The specified losses must have consequences namely - compensation for damages at the expense of the occupying country. So, it is vital to analyze the realities of international judicial practice regarding the specifics of compensation for damage by the aggressor state and to understand the prospects of obtaining such compensation for Ukrainians. The purpose of the work is to study the trends of international judicial practice regarding the specifics of compensation for damage resulting from military actions. The research methodology is hermeneutic, historical, extrapolation, comparative legal, generalization, analysis, synthesis, and deduction. Attention was drawn to the fact that a state that grossly violates international humanitarian law and human rights can act as a defendant in national courts. In addition, the analysis of the legislation on compensation for damages, including those caused as a result of Russia's military aggression,

Анотація

Воєнні дії російської федерації проти України завдають українському народу неабияких втрат: гине військове та цивільне населення, руйнується інфраструктура та житло, знищується культурна спадщина. Вказані втрати повинні мати наслідки у вигляді повного відшкодування шкоди за рахунок держави-окупанта. З огляду на це, проаналізувати реалії міжнародної судової практики щодо особливостей відшкодування шкоди державою-агресором та зрозуміти перспективи отримання такого відшкодування для українців. Метою роботи є дослідження тенденцій міжнародної судової практики щодо особливостей відшкодування шкоди внаслідок воєнних дій. Методологією дослідження є герменевтичний, історичний, екстраполяції, порівняльно-правовий, узагальнення, аналізу, синтезу, дедукції. Звернено увагу на те, що держава, яка грубо порушує міжнародне гуманітарне право та права людини, може виступати відповідачем у національних судах. Крім того, аналіз законодавства щодо відшкодування збитків, в тому числі нанесених в результаті військової агресії росії зумовлює

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determines the development and adoption of legal acts that will regulate the issue of social protection and the specifics of compensation for damages to the population affected by the armed conflict.

Keywords: compensation for damage, judicial practice, military actions, military conflict, international court.

Introduction

One of the methods that contributes to determining the damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation is the destruction and damage to the property of the population and enterprises. International law regulates the issue of bringing the offending state to justice. Such methods include sanctions, reparations, retorts, satisfaction and other methods of compensation. Therefore, to prevent violators from significantly ignoring the norms of international law, it is important to hold them accountable and provide effective mechanisms for compensation the detriments caused by military aggression.

Every person is enabled to protect his rights with all means, including court protection (Law No. 254k/96-BP, 1996). However, there is a problem of the real possibility of executing the decision and compensating for the damage caused as a result of military actions. According to the European Convention on Human Rights, as well as the Ukrainian Constitution, the state should guarantee property rights (Law No. 254k/96-BP, 1996, United Nations, 1950).

Today, there are considerable discussions both at the international level and at the national level regarding compensation for damage to the population and enterprises caused as a result of the military conflict. However, there is currently no unequivocal position on this issue. In particular, some experts believe that there is no practical need to bring the respondent state to justice in national courts, since there is no possibility of enforcing such a decision. On the other hand, other experts are convinced that it is worth going to court to protect the violated right, because, as practice shows, after the end of the Second World War, a whole series of models and mechanisms were created for prosecution and punishment of the Nazi: international tribunals, mixed tribunals, national courts of special jurisdiction, ordinary national courts.

опрацювання та прийняття нормативно-правових актів, що регулюватиме питання соціального захисту та особливості відшкодування збитків населенню, яке постраждало від збройного конфлікту.

Ключові слова: відшкодування шкоди, судова практика, воєнні дії, воєнний конфлікт, міжнародний суд.

In Ukraine, various options for compensation for damages inflicted by today's Russians are being considered. For example, the Office of the President announced the creation of a special Commission based on international cooperation, which will review applications for compensation and pay compensation from the created fund (Judicial and Legal Gazette, 2022).

But, in addition to the new mechanisms being created in Ukraine to compensate for damage, there are judicial mechanisms, including international courts (the UN International Court of Justice, the European Court of Human Rights). At the same time, there are mechanisms for reparation of damage by filing lawsuits in national courts, in which the defendant is the aggressor state.

Given the above, it is essential to study the international judicial practice, namely the cases that have taken place in the international judicial practice regarding compensation for damage caused by military actions, as well as the trends in such practice. This research will be proper for national law enforcement.

