

## Research Article

## EVIDENTIARY STANDARDS OF THE UN COMPENSATION COMMISSION: TAKEAWAYS FOR UKRAINE

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### ABSTRACT

**Background:** According to international law, a state responsible for internationally wrongful acts is obliged to fully compensate for the damage caused by such acts (Responsibility of States for Internationally Wrongful Acts, Art. 31). Accordingly, victims who suffered losses as a result of such actions are entitled to compensation. To implement these fundamental principles, the Committee of Ministers of the Council of Europe established the Register of Damages Caused by the Aggression of the Russian Federation against Ukraine. It is just the first of three elements of the future compensation mechanism for Ukraine (the other two, yet to be created, are the compensation commission and the compensation fund). However, to get compensation, every victim of the war will have to prove his or her case before the future commission. In this regard, the evidentiary standards will become critical. To understand how future compensation mechanism for Ukraine could operate, it is useful to study the practice of similar institutions. The UN Compensation Commission deserves special attention, as it could provide valuable insights into how war-related damage must be proven to warrant compensation.

**Methods:** The article's primary purpose is to explore the approach adopted by the UN Compensation Commission with respect to evidentiary standards. To this end, the article will first outline the general framework of the Commission's work, its purpose and organisational structure. It is then necessary to describe the categories of claims reviewed by the Commission, since - as will be shown later - the Commission applied a diversified approach: different categories of claims were subject to different evidentiary standards with varying degrees of exactingness. This differentiation was necessitated by the prioritisation of claims and the use of an expedited procedure for reviewing first-priority claims. This main part of the study will focus on the Commission's documents that illustrate its approach to evidentiary standards. First, the three evidentiary standards applied by the Commission will be outlined and

*explained: proving the incident alone with no need to establish the extent of the damage; proving damage on the basis of a "reasonable minimum" of evidence appropriate in the circumstances; and proving damage on the basis of documentary and other evidence sufficient to establish the extent of the damage. The article will then analyse how these three standards were applied in practice to the selected categories of personal injury claims. Finally, the conclusions will consider what takeaways can be drawn from the Commission's case law for the Ukrainian case.*

**Results and Conclusions:** *In times of armed conflict and occupation, gathering evidence of harm is notably challenging for victims due to various reasons. This fact calls for special consideration from international compensation mechanisms, which cannot adhere to the rigid formalities used in regular court proceedings. That is why the international law of evidence is adaptable and seeks to adjust to claimants' unique situations. This adaptability is exemplified by the relaxed and diversified standards of proof utilised by the UN Compensation Commission. Diversifying the standards of proof in the practice of the UN Compensation Commission consisted of applying three different approaches to different categories of claims. In addition, the burden placed on claimants was eased by presumptions developed in the Commission's case law. The pioneering approaches of the UN Compensation Commission should be applied and refined within an international compensation mechanism for Ukraine. This entails prioritising individual claims, introducing both regular and expedited tracks for processing claims, and ensuring flexibility with regard to the burden of proof and evidentiary standards to accommodate the challenges of wartime evidence collection without overwhelming victims.*

## 1 INTRODUCTION

The aggressive war waged by the Russian Federation against Ukraine has inflicted immense destruction. According to the World Bank, the estimated cost of reconstruction amounts to USD 486 billion as of December 2023.<sup>1</sup> Other estimations suggest that the overall damage could approach nearly one trillion.<sup>2</sup>

These calculations do not include the most significant loss of all: human casualties. According to the UN High Commissioner for Human Rights, as of February 2024, civilian casualties alone amounted to 30,755 people, including 10,675 killed and 20,080 injured.<sup>3</sup>

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1 World Bank, Ukraine, EU and UN, *Ukraine: Third Rapid Damage and Needs Assessment (RDNA 3) February 2022 – December 2023* (World Bank Publ 2024) 9.

2 Steven Arons, 'Ukraine Reconstruction May Cost \$1.1 Trillion, EIB Head Says' (*Bloomberg*, 21 June 2022) <<https://www.bloomberg.com/news/articles/2022-06-21/ukraine-reconstruction-may-cost-1-1-trillion-eib-head-says?leadSource=verify%252525252525252520wall>> accessed 21 March 2024.

3 HRMMU, 'Ukraine: Protection of Civilians in Armed Conflict, February 2024 update' (*United Nations: Ukraine*, 07 March 2024) <<https://ukraine.un.org/en/262581-protection-civilians-armed-conflict-%E2%80%94-february-2024>> accessed 21 March 2024.

These figures are accompanied by the acknowledgement that actual losses could be significantly higher because statistics only capture confirmed cases, whereas during wartime, verification is often unattainable.

A huge number of Ukrainians had to leave their homes. According to the Ministry of Social Policy, the number of officially registered internally displaced persons in the country currently reaches 4.9 million.<sup>4</sup> Additionally, about 6 million Ukrainians have been forced to flee the country.<sup>5</sup> All of this is a consequence of the aggressive war waged by the Russian Federation against Ukraine.

According to international law, a state responsible for internationally wrongful acts is obliged to compensate in full for the damage caused by such acts (Responsibility of States for Internationally Wrongful Acts, Art. 31).<sup>6</sup>

Thus, all damage caused by the Russian aggression must be compensated by the aggressor state. To this end, the Committee of Ministers of the Council of Europe adopted a Resolution (Resolution CM/Res(2023)3),<sup>7</sup> which introduced the first of three elements of the international compensation mechanism for Ukraine, namely the International Register of Damages Caused by the Aggression of the Russian Federation against Ukraine.

Forecasts of how the future compensation mechanism will work should be based on the study of previous precedents. The UN Compensation Commission is considered one of the most recent and successful compensation mechanisms, having delivered practical justice to millions affected by the Iraqi invasion and occupation of Kuwait.<sup>8</sup>

According to Francis E. McGovern, UNCC “should be a model for the design of future claims resolution facilities because of its tailoring of decision-making techniques to different types of claims. By adopting the processes to the claims, rather than vice versa, the UNCC has become a model of rough justice that will have long-lasting precedential impact.”<sup>9</sup>

The study of the Commission's practice could prove helpful in outlining the principles of the future mechanism for Ukraine, which is currently being shaped. In its Expert

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4 'Internally Displaced Persons' (*Ministry of Social Policy of Ukraine*, 2023) <<https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html>> accessed 21 March 2024.

5 'Ukrainian Refugee Situation' (*Operational Data Portal*, 14 March 2024) <<https://data.unhcr.org/en/situations/ukraine>> accessed 21 March 2024.

6 Responsibility of States for Internationally Wrongful Acts (adopted 12 December 2001 UNGA A/RES/56/83) <<https://undocs.org/A/RES/56/83>> accessed 21 March 2024.

