



Webinar Transcript: Ukraine and Reparations- An Update and a Call to Action for California International Arbitrators

Morning, everyone. I'm retired Judge Vic Bianchini. I'm a mediator and arbitrator with Judy Kid West and the American Arbitration Association, and a member of the ADR Committee of the California Lawyers Association Litigation Section. Now, on behalf of the CLA in California Arbitration, I'm here to welcome you to the first Wednesday session of California International Arbitration Week.

Now, this is the second annual event celebrating International Arbitration in California. California International Arbitration Week is hosted by the ADR Committee of the California Lawyers Association Litigation Section and calarb.org. We thank our many sponsors and welcome our attendees from around the world.

Our program this morning is entitled "Ukraine and Reparations: An Update and a Call to Action for California International Arbitrators," a subject close to my heart. Sponsored by Fed Arm, it is presented both in person at the law firm of White and Case in Los Angeles and virtually through the auspices of the California Lawyers Association.

We will now hear from our moderator and speakers. I thank you and enjoy.

Thank you, Judge. It's a pleasure to be here. I'd like to first thank our host, White & Case, for hosting us and for all the hard-working people on the committees here who have put this wonderful week together with all these very interesting panels. I think all of us appreciate all the hard work that's been done, and I know we've all gained a lot of information from all these different panels.

I am privileged to moderate a panel on a very important topic, something that is always at the front of every newspaper that we look at in terms of what's happening in Ukraine. There's an important role that is developing as we speak, both with respect to the battles that are happening in Ukraine against Russian oppression, but also what we as lawyers can do and anticipating our role in potential reparations and resolution of this conflict. That's the subject of today's session.

I'm pleased to introduce our panel. We're privileged to have two folks who will participate virtually. We have Patrick Purcell, who is the head of the Ukrainian Reparations Committee. They have put together a number of different operations, which Patrick will talk about. They've been leading the charge with respect to the historic United Nations resolution on the Ukraine issue. And then, of course, we have Markiyano, the minister from Ukraine, who will talk about

what's going on in Ukraine. So, we welcome those two gentlemen, both virtually, and we have them on our screen here. Patrick and Markiyan, good to have you with us.

Here in person, I'm privileged to have Judge Sofaer. Judge Sofaer has a storied resume. Among other things, he was a District Court judge for the Southern District of New York. He taught at Columbia Law School, which interestingly is the place where Markiyan and Patrick have housed The Institute that is in charge of the Ukraine reparations effort. Judge Sofaer left the Southern District of New York to become counsel to the State Department's Legal Advisor under President Reagan and George Schultz and participated in the Iranian Claims Tribunal. He has been involved in a number of other claims tribunals, so his expertise in this matter I think will be very interesting to all of us as we look to see what lies ahead of us.

And then, to my far left, we have Jerry Roth, who was a former partner at Munger Tolls, ran the San Francisco office, and was also the president of the UIA (International Lawyers Association). He has substantial experience with a number of claims in this area as well. So, I welcome all our panelists.

Let me start with what we're going to do. We're going to start with Markiyan to set the stage of what's happened in Ukraine, an overview of the war and damages, and what Ukraine hopes to accomplish with this program. Then we're going to talk next with Patrick, talk a little bit about the history of the International Claims and Reparations project that he has spearheaded, and as I mentioned, is based at Columbia. Then, we're going to talk to Judge Sofaer, get his expertise and his guidance with respect to what he's seen in the past and how that may afford best practices and some of the pitfalls that we may want to be careful of as we put this program together. And then, last, we will talk with Terry Roth, who will talk about the potential role of all of us, how we can participate, what's been done historically, and what those roles could be. And then, we will afford some time for questions and answers.

So, with that, let me start off and hand it off to Markiyan, who can provide us with an update on what has happened in Ukraine, outline the goals that Ukraine hopes to accomplish. Markiyan, welcome aboard.

Everybody, thank you to the organizers and the panels for having me. It's a pleasure to speak with all of you. I do apologize in advance for any noise you can hear outside of my space. I sort of have to do this on the go, as many people have to live their lives and do their work on the go in Ukraine.