Theoretical Framework or Literature Review

The issue of compensation for damage caused by the war was studied by several scholars.

Anisimova (2020) in her work examines the specifics of compensation for damages as a result of Russian aggression in Eastern Ukraine. Among other things, the author drew attention to the reasons for the ineffectiveness of the application of the civil-law mechanism for compensation of damages and emphasized the need to adopt a special law that should regulate the issue of social protection of persons who lost housing and real estate as a result of the war.

Atamanova and Kobets (2022) surveyed the prospects for the execution of decisions on the recovery of damages from the Russian

Federation. According to lawyers, there is no single, universal way for everyone to receive compensation for the damage suffered by the business as a result of the Russian military action on the territory of Ukraine, and therefore it is worth considering various options and even their combination so that the amount of compensation is fair or at least close to it.

Features of the application of transitional justice in Ukraine were regarded by Bushchenko and Hnatovskyi (2017). Among other things, the authors concluded that the introduction of transitional justice in Ukraine should solve a two-fold task: to contribute to the settlement of the acute social conflict in the state and to apply effective tools to compensate all victims of crimes, as well as to contribute to the establishment of a new, independent, self-sufficient system of criminal justice bodies, able not only to effectively resolve social conflicts but also to satisfy citizens' need for justice, ensuring the application of the principles of the rule of law in practice.

The resolution of territorial disputes by the UN International Court of Justice became the subject of Kononenko's (2018) research. The author comments that territorial issues have always been one of the most acute and complex in international law since the territory is a necessary attribute of the state, the material basis of the life of the people who inhabit it, and analyzes in detail how the practice of the UN International Court of Justice affects the resolution of territorial disputes.

In his article, judge Parkhomenko (2022) surveyed the key aspects of compensation for damage caused by military actions. In particular, he concluded that a state that grossly violates international humanitarian law and human rights can act as a defendant in national courts. In addition, international experience shows that the recognition of the obligation to compensate for damages can often be found in agreements, but a universal mechanism for compensation for damages due to armed aggression is currently absent.

Plyskan (2022) examined the features of recovery of compensation and confirmation of company losses as a result of military operations. The lawyer emphasized that at the moment it is worth fixing the damage and collecting evidence, including from open sources, that the property damage occurred as a result of the military aggression of the Russian Federation and that it should be understood that victory in the war will

only mean the beginning of work on the restoration of business activity and destroyed property. Each case of damage can be individual and now it is important to record the damage, describe the damage, collect evidence and prepare for a long struggle.

Skrypnyk and Musienko (2022) assessed the features of compensation for damages as an important part of the policy of de-occupation of Crimea. The authors are convinced that to prevent substantial disregard of the norms of international law, it is necessary to bring violators to justice and ensure effective compensation mechanisms for illegal actions and occupation and that Russia as a state should pay a high price for the damage caused, and representatives of the Russian political and military leadership should bear responsibility for violations of international humanitarian law. Sydorovych (2022) drew attention to the peculiarities of the application of both legal norms and established customs in the researched area.

Kharytonov (2022) researched judicial practice in the field of compensation for damage caused as a result of military actions. The author drew attention to the new legal positions of the Supreme Court, which gave Ukrainians the right to compensation for the damage caused to them by Russia's military aggression in court.

As can be seen from the above study of the literature, the issue of compensation for damage caused by war actions in the current conditions is popular among scientists and lawyers. However, judicial practice on this issue has not been sufficiently researched, which requires deeper examination and research.

Methodology

The work utilizes such methods of scientific knowledge as hermeneutic, historical, extrapolation method, comparative legal method, generalization, analysis, synthesis, and deduction.

The hermeneutic method was employed to define and give definitions to the conceptual apparatus regarding compensation for damage during hostilities. In particular, this method made it possible to reveal the meaning of the concepts "damage", "military conflict", "law enforcement" and several others, based on the scientific works of scientists and practical recommendations of judges and lawyers.

Establishing the chronology of the development of legislation and judicial practice during the military conflict became possible due to the benefit of the historical method. This method, as a process of research and gathering evidence about events that happened in the past and to form ideas or theories about history in the future, covers the following methodological techniques for analyzing relevant data on a historical topic, which allows synthesizing information to make a coherent account of events that occurred in the studied episode. Therefore, the usefulness of this method made it possible to investigate the realities of the past international judicial practice on issues of compensation for damage caused by military actions and to understand new realities and predict possible changes.