7 Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (adopted 12 May 2023) <<https://rm.coe.int/native/1680ab2595>> accessed 21 March 2024.

8 David D Caron and Brian Morris, 'The UN Compensation Commission: Practical Justice, Not Retribution' (2002) 13(1) *European Journal of International Law* 183, doi:10.1093/ejil/13.1.183.

9 Francis McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 189, doi:10.2139/ssrn.1495855.

Report of November 2023,<sup>10</sup> the Council of Europe emphasised the need to consult the Commission's practice.

The primary purpose of the article is to explore the approach adopted by the UN Compensation Commission with respect to evidentiary standards. To this end, the article will first outline the general framework of the Commission's work, its purpose and organisational structure. It will then be necessary to describe the categories of claims reviewed by the Commission, since - as will be shown later - the Commission applied a diversified approach: different categories of claims were subject to different evidentiary standards with varying degrees of exactingness. This was necessitated by the prioritisation of claims and the use of an expedited procedure for reviewing first-priority claims.

This main part of the study will focus on the Commission's documents that illustrate its approach to evidentiary standards. First, the three evidentiary standards applied by the Commission will be outlined and explained: proving the incident alone with no need to establish the extent of the damage; proving damage on the basis of a "reasonable minimum" of evidence appropriate in the circumstances; and proving damage on the basis of documentary and other evidence sufficient to establish the extent of the damage. Following this, an analysis will be conducted to ascertain how these three standards were applied in practice to selected categories of personal injury claims. Finally, the conclusions will reflect what takeaways can be drawn from the Commission's case law for the Ukrainian situation.

## 2 ABOUT THE COMMISSION IN GENERAL

The United Nations Compensation Commission (hereinafter referred to as the Commission) was established in 1991 pursuant to UN Security Council Resolution 692<sup>11</sup> to consider claims and pay compensation for damage and losses caused by Iraq's illegal invasion of Kuwait and subsequent occupation of Kuwait in 1990-1991.<sup>12</sup>

The legal basis of the compensation mechanism was the provision of paragraph 16 of UN Security Council Resolution 687, according to which:

*'Iraq... is liable under international law for any direct loss, damage - including environmental damage and the depletion of natural resources - or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait'.<sup>13</sup>*

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10 Council of Europe, 'Expert Report on Remedies and Redress Mechanisms for War-Affected Individuals in Ukraine' (Council of Europe, November 2023) <<https://rm.coe.int/council-of-europe-expert-report-on-national-remedies-in-ukraine-2775-2/1680adebf5>> accessed 21 March 2024.

11 Resolution 692 (1991) UN Security Council of 20 May 1991 <[https://undocs.org/S/RES/692\(1991\)](https://undocs.org/S/RES/692(1991))> accessed 21 March 2024.

12 For the general overview of the Commission's establishment see: Carlos Alzamora, 'The UN Compensation Commission: An Overview' in R Lillich (ed), *The United Nations Compensation Commission* (Brill Nijhoff 1995) 3.

13 Resolution 687 (1991) UN Security Council of 3 April 1991 <[https://undocs.org/S/RES/687\(1991\)](https://undocs.org/S/RES/687(1991))> accessed 21 March 2024.

The Commission differed from a court or tribunal in that it did not need to establish Iraq's responsibility; the internationally wrongful character of the invasion was already established by the UN Security Council and openly acknowledged by the Iraqi government. As a result, the Commission's rules do not provide for detailed adversarial procedures.<sup>14</sup> Its operations were more of an administrative rather than a judicial nature, focused on establishing the facts and determining the amount of compensation.<sup>15</sup>

Organisationally, the Commission consisted of the following bodies:

- Secretariat: responsible for receiving claims and examining them for compliance with formal requirements;
- Panels of Commissioners: tasked with reviewing claims on the merits and recommending the sum to be paid;
- The Governing Council is responsible for making the final decision on the payments.

Injured individuals and legal entities did not directly submit claims to the Commission but through their governments, which collected and consolidated the claims before submission.

In total, the Commission received about 2.7 million claims totalling USD 325.5 billion. Of those, around 1.5 million were granted, totalling USD 52.2 billion.<sup>16</sup> The Commission worked for 31 years and completed its work, having made payments in full by the end of 2022. The President of the Commission's Governing Council presented the Final Report to the UN Security Council on 22 February 2022, two days before Russia's full-scale invasion of Ukraine.

### 3 CATEGORIES OF CLAIMS

The Governing Council has defined six categories of claims:

Category A: Claims for a fixed amount of money on account of the forced abandonment of Kuwait or Iraq. These claims were filed by people who were forced to leave Kuwait or Iraq between 2 August 1990 (the day of the Iraqi invasion of Kuwait) and March 2, 1991 (the day of the ceasefire). The compensation for this category was fixed at USD 2,500 per person and USD 5,000 per family. However, if the applicant did not claim compensation under any other category, the amount was USD 4,000 and USD 8,000, respectively.

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14 The inquisitorial nature of the procedure utilized by the Commission provoked much debate in academic literature. See: John R Crook, 'The UNCC and Its Critics: Is Iraq Entitled to Judicial Due Process?' in R Lillich (ed), *The United Nations Compensation Commission* (Brill Nijhoff 1995) 77; Jeremy P Carver, 'Dispute Resolution or Administrative Tribunal: A Question of Due Process' in R Lillich (ed), *The United Nations Compensation Commission* (Brill Nijhoff 1995) 69.

15 See: 'Claims Processing' (*UNCC United Nations Compensation Commission*, 2005) <<https://web.archive.org/web/20231004074610/https://uncc.ch/claims-processing>> accessed 21 March 2024.

16 'UNCC at a Glance' (*UNCC United Nations Compensation Commission*, 2023) <<https://web.archive.org/web/20230610151433/https://uncc.ch/uncc-glance>> accessed 21 March 2024.

Category B: Claims for compensation for serious personal injury and/or death of a family member (parents, children, or spouse). Serious personal injury" has been defined in Decision 3 to mean (a) dismemberment; (b) permanent or temporary significant disfigurement, such as a substantial change to one's outward appearance; (c) permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; (d) any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.<sup>17</sup>

The compensation for such claims was USD 2,500 per person and USD 10,000 per family. However, if a person believed that this amount was not sufficient to remedy the damage, he or she could also file a Category C claim.

Category C: Individual claims for compensation of up to USD 100,000 for various types of damage. Claims in this category included twenty-one types of damages, including damage related to leaving Kuwait or Iraq, serious personal injury, mental pain and anguish, loss of property, loss of bank accounts, shares and other securities, loss of income, loss of real estate, and individual business losses.