The idea of giving you an overview of the damage in Ukraine is difficult because, I mean, where do I start? This war has many different distinctions, and one of them is that it plays out on live TV and social media. So the damage is plainly obvious to everybody. It's profound, widespread, horrific, and fundamental.

Just in the past few months alone, we've seen deliberate strikes on civilian infrastructure, such as the power grid and utilities, in addition to indiscriminate shelling of civilian populations in

cities, towns, and villages. Moreover, there is ongoing frontline fighting that spans a front line that is almost a thousand miles long. The devastation is incredible, and that alone dictates the need to approach the issue of future recovery and reconstruction of Ukraine and issue future reparations together. There is no way in the world that Ukraine, or any individual country, can afford to rebuild itself like this. As a matter of principle, it has to be the culprits, the criminals, to pay for all the damage they've caused in Ukraine. That's our fundamental thinking. It has to be rational; they have to pay for everything that is happening to Ukraine. This includes not only destruction and damage to property but also, and perhaps first and foremost, the pain and suffering inflicted on the people in our country.

The way we go about it, and again, before the war, I was just a regular lawyer in Ukraine doing commercial arbitration. When the war started, it knocked me offline for 10 days. I couldn't really find my way around life during those 10 days. But then, I got myself together and, as a lawyer, started thinking. So, how do we find a lawsuit against Russia to try to recover all these damages? Very quickly, all the usual options on our menu fell away for one reason or another.

We couldn't go to any particular national courts because there were issues with jurisdiction and immunity. We couldn't go to any established national courts or tribunals due to jurisdictional reasons. We know that Russia has been very careful and has shielded itself against institutions like the International Court of Justice or the European Court of Human Rights. Even though they are accessible in principle, they are not equipped to handle nationwide scale claims for damages and reconstruction in a way that would be timely and effective. It would take many years, and even if judgments were obtained, enforcing them would be challenging.

So, we wiped our slate clean and started thinking from the fundamentals. In international law, the principles are straightforward. A state that violates international law has a duty to make reparations for that violation. However, this duty is not self-executing like it is in normal life, where there are infrastructures to enforce obligations through courts, enforcement mechanisms, and organizations. In international law, such infrastructure does not exist. In each instance where the issue of reparations arises, this infrastructure needs to be built.

There are two common ways this infrastructure is built. The first is through the consent of all the parties involved, often through a peace agreement or similar arrangement where parties agree that one will pay reparations to the others. The second option is through the UN Security Council, which has the power to issue binding decisions on all states through the provisions of Chapter Seven of the UN Charter.

Quickly, we realized that neither of these options is available to us. Russia is unlikely to agree to anything, and as a permanent member of the Security Council, they can veto any decision aimed at taking measures through the Security Council to address the situation.

So, how do we go about it? Our thinking led us in a direction where we believe it is ultimately the responsibility of the civilized states, the participants of the civilized world, to come together and create a framework that can establish the mechanism and infrastructure to hold Russia

accountable for the damage it has caused. This framework, in our view, would need to be built through an international agreement in which as many states as possible would participate. It would establish a core tribunal or claims commission, regardless of its specific name, that would adjudicate and consider claims for reparations from Ukraine, including claims from individuals and companies, as well as from the state itself. The decisions, awards, or judgments made by this tribunal would be enforceable.

Since going through the Security Council is not a viable option, the initial step was to ensure that this framework has international legitimacy. And whether we like it or not, true international legitimacy in these matters can only be achieved through the United Nations.

Thankfully, the issue of veto power by a permanent member of the Security Council has been recognized for a long time. The international community realized that an individual member cannot paralyze the entire organization. In the 1950s, the United Nations General Assembly passed the "United for Peace" resolution. This resolution gave the General Assembly the responsibility to address issues related to international peace and security in cases where the Security Council is deadlocked due to a veto from a permanent member. This framework has been in place since the 1990s and has been invoked only 10 times in history.

Using this framework, we were able to request action from the General Assembly. The General Assembly opened an 11th special session and took several steps, including adopting various political resolutions condemning Russia's aggression against Ukraine. They expelled Russia from the Human Rights Council and passed a resolution protecting Ukraine's territorial integrity, especially in response to Russia's purported annexation of Ukrainian territory. The first resolution in this sequence was the "Resolution on Furtherance of Reparation Remedy for Ukraine." This resolution was the result of four months of intense work and contains three fundamental provisions.