Understanding the differences in the national legislation of different countries and the influence of international judicial practice on the implementation of the principle of the rule of law was obtained thanks to the help of the comparative legal method. In particular, the application of this method made it possible to identify similar positions and levers of settlement, and therefore this method, among other things, made it possible to identify problematic issues of foreign countries that Ukraine may likely face.

The method of extrapolation was utilized to predict new opportunities for international judicial practice in the researched field. It made possible to identify sustainable development trends formed in the past and present and made it possible to transfer them to the future. Including, the application of the extrapolation method made it possible to predict the results that can be reached in the future, if changes are made to the national legislation and to improve the international mechanism of judicial protection.

The usage of the method of generalization made it possible to single out common trends, international judicial practice, and features of compensation for such damage. Generalization, as a logical process of transition from individual to general or from less general to more general knowledge, made it possible to understand the multifaceted types and forms in which the essentially identical processes of evidence collection, appeal to court, and execution of court decisions are manifested and made it possible to divide them into components, on groups of a special class.

The analysis of judicial practice, both international and national, the analysis of

normative legal acts, etc., played a significant role in this study because a correctly performed analysis serves as a guarantee of a logical presentation of the research material.

With the help of the deduction method, the logic of international judicial practice in compensating damage caused by military actions became clear, and a version of the causal chain was developed that explains the consequences.

The service of the synthesis method made it possible to separately investigate individual phenomena of international judicial practice and consider them as a system, that is, a set of interconnected elements that generate each other and are interconnected and interdependent. Thus, the process of gathering evidence, presenting evidence to the court, and peculiarities of decision-making, were separately investigated.

Results and Discussion

General provisions on international mechanisms for compensation for damage caused by military actions

Before considering the judicial practice regarding compensation for damage caused by hostilities, it is worth paying attention to the general provisions on international instruments of bringing the aggressor state to justice.

One such tool is transitional justice, the concept of which emerged as a reaction to the collapse of authoritarian regimes and dictatorships in Latin America, Africa, and Central and Eastern Europe. The basis of this concept is that radical changes in society do not mean starting from scratch, because the past creates a certain imprint on the future.

Objectives of the concept of transitional justice:

1. Overcoming impunity, i.e. socio-historical understanding of human rights violations and punishment of the guilty;
2. Restoring the rule of law and ensuring its long-term sustainability;
3. Achieving reconciliation in a divided society (Civilm Plus, 2019).

The purpose of transitional justice is to prevent the recurrence of crimes in the future, that is, transitional justice performs a preventive role and, in its content, consists of the right to information, the right to restore justice, and the right to compensation for damages. In turn, the

right to compensation for damages serves as a guarantee of non-repetition.

Jurisprudence of international courts regarding compensation for damage resulting from military actions

It is possible to receive compensation for damage caused as a result of military actions in court. The European Court of Human Rights and the UN International Court of Justice are the judicial bodies to which you can apply for a decision on compensation.

We have to consider in more detail the international judicial practice regarding the issue of compensation for damage, which may be useful for national law enforcement.

Appeal to the ECtHR (1)/ Appeal to the UN International Court of Justice (2)

Grounds for appeal:

1. European Court of Human Rights, when considering cases related to the consequences of the war in the former Yugoslavia, noted that the fulfillment of the state's positive obligation to guarantee property rights should not lead to an excessive burden on its budget (Council of Europe, 2018).
2. A request for interim measures takes priority over all other cases. If the Court is not sitting at the time the request is made, it is immediately convened for its urgent consideration (United Nations, & International Court of Justice, 1945).