This category included eight subcategories:

- C1: Damages arising from departure from Iraq or Kuwait, inability to leave Iraq or Kuwait, a decision not to return to Iraq or Kuwait, hostage taking or other illegal detention;
- C2: Damages arising from personal injury;
- C3: Damages arising from the death of [the claimant's] spouse, child or parent;
- C4: Personal property losses;
- C5: Loss of bank accounts, stocks and other securities;
- C6: Loss of income, unpaid salaries or support;
- C7: Real property losses;
- C8: Individual business losses.

In addition, for the sub-categories C1, C2, C3 and C6, applicants could also claim compensation for mental pain and anguish (MPA) in accordance with the standards and limits set out in Decisions 3 and 8 of the Governing Council.<sup>18</sup>

Category D: Individual claims for compensation of more than USD 100,000 for various types of damage. The types of damage were the same as in Category C.

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17 Decision 3 (1991) (S/AC.26/1991/3) of the Governing Council UNCC of 18 October 1991 'Personal Injury and Mental Pain and Anguish' <<https://digitallibrary.un.org/record/241706?ln=en>> accessed 21 March 2024.

18 *ibid*; Decision 8 (1992) (S/AC.26/1992/8) of the Governing Council UNCC of 24 January 1992 'Determination of Ceilings for Compensation for Mental Pain and Anguish' <<https://digitallibrary.un.org/record/241656>> accessed 21 March 2024.

Category E: Claims of corporations, other private legal entities and public sector enterprises. Such claims related to losses under construction or other contracts, losses from non-payment for goods or services, losses related to the destruction or seizure of business assets, lost profits, losses in the oil sector, etc.

Category F: Claims filed by governments and international organisations, including for damage to the environment. Such claims covered the costs incurred by states in evacuating their citizens, providing them with aid, damages in connection with the destruction of diplomatic buildings, loss or damage to other state property, as well as environmental damage and depletion of natural resources in the Gulf region, including as a result of oil well fires and oil dumps into the sea.

## 4 PRIORITISATION AND EXPEDITED PROCEDURE

An important innovation of the Commission was prioritising individual claims of affected natural persons over claims of governments and corporations, which had previously been the case. This humanistic and victim-centred approach represented a significant step in the evolution of international compensation mechanisms.

The Governing Council decided to consider under the expedited procedure and treat as urgent individual claims of victims in categories A (forced abandonment of Kuwait or Iraq), B (serious personal injury and/or death of a family member) and C (various types of damage up to \$100,000).<sup>19</sup>

Art. 37 of the Provisional Rules For Claims Procedure provides specific features of the expedited procedure.<sup>20</sup> These, in particular, include the use of special methods of analysing claims, including computerised comparison of claim details with verification data, sampling, statistical modelling, and the absence of oral hearings.

Under Art. 37(d) of the Provisional Rules, each panel of commissioners was required to complete its review of the claims submitted to it and publish a report promptly, ensuring completion within 120 days from the submission date of the claims to the panel.

In decision S/AC.26/1991/1, the Governing Council stated:

*“For a great many persons these procedures would provide prompt compensation in full; for others they will provide substantial interim relief while their larger or more complex claims are being processed, including those suffering business losses.”*<sup>21</sup>

19 Decision 1 (1991) (S/AC.26/1991/1) of the Governing Council UNCC of 2 August 1991 ‘Criteria for Expedited Processing of Urgent Claims’ <<https://digitallibrary.un.org/record/125786?ln=en>> accessed 21 March 2024.

20 Decision 10 (1992) (S/AC.26/1992/10) of the Governing Council UNCC of 26 June 1992 ‘Provisional Rules for Claims Procedure’ <<https://digitallibrary.un.org/record/241657?ln=en>> accessed 21 March 2024.

21 Decision 1 (1991) (S/AC.26/1991/1) (n 19) para 1.

Thus, a person who suffered significant economic losses of more than USD 100,000 could file a Category C claim and receive at least partial compensation through the expedited procedure, and at the same time, based on the same facts, file a Category D claim (claims over USD 100,000) under the regular procedure, prove that his or her losses were actually greater and eventually receive full compensation.

The expedited processing of the three categories of claims was also made possible due to the lowered standards of proof established for these categories by the decision of the Governing Council S/AC.26/1991/1 (discussed below).

## 5 BURDEN OF PROOF

According to the general principles of tort law, the injured person has to prove:

- (a) the fault of the person against whom the claim for compensation is made (i.e., that the defendant has acted in a wrongful manner);
- (b) the presence of legally relevant damage (i.e., the presence of negative consequences that are recognised as compensable by law); and
- (c) a causal link<sup>22</sup> between the first and the second (i.e., that the victim's damage was caused by the wrongful behaviour of the person against whom the compensation claim is made).

However, as noted above, there was no need for the Commission to establish Iraq's fault - the fault had already been established by the UN Security Council and acknowledged by the Iraqi government itself. Thus, the Commission's task was to verify (a) the fact that the applicant had indeed suffered an injury falling within one of the six categories defined and (b) that this damage was indeed a consequence of Iraq's invasion of Kuwait and subsequent occupation of Kuwait.

To this should also be added the task of determining the amount of compensation, which, from a theoretical point of view, can either be considered part of the first question (presence of damage) or can be separated into a distinct inquiry.

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22 For the analysis of causation inquiry in the practice of the UNCC see: Norbert Wühler, 'Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission' in R Lillich (ed), *The United Nations Compensation Commission* (Brill Nijhoff 1995) 207; Merritt B Fox, 'Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UN Compensation Commission' (2002) 13(1) *European Journal of International Law* 201, doi:10.1093/ejil/13.1.201; Arthur W Rovine and Grant Hanessian, 'Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission' in R Lillich (ed), *The United Nations Compensation Commission* (Brill Nijhoff 1995) 235; and Bohdan Karnaukh, 'What Damage is a "Direct" Consequence of War: the Practice of The UN Compensation Commission' (2024) 1 *Foreign Trade: Economics, Finance, Law* 23, doi:10.31617/3.2024(132)02.



## 6 EVIDENTIARY STANDARDS

As a general rule, the burden of proof of a certain fact rests with the person who relies on that fact to support his or her legal standing (claim, action, complaint or objection). According to this rule, a claimant applying to the Commission must prove with relevant evidence that he or she has suffered legally cognisable damage, justify its amount, and demonstrate that it was the result of Iraq's internationally wrongful acts.

Standards of proof are of key importance in the context of probative activities. The standard of proof indicates the level of exaction with respect to the evidence submitted to prove a particular fact. It is a sort of "bar" that the party has to meet for its legal stance to be recognised as well-founded. Depending on the procedural rules, this bar may be higher or lower, and, accordingly, the exaction will be greater or lesser.