One is that Russia must be held accountable for violating international law in Ukraine. Two, there must be an international mechanism that states have to build together with Ukraine to convert that duty into a meaningful thing. And three, as a first step, there must be a register of damages that must be built to serve as a record for evidence of destruction and related claims in Ukraine. From that point on, on the 14th of November, we went from abstraction to concrete things because we had things to implement that were legitimized by that resolution. And since then, our work has been going on in three separate parallel streams.

Team number one is to establish this register of damage that would require claims from people, from companies, and from the state, along with all the necessary evidence. That register is about to be established, and we already know that it will be established in The Hague, unsurprisingly the capital of international justice. In a matter of weeks, we should be able to announce how exactly it will look like and how exactly it will be about it, again through the cooperation of as many states as possible.

The second track is the establishment of a Claims Commission, that is the body that will eventually take the claims recorded in the register and adjudicate them, assign a monetary value to them, and basically make them executable, what they want to call judgments, because that's not what it's going to be, but decisions or awards that Russia will have to do anything.

And the third element and the third track is to figure out how to explain the assets and finance. We know we've mentioned that Russia has not been participating in any of this as we speak right now. But that does not mean that Russia cannot pay because the obligation to make reparation is not conditional upon Russia's consent. So, unsurprisingly, as you've been hearing in headlines, articles, publications, and discussions, we are taking a look at Russia's assets located outside of the country and seeing if we can confiscate them or repurpose them and direct them towards reparations for the victims of the war. That requires serious distinction, coordination, and work because there are obvious issues that will have to be figured out before that happens.

Notably, there are problems with Russian state assets, state sovereign assets that are not used for commercial purposes or protected by sovereign immunity as a matter of principle in pretty much every civilization. We have to figure out how to evade or avoid that protection. I won't go into detail because there's not enough time for that discussion. But basically, our thinking is that if Russia is committing an egregious violation of international law, its aggression should not be allowed to hide behind another provision of international law, the provision of sovereign immunity, to protect its assets that it has taken advantage of within the Western legal and financial systems. This will require work in domestic legal assistance with governments and legislators.

We have been deeply engaged in discussions with the Western government, members of Congress on both sides of the aisle, and in both chambers about ways to sort this out. There are some very interesting initiatives that would go towards that purpose. However, as we know from practice, these things take time. It's likely a matter of years rather than months, although we are striving to work as quickly as possible. At the end of the day, our goal is to establish a system that would work to compensate those who have suffered as a result of the Russian invasion.

Again, for people, companies, and the state, this serves a dual purpose. First, there must be accountability and a sense of justice for the victims. When someone, whether an individual or a massive state, comes in and causes destruction, they must be punished for it. Second, it's about providing the means for every Ukrainian to rebuild their lives and their country, so we can avoid relying on continuous external assistance. The support we have received so far has been immense and amazing, but fundamentally, it's not the experience of other states to bear the cost of all the destruction caused.

Regarding the scale of the damage, what we see on the news is indeed a significant part of it. This is not confined to obscure small villages along the border or isolated pockets; it is widespread. Russian cruise missiles have the capability to reach every corner of Ukraine. These

strikes have been documented and shared on platforms like Twitter and Facebook. If it were a movie, it would be astonishing footage, but unfortunately, it's happening in real life.

Efforts have been made to estimate the extent of the damage, although it is challenging. One study conducted by the Kyiv School of Economics assessed the damage to property and infrastructure alone at around 200 billion US dollars. The World Bank conducted a study last September, which estimated the damage at approximately 500 billion US dollars. Other sources also provide varying figures. Moreover, these estimates do not even account for the environmental damage.

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Western legal and financial systems. That will require work in domestic legal assistance with governments and the legislators. We have been deep in discussions with the US government, members of Congress on both levels, on both sides of the aisle, and in both chambers about these ways to sort that out. And there are some very interesting initiatives that would go towards that purpose. But, of course, as we all know from practice, these things take time. It's probably a matter of years rather than months, although we try to work as quickly as possible. But at the end of the day, our goal is to establish a system that would work to compensate those who have suffered at the end of the Russian invasion.