The decision of the Case:

1. Al-Adsani v United Kingdom (2001) (involved a claim by a dual British/Kuwaiti citizen against the United Kingdom who alleged that the British courts had breached Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms by granting immunity to Kuwait against whom he had brought a civil action for torture during his detention by the authorities of this country). In its decision, the ECtHR, while recognizing that the prohibition of torture has acquired the status of a jus cogens norm in international law, nevertheless indicated that it was unable to discern any solid grounds for the conclusion that a state "no longer enjoys immunity from civil suits in the courts of another state where torture is alleged". (McElhinney v. Ireland, 2001) –

concerned a claim for damages brought in Ireland against a British soldier. The domestic courts rejected the claim based on the immunity petition filed by the United Kingdom. The ECtHR ruled by 12 votes to 5 that the decisions of the Irish courts did not go beyond an unreasonable restriction of an individual's right of access to a court. Two of the 5 dissenting judges believed that the majority did not take into account the development of international law and disproportionately limited the right of access to a court, unduly affecting and violating the essence of this right. This was pointed out by judge Loukaides: "The immunities of international law arose at a time when individual rights practically did not exist and when it was needed by states for greater protection against possible persecution due to judicial abuse. The doctrine of state immunity nowadays is subject to more and more restrictions, there is a tendency to reduce its application given the development of human rights, which strengthen the position of the individual". Other judges (Caffish, Cabral Barreto and Vajic) in a joint separate opinion also pointed to the observance of the right of access to the courts. They noted that at present "there is no international obligation on the part of States to grant immunity to other States in matters of torts caused by agents of the latter". They reasoned that the principle of state immunity has long ceased to be a general rule that exempts states from the jurisdiction of courts.

2. The decision of the International Court of the United Nations in the case Germany v. Italy (2012) is quite significant in the issue of state immunity. Germany requested the Court to recognize that Italy had violated the jurisdictional immunity enjoyed by Germany under international law by allowing file civil claims against it in Italian courts for compensation for damages caused as a result of violations of international humanitarian law committed by the Third Reich during World War II. Although the decision was made in favor of Germany, it is worth noting the dissenting opinion of Judge Yusuf. It describes quite well the relationship between general justice and the protection of human rights and the problem of state immunity for serious violations of human rights. This will be relevant both for today's conditions and, as it is seen that it is worth taking into account when protecting the rights of Ukrainian citizens.

The obligation to compensate for damages is also mentioned in the statutes of international tribunals. For example, in the statute of the International Tribunal for the former Yugoslavia, only restitution is mentioned, in the Rules of Procedure, the question of restitution is raised more broadly. In addition, although the Statute does not mention the issue of compensation, a system of cooperation between the tribunal and national authorities is established, thanks to which the establishment of the fact of guilt by the tribunal will allow victims to apply to the court for compensation under national law (United Nations, 1993).

It is also worth paying attention to Israel's experience in the issue of individual responsibility of persons guilty of grave crimes against humanity. In 1962, the Supreme Court of Israel concluded in the Eichmann case that all the crimes attributed to the applicant were international. Therefore, according to the principle of universal jurisdiction, acting as a guardian of international law and an agent for its implementation, the State of Israel had the right to try the applicant (Attorney General v. Adolf Eichmann, 1961).

An equally well-known case that concerned the personal responsibility of a person is the decision of the House of Lords of Great Britain (Judgment - In Re Pinochet, 1998) regarding Augusto Pinochet. It ruled that he did not enjoy immunity from prosecution concerning the allegations of torture, holding that acts of torture could not be considered official acts of a head of state, as such an interpretation would run counter to the very definition of the crime, which requires it to be committed by a person acting in an official capacity, and would undermine the system of universal jurisdiction, excluding proceedings outside the borders of a state against an official unless that state is willing to waive immunity.

In Ukraine, an important approach to obtaining compensation was formed by the Supreme Court in the decision dated 04.14.2022 in case No. 308/9708/19. The Supreme Court noted that the court of Ukraine, considering a case where the defendant is the Russian Federation, recognizes the Russian Federation as responsible for the damage caused to a person as a result of military operations. Determining whether judicial immunity applies to the Russian Federation in the case under review, the Supreme Court took into account the following: the subject of the lawsuit is compensation for moral damage caused to natural persons, citizens of Ukraine, as a result of the death of another citizen of Ukraine; the place

of infliction of damage is the territory of the sovereign state - Ukraine; it is assumed that the damage was caused by the agents of the Russian Federation, who violated the principles and goals enshrined in the UN Charter regarding the prohibition of military aggression committed against another state – Ukraine; the commission of acts of armed aggression by a foreign state is not an exercise of its sovereign rights, but indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state – Ukraine, enshrined in the UN Charter; the national legislation of Ukraine is guided by the fact that, as a general rule, damage caused in Ukraine to a natural person as a result of the illegal actions of any other person (entity) can be compensated by a decision of a court of Ukraine (according to the principle of general tort).