For example, the standards of proof for criminal and civil cases are different.<sup>23</sup> In a criminal case, a person's guilt must be proven beyond reasonable doubt, while in a civil case, the facts are established based on the "preponderance of the evidence" standard. The former standard is much more demanding, meaning the judge must be 90 or more per cent convinced of the person's guilt. The civil standard is less demanding - it is enough to convince the judge that the fact is more likely to have occurred than not (effectively, it means that the judge only needs to be (50+1) per cent convinced that the alleged fact is true).<sup>24</sup>

However, the consideration of claims by the Commission and similar institutions in the past has a number of distinct features that require a specially tailored, flexible and diversified approach to setting the "evidentiary bar" that claimants have to overcome. In particular, the claimants' ability to collect evidence was affected by the exceptional circumstances of the harm. In times of military aggression and occupation, gathering evidence is far from being a top priority for individuals. People are forced to flee the war in a hurry, leaving their belongings behind, and in this mess, needed documents could be lost, stolen or ruined. War disrupted the operation of various government agencies and institutions, making it difficult to keep track of various civil status acts and other events that normally would have been officially documented.

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23 See: Bohdan Karnaikh, 'Standards of Proof: A Comparative Overview from the Ukrainian Perspective' (2021) 5(2) Access to Justice in Eastern Europe 25, doi:10.33327/AJEE-18-4.2-a000058; Valentina I Borysova and Bohdan P Karnaikh, 'Standard of Proof in Common Law: Mathematical Explication and Probative Value of Statistical Data' (2021) 28(2) Journal of the National Academy of Legal Sciences of Ukraine 171, doi:10.37635/jnalsu.28(2).2021.171-180.

24 These figures have mathematical explanation behind them. According to Bayesian decision theory, the standard of proof depends on the ratio of the false positive error disutility to false negative error disutility. Since both types of error have the same disutility in a civil litigation, the threshold value of conviction is 50+ percent. Yet in a criminal case the disutility of false positive error considerably exceeds the disutility of the false negative one, and therefore the threshold value of conviction shall be much higher, amounting to 90 percent. For elaborate mathematical explication see: Borysova and Karnaikh (n 23) 179.

In recommendations S/AC.26/1994/1, the Commission stated:

*“The scarcity of evidentiary support characterizing many claims may be attributable mainly to the circumstances prevailing in Kuwait and Iraq during the invasion and occupation period. Under the general emergency conditions prevailing in the two countries, thousands of individuals were forced to flee or hide, or were held captive, without retaining documents that later could be used to substantiate their losses. In addition, many claimants chose not to or could not return to Iraq or Kuwait, and therefore had difficulty producing primary evidence of their losses, damages or injuries.”<sup>25</sup>*

These circumstances, coupled with the large number of claims that the Commission had to process, made it inefficient and infeasible to apply the regular standards of proof used in civil or criminal proceedings. Therefore, it was a natural step to establish special, lowered requirements for evidence to prove the damage caused. In doing so, the Commission noted that this practice is common for similar international compensation mechanisms:

*“The scarcity of evidentiary support where massive numbers of claims are involved is not a phenomenon without precedent in international claims programs, in particular if the events generating responsibility have taken place in abnormal circumstances such as those prevailing in Kuwait and Iraq during the conflict. An analysis of the practice of international tribunals regarding issues of evidence shows that tribunals often had to decide claims on the basis of meagre or incomplete evidence. It has been observed that the lowering of the levels of the evidence required occurs especially “in the case of claims commissions, which have to deal with complex questions of fact relating to the claims of hundreds or even thousands of individuals.”<sup>26</sup>*

Secondly, in addition to the context of the armed conflict, the Commission also considered the realities of national practice in the respective country of the victims' origin when determining the level of exactingness in respect of evidence. For example, the Commission took into account that Kuwait's economy is mainly cash-based, which impacts the specifics of proving the transactions and settlements made under them.<sup>27</sup>

Thirdly, the Commission applied a diversified approach - different standards of proof were applied to different categories of claims. The exactingness depended directly on the amount of compensation claimed by the applicant: the lower the amount, the lower the requirements for proving damage, and vice versa. Moreover, in some cases (when the amount of

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25 Recommendations (S/AC.26/1994/1) of the Panel of Commissioners UNCC of 26 May 1994 ‘Concerning Individual Claims for Serious Personal Injury or Death (Category “B” Claims)’ <<https://digitallibrary.un.org/record/202480?ln=en>> accessed 21 March 2024.

26 Report and Recommendations (S/AC.26/1994/3) of the Panel of Commissioners UNCC of 21 December 1994 ‘Concerning the First Installment of Individual Claims for Damages up to Us\$100,000 (Category “C” Claims)’ 29 <<https://digitallibrary.un.org/record/202830?ln=en>> accessed 21 March 2024.

27 ibid 28.

compensation was fixed), even the burden of proof changed. Thus, in Category A (forced displacement) claims, for example, there was no need to prove the amount of damage at all: the applicant had only to demonstrate that he or she had left the country during a specified period of time (from the date of the invasion until the date of the ceasefire). The claimant did not have to provide any explanation or evidence regarding the costs or damages that such forced displacement entailed.<sup>28</sup>

The same applied to claims for serious personal injuries and death of family members, where applicants claimed a fixed amount:

*“in the case of serious personal injury not resulting in death, \$2,500 will be provided where there is simple documentation of the fact and date of the injury; and in the case of death, \$2,500 will be provided where there is simple documentation of the death and family relationship. Documentation of the actual amount of loss resulting from the death or injury will not be required. If the actual loss in question was greater than \$2,500, these payments will be treated as interim relief, and claims for additional amounts may also be submitted under paragraph 14 and in other appropriate categories.”*<sup>29</sup>

The last, third category of claims reviewed under the expedited procedure did require proof of the amount of damages suffered. For this category, the Governing Council established a special evidentiary standard of “a reasonable minimum [of evidence] appropriate under the circumstance”. At the same time, it is stipulated that claims for smaller amounts (up to \$20,000) require less documentary evidence. In accordance with paragraph 15(a) of decision S/AC.26/1991/1:

*“Such claims must be documented by appropriate evidence of the circumstances and the amount of the claimed loss. The evidence required will be the reasonable minimum that is appropriate under the circumstances involved, and a lesser degree of documentary evidence would ordinarily be required for smaller claims, such as those below \$20,000.”*<sup>30</sup>

Finally, the most demanding standard applied by the Commission was set to categories D, E and F of claims. Such claims had to be supported by “documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss” (Art. 35(3) of the Provisional Rules for Claims Procedure). However, the Commission, in its Report S/AC.26/1998/1 emphasised that even this most demanding standard is not commensurate with the high criminal law standard “beyond a reasonable doubt.” Instead, it

28 Decision 1 (1991) (S/AC.26/1991/1) (n 19) para 11.

29 *ibid*, para 12.