Thanks very much, and thank you again to the organizers for inviting us here, and apologies to the audience for having to appear virtually. That was not neither Marquian nor my intention. I think it's important to reframe the discussion a little bit. Once we've now heard from Marquian and say, just as a matter of law and a matter of international law, this is, without exaggeration, in my view anyway, the single most significant moment in international law since 1945. We are interrogating and pushing the boundaries of the international security framework that was created to prevent wars of conquest, redrawing borders in Europe. The UN framework, the role of the Security Council, and really one of the core pillars of international law, which is responsibility for wrongful acts by states, all of those issues are at the forefront of this one small piece of international law that we are working on in the reparations workstream.

I think that is an incredibly daunting task, but it's one that I think we owe a great debt to Ukraine for allowing us to have. If you think about where we were on February 25th, 2022, the international consensus was that we would not be in a position to have this conversation. And through the blood and tears and treasure of Ukraine and the coalescence of allies, we've carved ourselves a space to ensure that the international law regime will persist. That's an incredible debt that we owe to Ukraine. We also, in my view, owe a debt to President Zelensky, whose foresight in creating this working group, of which I'm just a member, to think about what the end of the war looks like and how to ensure accountability. In 1940, the Allies were already thinking about Nuremberg, four years before the Allies invaded Europe. And I think that's telling because it shows that this takes time.

But we have the time to think carefully about it, so I just wanted to place that in perspective. The other thing I would say, as an initial point, is that as lawyers, we play an incredible role in this. We are witnessing, for the first time, the non-kinetic use of force through the seizure and blocking of Russian assets. It's a non-kinetic use of force to ensure that Russia's physical aggression is met with international pushback in a way that doesn't spiral into a hot war and cost more lives. Lawyers are an important part of that conversation because assets and international law principles are what we do for a living.

That was the call, and we started from a blank slate. International claims commissions and reparations are well-known vehicles and principles, but what's unique in this situation is the speed with which we are setting it up to work in parallel with the ongoing international wrong. Second, in every other instance, claims commissions are set up with the participation of the culpable party. Here, we don't anticipate, at least in the initial stages, Russia willfully

participating in the payment of reparations to victims. That's unique, and it presented us with a challenge. If you look at a claims commission, there are three things it needs: legitimacy, structure, and the work of the commission. Those three things are what we needed to establish.

So, we thought about how to establish legitimacy. Historically, you establish legitimacy through a decision by the Security Council, setting up an international claims commission that will then pay out victims for an act of wrongful aggression by a state. But we didn't have that option. Obviously, because the Security Council was unavailable to us for patently obvious reasons, we drafted a resolution that created a syllogism: for every wrongful act by a state, reparations are due, and therefore a Claims Commission must be created. We brought that resolution to member states of the General Assembly and pushed for a vote in November. At first, we were met with some skepticism, but then managed to achieve a vote and pass the resolution with 94 members voting in favor of it. This creates legitimacy for this international effort.

The second part is the structure, which we are currently working on. We will have a registry of damage where people can submit their evidence to demonstrate the harm caused by Russia. This database will collect evidence and quantify the amount of damage Russia must be held accountable for. The World Bank estimated the damage at around \$750 billion in September, but it is likely much higher now.

The structure also involves the adjudication process. We need to identify and describe the claims, determine the necessary evidence, and calculate the compensation due. We are having robust conversations with like-minded governments about what this structure should look like.

Finally, the work itself will be ongoing and will likely span the remainder of my career. We are dealing with an overwhelming amount of damage and a large number of individuals affected, similar to what was seen in World War II. Quantifying and paying out those claims will take a tremendous amount of time and effort.