That is, the Supreme Court proceeds from the fact that in case of application of the delict exception, any dispute arising on its territory by a citizen of Ukraine, even with a foreign country, in particular the Russian Federation, can be considered by Ukrainian court. The Supreme Court established the grounds for the conclusion that starting from 2014, there is no need to send requests to the Russian Embassy in Ukraine regarding the consent of the Russian Federation to be a defendant in cases of compensation for damages in connection with the Russian Federation's armed aggression against Ukraine and its disregard of sovereignty and territorial integrity of the Ukrainian state. And from February 24, 2022, such sending is impossible also given the termination of diplomatic relations between Ukraine and the Russian Federation.

So, the new realities of judicial practice indicate that there are three ways to obtain a decision on compensation for damage caused by military actions: an appeal to the ECtHR, an appeal to the UN International Court of Justice, and an appeal to a national court.

Problematic issues of implementation of decisions on compensation for damage caused by military actions

Issuance of a court decision on compensation for damage caused by military actions is an essential stage in obtaining compensation, but more important is the actual implementation of the decision, that is, compensation for damage caused by military actions.

In particular, enforcement of a national decision on recovery of damages from the Russian

Federation is possible in two ways: in Ukraine or a foreign jurisdiction.

National jurisdiction (1)/Foreign jurisdiction (2)

1. Currently, there are no mechanisms in Ukraine that would make it possible to execute a decision on debt recovery from the state at the expense of the property of its residents.
2. A Ukrainian court decision can be enforced on the territory of another state where the property of the Russian Federation is located. However, for this, it is necessary to establish the existence of grounds for the execution of the decision of a foreign court following the national legislation of the previously selected country (currently there is no international multilateral convention that has entered into force, and therefore the conditions for the execution of the decision are determined by the national legislation of each country and its bilateral and/or regional international agreements on legal aid.

But it is worth noting that at the stage of execution of the decision, the courts of foreign countries will check whether the Ukrainian court decision does not contradict their public order. A special role in this aspect is played by international legal customs regarding the immunity of a state that has caused damage by acts of aggression, genocide, and military actions, from lawsuits by private individuals of another state for its compensation.

In particular, exclusions from state immunity according to the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities do not apply to cases of military action (United Nations, 2004).

An example of this is the decision of the International Court of Justice of the United Nations in the case of Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening (2012), which recognized the need for the national courts of Italy to apply judicial immunity to Germany when considering cases based on claims by victims of World War II.

At the same time, international legal customs change with the development of interstate relations and reflect new demands of the times. It cannot be claimed that the position of even the UN International Court of Justice will never change.

Conclusions

As a result of the research of the new realities of international judicial practice regarding compensation for damage caused by military actions, the following conclusions were made.

1. A state that violates the norms of international humanitarian law and human rights can act as a defendant in national courts, taking into account the modern development of international law in the matter of jurisdictional immunity, which does not contain absolute requirements for its application. At the same time, its limitation depends on the specifics of the situation, and the aggression against Ukraine just proves in favor of a restrictive approach.
2. There are three ways to obtain a decision on compensation for damage caused by military actions: an appeal to the ECtHR, an appeal to the International Court of Justice of the United Nations, and an appeal to a national court. However, each of these mechanisms has its characteristics, and there is currently no universal mechanism for compensation for damage caused by armed aggression. But it is worth using previous experience to avoid mistakes and develop our approach that could contribute to the greatest protection of the rights of Ukrainian citizens.
3. Decisions of Ukrainian courts that do not meet the generally recognized principles of law in terms of limiting the jurisdictional immunity of another state will violate the principles of consideration of such cases, and, therefore, will result in the refusal to recognize such decisions.
4. To implement the decisions of both national and international courts in Ukraine, there should be a special act on the liability of Russia for the damage caused and the procedure for consideration of cases of the corresponding category, based on generally recognized principles of law.

As for the further scientific study, it is significant to research the specifics of the implementation of decisions of international courts by the aggressor state for individuals and legal entities.

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