30 *ibid*, para 15(a).

aligned more closely with the civil law standard of “preponderance of the evidence,” albeit adjusted for the exceptional circumstances of war.<sup>31</sup>

All evidentiary standards applied by the Commission, along with the general rule on the burden of proof, were summarised in Art. 35 of the Provisional Rules for Claims Procedure.

Thus, the diversified approach to evidentiary standards in the Commission’s practice involved the application of three different standards of proof:

- for fixed-amount claims processed under the expedited procedure, claimants had to prove only the fact of injury without having to prove the exact amount of damage caused by the harmful incident
- for claims processed under the expedited procedure seeking compensation of up to \$100,000 (category), the claimant had to prove the fact of injury and its amount based on a reasonable minimum [of evidence] appropriate under the particular circumstances of the case
- for individual applications processed under the regular procedure and involving compensation in excess of \$100,000, the claimant had to prove the fact of injury and its amount, relying on documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the loss claimed.

Finally, another aspect that eased the burden placed on claimants was the use of presumptions, i.e. assertions accepted by the Commission as a given without the need for proof by the claimant. Presumptions may relate to specific facts and may be drawn as an inference from other established facts.

For example, the Commission considered it reasonable to presume that the majority of deaths and injuries that occurred in Iraq or Kuwait between 2 August 1990 and 2 March 1991 were causally related to the invasion and occupation.<sup>32</sup>

The Commission also presumed the existence of non-pecuniary damage (mental pain and anguish) in cases where it was established that a person (1) was taken hostage or unlawfully detained for more than three days; or (2) was taken hostage or unlawfully detained for three days or less under circumstances that indicated an imminent threat to his or her life; or (3) was forced to hide for more than three days due to a manifestly reasonable fear for his or her life or because he or she was taken hostage or unlawfully detained.<sup>33</sup> If a vehicle was left in Iraq or Kuwait before or during the invasion and occupation and then lost without trace, the Commission also presumed that the loss was attributable to hostilities.<sup>34</sup>

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31 Report and Recommendations (S/AC.26/1998/1) of the Panel of Commissioners UNCC of 3 February 1998 ‘Concerning Part One of the First Instalment of Individual Claims for Damages Above US\$100,000 (Category “D” Claims)’, para 72 <<https://digitallibrary.un.org/record/251206?ln=en>> accessed 21 March 2024.

32 Report and Recommendations (S/AC.26/1994/3) (n 26) 110, 124.

33 *ibid* 87.

34 Report and Recommendations (S/AC.26/1998/1) (n 31) para 266.

## 7 HOW IT WORKED: SELECTED EXAMPLES OF THE EVIDENTIARY STANDARDS APPLIED

### 7.1. Category B

In Recommendation S/AC.26/1994/1,<sup>35</sup> the Panel noted that the circumstances prevailing in Kuwait and some neighbouring countries between 2 August 1990 and 2 March 1991 made it extremely difficult for claimants to obtain contemporaneous medical records (i.e., medical records that were made immediately or shortly after the injury). Given this, the Panel decided to accept medical documentation drawn up later on as sufficient evidence to confirm the fact of injury or trauma.

Moreover, the Panel noted that some claimants were deprived of the opportunity to obtain the necessary medical documents, particularly given that the number of medical facilities and medical personnel in the country had been critically reduced during the occupation.<sup>36</sup>

Some were unable to obtain any documents because they were injured in the desert while fleeing Iraq or Kuwait; others found it difficult to see a doctor for personal or cultural reasons, as in the case of sexual violence or torture.

In such cases, the Board accepted other written evidence, witness testimony and, in some cases, the applicant's personal statements as sufficient evidence of the injury instead of medical documentation.<sup>37</sup>

In particular, the Panel considered a number of cases in which claimants alleged that they had been detained by the Iraqi military and tortured in detention. The majority of such applicants submitted as evidence personal explanations stating that they had been detained and tortured, as well as an official document from the Kuwaiti authorities or the International Committee of the Red Cross confirming that the person had been detained. The vast majority had no medical documents certifying the consequences of torture.

The Commission's medical expert confirmed that victims of torture are often reluctant to seek medical help because they want to erase the memory of torture or may be ashamed to admit that their mental health has suffered as a result of their ordeal. In addition, some forms of torture do not leave visible physical scars. Taking into account the above, and the

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35 Recommendations (S/AC.26/1994/1) (n 25) 35.

36 Three main factors affected the availability of medical and related services during the invasion and occupation. First, there was a massive outflow of medical personnel from the country. Secondly, the closure, destruction and looting of medical facilities: by the end of the occupation, all 87 medical facilities were either closed or operating at far less than normal capacity. Thirdly, it is the restriction of access to medical facilities, in particular, because the occupation authorities have conditioned the ability to receive medical care on the exchange of a Kuwaiti passport for an Iraqi one, established curfews and priority treatment for the Iraqi military.

37 Recommendations (S/AC.26/1994/1) (n 25) 36.

fact that the torture of Kuwaiti nationals in Iraqi captivity has been recognised as widespread in reports by international organisations,<sup>38</sup> the Panel concluded that:

*“compensation should be awarded to those claimants who showed that they were tortured by Iraqi forces while in detention, even if they were not able to submit medical documentation, provided that the fact of detention has been attested to by an official authority.”*<sup>39</sup>

A similar approach was followed with regard to claims of sexual violence. In addition to the fact that victims of sexual violence often avoid seeing physicians, a physician can potentially document traces of such violence only if the victim seeks treatment immediately after the attack. In the context of war and occupation, it is virtually impossible. As well as the practice of torture of detainees, sexual violence by the Iraqi military has been documented in reports by international organisations. Given this, the Panel recommended that claims of sexual violence be upheld, even when such claims were based solely on circumstantial evidence.

In Category B claims regarding the death of a family member, three circumstances were subject to verification, namely the fact of death, the family relationship between the claimant and the deceased, and the causal link between the death and the invasion.

A death or burial certificate or similar document issued by an official institution (including a national authority, foreign embassy, or international organisation), such as a letter informing the family of the deceased about the death, were recognised as conclusive evidence of the fact of death.