There are ways, thankfully, with AI and other things that we can move those things faster. But that really will be a significant amount of work and will take a long period of time. So right now, and then I'll turn over the microphone again, right now what we're doing is, and Mark Young made a little bit of news, I think this was the first time we've ever publicly announced that the registry of damage will be located in The Hague. So you've heard it first at California arbitration week. But once that is established, then the Secretariat will be up and running. We will have an independent international organization that has legal personality. And then those states, hopefully all of the 94, or some version of them, will get together and create a multilateral instrument that will create the commission, and we can start adjudicating claims. And then finally, the question of Russian consent, how to bind Russia, right? I mean, we're all arbitration practitioners, we understand that in some ways, non-judicial legal proceedings are the product of consent, and that's where some of the legitimacy comes from. My own view is that Russia, in a post-Putin world, once peace has been secured, will participate in this commission because it will want, like every other party that has been subject to a claims commission, it will want to re-enter the world's capital markets. It will want to re-enter the world's firmament, and placing

exposure in a claims commission and not fragmented court judgments in London, Paris, and the United States will be in Russia's interest. But obviously, first, we need to win the war. So let me pause there and turn it back over. Thanks, Patrick. Congratulations on all the success you've had. I think all of us tip our hat in your direction in terms of getting that UN security that vote to the UN and putting this all together. As you're talking, it's a little bit about building a car while it's racing down the runway, and you're still putting it together. So a lot of work to be done. Let me turn it over now to Judge Sofaer, who I mentioned in my introduction, was counseled to the State Department, worked with the Secretary of State George Schultz on a number of claims commissions. He's also the George Schultz scholar at the Hoover Institute at Stanford University. Judge Sofaer, maybe you could spend a little bit of time telling us about your experience with claims tribunals, what we should expect, and just get a little bit of perspective based on some experience that you've had. Good morning. I'd be happy to do that, Ken, to the extent possible. But first, let me congratulate these wonderful lawyers, Markiyani and Patrick, for the work they're doing and for the work that their teams are doing. It's awesome, and it's something that we all should support wholeheartedly. There are problems that they are encountering and that others are seeing in the difficulties in establishing each step of the process.

But without the energy and commitment that stemmed from initially Zelensky's call for reparations in March last year, and the massive work that everybody is doing, a lot of people are doing to get this process underway, we would not be here. This would not be an issue. People would be floundering around about what to do about the damages that have occurred, the massive damages that have occurred. If this war continues another year, you're talking about potentially multiple trillions of dollars because the Russians seem to have adopted a strategy of destruction rather than any kind of sophisticated effort to win a war with minimal casualties. So, we're focused on reparations today, and I'm all for this effort. My plea to you, and I'm sure that Patrick and Markiyani will appreciate this, is to just remember that there are problems and complications that are worth looking at because you don't want this process to do more harm than good, which can happen. We saw reparations do a lot of harm after the First World War when massive reparations were imposed on Germany, and in retrospect, we know that those reparations gave Hitler one of his main arguments in becoming what he was. We also know that peace is the ultimate objective, a peace that's respectable and honorable, and sometimes calls for reparations can become problematic when you're trying to establish peace. Though I'm sure that everybody involved in the process of attempting to establish the amounts of damage being done is fully appreciative of the complexity of the context in which reparations are sought. I have four points to talk about today, and I think they're each important, and on some of them, there's a real difference between my position, based on my experience, with the issue of legitimacy and the UN, and the positions appearing to be supported by the committee. First of all, the consequences of seeking reparations. Second, the reliance on the General Assembly for legitimacy. Third, the possible creation of unrealized expectations and the dangers of that. And then finally, the ultimate objective we should all have at this point of strengthening international law because if there's one thing being demonstrated by the process underway, it is that we have failed to establish even the most basic premise of international law after the Second World War, that you could not have an invasion, use of force for the purpose of basically taking a country's sovereignty away.

So, we've had a total failure of international law, deliberate killing of civilians, things that are just nightmarish for us to consider. First, the impact of reparations. Now, the UN Ambassador and obtaining support for reparations in the General Assembly said that the resolution will work for the benefit of all those who are being threatened now or might be threatened later by the use of force. Now, this statement assumes that Russia will be deterred somehow from using force by the threat of reparations. And if you stop to think about that for a second, you might share my skepticism of that. They are utterly scornful of this process of reparations. I think they should take it seriously, and some sensible Russians will take it seriously, and ultimately it will have a beneficial effect. But the notion that these legal processes are going to actually help deter a monstrous regime that is committed to taking literal sovereign control over territory that they do not have any right to is dubious at best.