However, in a number of cases, death certificates could not be issued immediately upon death, in particular because the cause of death had to be determined by an expert, of which there were few due to the situation in the country, or because families received death certificates from the Iraqi authorities and then had to exchange them for Kuwaiti certificates. As a result, the death certificate could be issued several months after the death. The Commission accepted such certificates as proper and sufficient evidence.<sup>40</sup>

With regard to the causal link between the death and the invasion, a death certificate or any other official document (e.g., a police report) was considered sufficient evidence of causation if it stated the cause of death. If the death certificate did not indicate the cause of death, other documents explaining the connection between the invasion and the death were accepted as evidence.

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38 Walter Kälin, ‘Report of the Situation of Human Rights in Kuwait under Iraqi Occupation: prepared by Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67 (E/CN.4/1992/26)’ <<https://digitallibrary.un.org/record/225886?ln=en>> accessed 21 March 2024.

39 Recommendations (S/AC.26/1994/1) (n 25) 37.

40 ibid 39-40.

In some cases, the Panel recognised the applicant's statements of the connection between his or her injuries and the invasion as sufficient evidence, provided that the Commission's medical expert confirmed that the nature of the injury was consistent with the cause alleged by the claimant.<sup>41</sup>

## 7.2. Category C

As noted above, for this category of applications, the standard of proof was defined as a "reasonable minimum" of evidence appropriate under the particular circumstances of the case. In determining what constitutes such a "reasonable minimum", the Panel compared the specific evidence submitted by the complainants with the background data at the disposal of the Panel regarding the availability, relevance and reliability of any such evidence in the context of the conditions prevailing as a result of the invasion and occupation.

The Panel also noted that the completed claim form itself can be of significant probative value, provided it is properly completed and consistent with the background data and patterns identified in similar claims. It is also important that the claim form contains an assurance signed by the claimant that the information in the claim is true.<sup>42</sup> This is especially relevant for persons who were held in Iraqi captivity:

*"A special standard, furthermore, should apply to those "C2" claimants who have established that they have been taken hostage or otherwise detained or have been in hiding. Covered by the "C1" loss page, such events are likely to have had a deleterious effect on the health of these individuals, at the same time hampering their ability to provide evidence of their injuries. Consequently, their completion of the "C2" loss page may be viewed as sufficient proof of the fact of their injury."<sup>43</sup>*

While assessing the probative value of the completed claim forms, the Panel also considered the socio-economic characteristics of the claimants, such as education and income, as they helped to better understand the individuals' ability to present certain evidence and substantiate their position.

In addition, since the claims were not submitted directly to the Commission, but through governments, the evidentiary weight of the information provided in the claims had to be assessed by analysing the national programs for processing these claims, and in particular whether the officials of the relevant state assisted the applicants in filling out the documents and whether they conducted any verification or checking of the information.

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41 *ibid* 41.

42 Report and Recommendations (S/AC.26/1994/3) (n 26) 24.

43 *ibid* 110.

In particular, the following factors had to be taken into account:

- “(i) Whether claimants were required to complete their claim form at an officially designated location (e.g., national claims programme central or local office) or under the supervision of, or with assistance from, a national claims programme official;*
- (ii) Whether the evidentiary items provided by claimants were reviewed by programme officials;*
- (iii) The policies, procedures and standards employed by programme officials in screening, modifying or validating claims (e.g., whether programme officials requested additional information or evidence from claimants in support of claims, and what types of claims were held back due to deficiencies, and what types of deficiencies resulted in claims being held back);*
- (iv) The policies and procedures implemented by the national claims programme in connection with verifying the claims (e.g., the use of investigators or loss adjusters).<sup>44</sup>*

The vast majority of claims in this category were supported by the applicant's personal statements as the main evidence. These statements recounted the applicant's experiences during the invasion and described the circumstances and extent of the damage he or she had suffered. The Panel decided that the evidentiary weight of such statements should vary depending on the specific damage claimed.<sup>45</sup>

In certain situations, such as when someone claims compensation for mental suffering caused by being forced to hide, their own written statement might be the best evidence available to explain where, why, and how they were hiding. The details provided in these statements can assist judges in comprehending the significance and authenticity of the claims, especially when corroborated by other relevant information.

However, if someone is claiming compensation for damage to their property, their personal statement alone might not suffice to prove ownership of the property or quantify the extent of their losses.

Many claimants submitted witness testimonies as evidence. Such testimony could either be an independent document or take the form of confirmation by one or more witnesses of the facts set forth in the claim. Notably, the witnesses were most often relatives and friends of the claimant. In its Report S/AC.26/1994/3, the Panel noted that the evidentiary weight of such testimony should be determined in the light of:

- (i) the relationship of the witness to the person incurring the loss, bearing in mind that under hostile conditions and circumstances involving urgency, the only available witness may be a person related to the victim; and (ii) general evidentiary principles relating to the quality and relevance of a witness statement, such as whether the*

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44 *ibid* 28.

45 *ibid* 25-6.



statement indicates the bases for the witness' testimony (e.g., time, place, first-hand knowledge of the events).<sup>46</sup>

Of course, written evidence such as receipts, invoices, contracts, official government documents, civil status documents, bank and real estate documents, letters from relevant professionals (including physicians, insurance experts and former employers), photographs, and newspaper articles were recognised as having a high probative value.

As with the previous category of claims, the Panel also relied on general background information, including reports and statistical data prepared by national authorities, international organisations and other independent institutions, on the nature and causes of the losses occasioned by Iraq's invasion and occupation of Kuwait.

### 7.3. Category D

For this category of claims, a higher standard of proof (compared to categories A, B and C) was required, as well as consideration of each claim individually. Describing the standard, the Panel noted:

*“The Panel is aware that international tribunals, however composed, and entrusted with the task of adjudicating a dispute between two States belonging to whatever legal system or systems, have recognised the principle that the law of evidence in international procedure is a flexible system shorn of any technical rules. The Panel is also conscious of the fact that the lack of standard international law rules of evidence and the fact that international tribunals are liberal in their approach to the admission and assessment of evidence does not waive the burden resting on claimants to demonstrate the circumstances and amount of the claimed loss. On the other hand, considering the difficult circumstances of the invasion and occupation of Kuwait by Iraq, as outlined in the Background Reports referred to above, many claimants cannot, and cannot be expected to, document all aspects of a claim. In many cases, relevant documents do not exist, have been destroyed, or were left behind by claimants who fled Kuwait or Iraq. Accordingly, the level of proof the Panel has considered appropriate is close to what has been called the “balance of probability” as distinguished from the concept of “beyond reasonable doubt” required in some jurisdictions to prove guilt in a criminal trial. Moreover, the test of “balance of probability” has to be applied having regard to the circumstances existing at the time of the invasion and loss.”<sup>47</sup>*

At the same time, when assessing the evidence in this category of claims, the Commission took into account a number of factors that affected the availability of certain evidence, in particular: (a) the circumstances of the armed conflict; (b) the socio-economic characteristics of the claimants; (c) the predominantly cash-based nature of the Kuwaiti

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46 *ibid* 26.

47 Report and Recommendations (S/AC.26/1998/1) (n 31) para 72.

economy; and (d) the specifics of the national compensation programs through which the initial gathering of information from the claimants was carried out.

As in the previous categories, background information, i.e. general data on the events of the military conflict consolidated in reports and statements of international organisations, played an important role in assessing the credibility of claimants' statements. Thus, even the most demanding of the evidentiary standards used by the Commission remained flexible enough to consider circumstantial evidence in the form of background data sets.

## 8 UKRAINIAN CASE: FIRST STEPS

On 2 April 2024, the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine opened for the submission of claims. The complete list of categories of claims eligible for recording in the Register was approved on 26 March 2024 and includes three broad categories: claims by natural persons (A), claims by the State of Ukraine (B), and claims by legal entities (C).<sup>48</sup> Each of them is further divided into sub-categories. For example, claims by natural persons include claims related to involuntary displacement (A1), claims related to violation of personal integrity (A2), claims related to loss of property, income or livelihood (A3) and loss of access to public services (A4).

However, the Register will begin with one category initially, namely damage or destruction of residential immovable property (A3.1). One reason for this decision is, of course, the immense impact the loss of housing has on people's lives. Another reason relates to the existing evidentiary support of this category of claims. In its statement, the Board of the Register underscored that "*substantial evidence is readily available*".<sup>49</sup>

The substantial evidence the Board mentions is collected through a domestic mechanism for recording damage to residential property,<sup>50</sup> which operates in the digital format.

48 Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine: Categories of Claims Eligible for Recording (approved 26 March 2024) <<https://rd4u.coe.int/documents/358068/386726/RD4U-Board%282024%2907-final-EN+-+Categories+of+Claims.pdf/3f375b28-5466-0c2e-90b6-55d23c4f7a49?t=1711546048763>> accessed 6 April 2024.

49 'The Board prepares for the opening of submission of claims to the Register of Damage for Ukraine' (*RD4U Register of Damage for Ukraine*, 1 March 2024) <<https://rd4u.coe.int/en/-/the-board-prepares-for-the-opening-of-submission-of-claims-to-the-register-of-damage-for-ukraine>> accessed 6 April 2024

50 The domestic mechanism is regulated by the Resolutions of the Cabinet of Ministers of Ukraine, see: Resolutions of the Cabinet of Ministers of Ukraine no 380 of 26 March 2022 'On collection, processing and accounting of information on the damaged and destroyed real estate as a result of the fighting, acts of terrorism, diversions caused by the armed aggression of the Russian Federation against Ukraine' (amended 23 June 2023) <<https://zakon.rada.gov.ua/laws/show/380-2022-%D0%BF#Text>> accessed 21 March 2024; Resolutions of the Cabinet of Ministers of Ukraine no 473 of 19 April 2022 'On approval of the Procedure for accomplishment of the urgent works on mitigation of consequences of the armed aggression of the Russian Federation connected with damage of buildings and constructions' (amended 11 January 2024) <<https://zakon.rada.gov.ua/laws/show/473-2022-%D0%BF#Text>> accessed 21 March 2024.

Homeowners can file a claim through a mobile application called “Diia”. The same app will be used for the submission of claims to the Register.<sup>51</sup> A claim will be deemed complete and submitted when a claimant fills out all the required information and documentation in the Claim Form in the Diia app, verifies all such information and documentation, and electronically signs the Claim Form within the app.<sup>52</sup> All evidence must be submitted in digital format through Diia; evidence in any other format will not be considered.<sup>53</sup>

Regarding the evidence required, it broadly states that “claimants shall be responsible for submitting information and Evidence supporting the eligibility of their Claims.”<sup>54</sup>

Similar to the UN Compensation Commission, the Register will use “mass claims processing techniques and tools such as computer-assisted data processing, data analysis and sampling, including with the use of artificial intelligence.”<sup>55</sup>

The digitalisation of the process is commendable as it expedites the procedure, increases accessibility, and enhances reliability due to interoperability between governmental databases. However, civil society has highlighted numerous hurdles that affected individuals face while proving their losses.<sup>56</sup> In particular, in many instances, documents proving the ownership may be lost because of the hostilities or hasty evacuation. If the data is unavailable in the State Register of Property Rights to Real Estate ([rrp.minjust.gov.ua](http://rrp.minjust.gov.ua), launched on 1 January 2013), the proof of the title becomes close to impossible. The mentioned Register of Rights lacks some data that was previously stored in paperwork in the bureaus of technical inventory. It also lacks data concerning property bought from communal farms within the privatisation campaign. In rural areas, people may abstain from registering their titles to avoid paying registration fees (which may be comparable to the price of the house in the area). Unauthorised construction is yet another “blind spot” for the National Register of Rights. Additionally, in the areas where hostilities continue, documenting damage is hindered.

51 See: Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine: Rules Governing the Submission, Processing and Recording of Claims (“Claims Rules”) (approved 26 March 2024) art 13 <<https://rd4u.coe.int/documents/358068/386726/RD4U-Board%282024%2904-final-EN+-+Claims+Rules.pdf/46892730-ba99-c1ec-fa98-44082a2e0f25?t=1711545756013>> accessed 6 April 2024.

52 *ibid*, art 13(2).

53 *ibid*, art 14(2).

54 *ibid*, art 14(1).

55 *ibid*, art 20.

56 Ukrainian Helsinki Human Rights Union and Think Tank “Institute of Legislative Ideas”, ‘What should the International Register of Damage take into account when designing procedures for submitting and reviewing applications concerning destroyed or damaged housing?’ (*Confiscation Tracker*, 15 March 2024) <[https://confiscation.com.ua/en/analytics/what\\_should\\_the\\_international\\_register\\_of\\_damage\\_take\\_into\\_account\\_when\\_designing\\_procedures\\_for\\_submitting\\_and\\_reviewing\\_applications\\_concerning\\_destroyed\\_or\\_damaged\\_housing/](https://confiscation.com.ua/en/analytics/what_should_the_international_register_of_damage_take_into_account_when_designing_procedures_for_submitting_and_reviewing_applications_concerning_destroyed_or_damaged_housing/)> accessed 6 April 2024.

The obstacles mentioned above should be carefully considered by the Register of Damage for Ukraine, akin to how the UN Compensation Commission took into account the contextual challenges “in the field”. Disregarding the peculiarities of the ongoing hostilities situation may lead to many victims being deprived of compensation.