As I said, also, the idea of reparations should always be understood in terms of a context of a desire for peace and the adverse consequences that can occur from an excessive reliance on reparations rather than a realization that there are other things that are very important in bringing about peace. Now, to rely on the General Assembly for legitimacy is something I flatly disagree with. The legitimacy here is in the effort that Ukraine is making and in the support that Ukraine gets from sovereign states. The fact is that a good majority of the state members of the General Assembly voted against what Russia has done in Ukraine, essentially ordered Russia to leave Ukraine, to stop the war. But when it came time for the reparations resolution, the historic importance of that resolution for me as an international lawyer who was the agent of the United States in all the claims processes that were involved when I served, the historical importance is in the fact that the resolution shows the lack of resolve of the member states of the United Nations to obtain reparations for Ukraine.

While the General Assembly adopted a resolution, it obtained 94 votes in favor, as Patrick pointed out, but there were 17 votes against, 73 abstentions, and 10 member states did not vote. So, the 94 votes, if you have to think about this in terms of the General Assembly not having any legal rights, any legal significance through a General Assembly resolution, you have to look for moral significance in order to obtain that legitimacy. And here we have 94 votes in favor when a majority of the voting members of the General Assembly is 97, so you have fewer than a majority of the members of the General Assembly voting for reparations, and you have a total of 90 out of 99 members either not voting, not in favor, or not voting. This lack of General Assembly support does not, in my view, invalidate the case for reparations. I do not regard that vote as undermining the legitimacy of an international agreement among member states of the UN to create a process for reparations.

What I am concerned about is that we are putting our confidence, to any degree, on the actions of the General Assembly in this context. The General Assembly played a marvelous role in ending apartheid in South Africa because it ended up voting against apartheid with a process and a program by consensus. This really established the legitimacy of the end of racism, and hats off to all the states and that magnificent result. But that is not what we have here, so I would not make anything really of this General Assembly resolution beyond saying, "Well, we

have 94 members ready to work together to establish a process that will bring about justice." In that regard, you should keep in mind that the General Assembly is reliable in condemning almost every effort the United States has made to stop thugs and others from overthrowing democratically elected governments. This is not a place where you can find reliable legitimacy in the international arena.

Disappointed expectations. My concern here really is echoed by the two excellent speeches we've heard. The greatest potential damage in the reparations effort is the prospect that it will raise and disappoint the expectations of claimants, and this would diminish the moral authority of other efforts that might be more important than reparations and, in my view, are more important than reparations to hold Russia accountable. Some reparations efforts have failed in recent years, and I find it ironic that one of the few efforts to have a reparations process without the participation of the party that's supposed to pay has been an utter failure. Another failure: a process was set up to calculate the damages caused by Israel's wall, which was determined to be illegal by the International Court of Justice, and that tribunal worked for 12 years, spent about eight and a half million dollars, adjudicated 37,500 claims, and then went out of business because it had no more money. Not a single dollar was paid on any of those claims. That is an embarrassment. I do not support forming any kind of institution that would end up like that, and I'm sure Patrick and Mark do not support that either. That's why they're going in steps, and that's why I fully support what they're doing to first begin with this process of registry, and then after the money is collected, to proceed to adjudication and enforcement.

Now, it'll cost a lot of money even to establish the Hague tribunal that they are contemplating and the registry, but we can do it. We can round up that money. We can contribute. We can contribute our time, our efforts, and our countries can contribute as well. But to round up the money to pay a trillion dollars or two trillion dollars in damages is going to be a very, very difficult process. And I, for one, in my experience, would see that as happening first of all after Putin is no longer there, and secondly, perhaps from streams of money and income that could be designated for this purpose, as we did with Iraq, where instead of going back to Iraq and saying, "Give us 50 billion dollars," we looked at their oil income, which was around 5 billion a year, and the Security Council allocated about a billion of that per year to payment of claims. And that hit claims of over 50 billion dollars were paid out of that process over a long period, over 30 years, so that it wasn't so burdensome on Iraq that it couldn't function as a country. So, this is the kind of arrangement that becomes possible if you're patient. And that is not only not embarrassing, that is triumphant. That is a really proper and respectable achievement in international law.