## 9 CONCLUSIONS

In the extraordinary conditions of armed conflict and occupation, collecting evidence of injury is considerably more difficult for victims. There are many various reasons for that. First, when victims are facing imminent danger, documenting the events unfolding around them is not their primary concern. Secondly, the nature of the undergone experience is often such that victims may consciously or unconsciously avoid any actions that remind them of the horrific past. Thirdly, official certification of certain facts usually made by state bodies or other institutions (including medical institutions) may prove impossible or close to impossible due to malfunctions of such bodies and institutions, loss of control over a part of the territory by the state, physical destruction or loss of archives, registers, etc.

All of these circumstances call for special attention from international compensation mechanisms, which cannot afford the rigid approach and strict formalism characteristic of ordinary proceedings in national courts. For this reason, the law of evidence in this area is flexible and sensitive to the special circumstances in which claimants find themselves.

This flexibility is reflected in the special, lowered standards of proof employed in international compensation mechanisms, as exemplified by the UN Compensation Commission. The diversification of standards of proof consisted of applying three different approaches to different categories of claims. One approach only required claimants to prove the damage and its connection to the invasion without providing any evidence of the amount of damage. Secondly, the amount of damage had to be proved by a “reasonable minimum” of evidence appropriate to the circumstances of the case. Finally, the third standard, reminiscent of the civil law standard of “preponderance of the evidence”, required applicants to submit “documentary and other appropriate evidence sufficient to demonstrate the circumstances and extent of the damage suffered”. However, even this standard was subject to adjustment for the special context of war.

In addition, the burden placed on claimants was eased by presumptions developed in the Commission's case law.

The approaches pioneered by the UN Compensation Commission should be utilised and further developed within the framework of an international compensation mechanism for Ukraine. Embracing a revolving human-centred approach and prioritising individual claims of injured natural persons, as demonstrated by the Register of Damage for Ukraine,

is essential.<sup>57</sup> Secondly, introducing two different tracks for processing claims – regular and expedited (fast-track) – where claimants can receive interim, fast-track compensation while awaiting consideration of their claims in the regular track, is a productive idea.

Ultimately, the approach to the standards of proof in compensation mechanisms dealing with war and mass harm incidents cannot be anything other than flexible and sensitive to the special circumstances of the harmful events. The burden of proof imposed on victims of war should not become an excessive, unbearable weight; instead, it should be tailored flexibly to the conditions in which victims find themselves and to the realities of wartime that limit the ability to collect and present evidence.

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## АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

### ДОКАЗОВІ СТАНДАРТИ У ПРАКТИЦІ КОМПЕНСАЦІЙНОЇ КОМІСІЇ ООН: ДОСВІД УКРАЇНИ

**Богдан Карнаух\* та Тетяна Хутор**

#### АНОТАЦІЯ

**Вступ.** Згідно з міжнародним правом, держава, відповідальна за міжнародно-протиправні діяння, зобов'язана повністю відшкодувати шкоду, заподіяну такими діяннями (Відповідальність держав за міжнародно-протиправні діяння, ст. 31). Відповідно, потерпілі, яким внаслідок таких дій завдано збитків, мають право на компенсацію. Для реалізації цих фундаментальних принципів Комітет міністрів Ради Європи створив Реєстр збитків, завданих агресією Російської Федерації проти України. Це лише перший із трьох елементів майбутнього механізму компенсації для України (два інших, які ще мають бути створені, — компенсаційна комісія та компенсаційний фонд). Однак, щоб отримати компенсацію, кожен, хто постраждав від війни, повинен буде довести свій кейс перед майбутньою комісією. У цьому контексті доказові стандарти стануть критичними. Щоб зрозуміти, як міг би працювати майбутній механізм компенсацій для України, корисно вивчити практику подібних установ. Компенсаційна комісія ООН

заслужує на особливу увагу, оскільки вона може надати цінну інформацію про те, як необхідно довести збитки, пов'язані з війною, щоб отримати відшкодування.

**Методи.** Основна мета статті — вивчити підхід Компенсаційної комісії ООН щодо доказових стандартів. У зв'язку з цим у статті спочатку зазначено загальні межі роботи Комісії, її мету та організаційну структуру. Потім описано категорії заяв, розглянутих Комісією, оскільки, як показано далі, Комісія застосувала диверсифікований підхід: різні категорії заяв підлягали різним доказовим стандартам з різним ступенем вимог. Така диференціація була зумовлена встановленням пріоритетів щодо заяв та застосуванням прискореної процедури розгляду заяв першої черги. Основна частина дослідження зосереджена на документах Комісії, які ілюструють її підхід до доказових стандартів. Спочатку окреслені та пояснені три доказові стандарти, які застосовує Комісія: доведення лише інциденту без необхідності встановлення розміру завданої шкоди; доведення шкоди, що ґрунтується на «розумному мінімумі» доказів у відповідних обставинах; доведення шкоди на підставі документальних та інших доказів, достатніх для встановлення розміру шкоди. Потім у статті проаналізовано, як ці три стандарти застосовувалися на практиці до вибраних категорій заяв про відшкодування шкоди, завданої тілесними ушкодженнями. Також були сформульовані висновки, які можна зробити з огляду на практику Комісії щодо досвіду України.

**Результати та висновки.** Під час збройного конфлікту та окупації збір доказів шкоди є надзвичайно складним для постраждалих з різних причин. Цей факт потребує особливої уваги з боку міжнародних механізмів компенсації, які не можуть дотримуватися жорстких формальностей, що використовуються у звичайних судових провадженнях. Осв чому міжнародне доказове право є адаптивним і прагне пристосуватися до унікальних ситуацій заявників. Прикладом цієї адаптивності є м'які та диверсифіковані доказові стандарти, які використовує Компенсаційна комісія ООН. Урізноманітнення стандартів доказування в практиці Компенсаційної комісії ООН полягало у застосуванні трьох різних підходів до різних категорій заяв. Крім того, тягар, покладений на позивачів, було полегшено через презумпції, розроблені в практиці Комісії. Піонерські підходи Компенсаційної комісії ООН мають бути застосовані та вдосконалені в межах міжнародного механізму компенсацій для України. Це передбачає визначення пріоритетності індивідуальних заяв, запровадження як регулярних, так і прискорених шляхів розгляду заяв, а також забезпечення гнучкості щодо тягаря доказування та стандартів доказів, щоб врахувати проблеми збору доказів у воєнний час.

**Ключові слова:** доказові стандарти; тягар доказування; деліктне право; шкода, пов'язана з війною; міжнародне доказове право; механізм міжнародної компенсації.