We will find that if you tried to enforce judgments of a tribunal against frozen Russian assets, those assets are owned by entities of the Russian government or by people who have had nothing to do whatsoever with the damages you're seeking to pay. Traditional law in the U.S and elsewhere states that you cannot execute on anyone's property when that property is unrelated to the damages you're claiming. Now, if you go to Congress and you manage to get a law that changes that, you can count on reciprocal treatment of U.S assets and business assets all over the world that are affected, and it will be very dangerous and difficult, perhaps impossible, to

get Congress to do that. This is not like saying this is a commercial matter or this is an act of terrorism and not really a state act, and we should take away sovereign immunity. That is a process that is going on in a limited way, but to say that the military actions of the Russian government could be deemed non-immune would basically gut the foreign sovereign.

Finally, I just want to say that I think we need to give a lot of attention to the overall effort to improve the status of international law in the world and in our country. And to do that, we also need to focus on the criminal cases that are being brought in tribunals that are very difficult to reach in an effective manner. So, I would urge the United States to allow criminal claims where international law does not permit immunity, such as torture claims and other internationally recognized violations of the laws of war and humanitarian law. We have such a statute, but we do not provide jurisdiction for claims in other countries at this point. However, other countries have statutes that permit these claims, and they should be utilized effectively.

Beyond that, I would urge Patrick and his team to look at making international claims processes more efficient and less expensive. The International Criminal Court has been horrendously expensive and inefficient in its first 10 years, spending around 700 million dollars, completing only one case, conducting seven investigations, and having around 30 proceedings. It's not a practical way to effectively prosecute a large number of cases. I don't mean "kill" literally, but rather successfully prosecute.

I don't think the U.S should insist upon the death penalty or cause any other kind of crisis in international tribunal negotiations. What I'm saying is to look at federal law, our cases, and the way other countries handle conventional litigation. We can deliver justice effectively without lengthy and complex proceedings that sometimes resemble show trials, which is reminiscent of the Soviet Union. Show trials are dangerous, and they can lead to the withholding of evidence and improper behavior by prosecutors, as has happened in the ICC.

I end with that. The fact that in the process, try your best to streamline the international tribunal process, and it will make everything easier and more credible. Thank you for those observations. I think I'd be curious about the Iran's Claims Tribunal. That was fairly successful. A lot of money got paid out. That is a ray of hope in terms of the processes that are being set up here and the ability for claimants to get paid. Am I right? The International Claims Tribunal, as you know, came from—they had seized our people and holding them as hostages in Iran in '78, '79, and we froze, incidentally, Jimmy Carter does not get enough credit for that. Before he left office, he froze Iranian assets, and that led to the Algiers Accords, and the two countries voluntarily established the Iran-U.S. Tribunal in The Hague, and the Dutch gave us free facilities and whatnot, and it has been—it has been successful. When I served, I negotiated the settlement of many cases in the Iran Tribunal, including all the small claims, which were included in a very large settlement for \$55 million, and we went to the smallest claim. We went to the Claims Tribunal that we have in our Justice Department, and they adjudicated all those claims and distributed all that money, and it was a hundred cents on a dollar minus. We did not manage to have enough money for interest, but nonetheless, a very significant achievement. But all of that, remember, comes as a result of some kind of pressure that brings the parties

involved to the table. And as Patrick says, and I agree with Patrick, that eventually, we have a good chance of convincing Russia or a new Russian government, let's say, to come to the table and reach some kind of agreement like that where you really can feel confident that the money is going to be there.

Iran has to keep replenishing its account to maintain that \$500 million that needed to be there in order to pay awards. And, of course, with some hard work on the inside, with some hard work to get our Defense Department lined up with our State Department, but we have had to work hard. But we have paid all our judgments as well, as we are so obliged to do. Putting things in perspective, there are some lessons to be learned from what happened in the Iran's Claims Tribunal. It was very successful, albeit, is your point that it was negotiated. We have to cross that bridge with Russia to help that funding and make it more efficient. It's so inefficient. Well, can you modify so expenses? We have technology now, which can help. So there's a ray of hope there. And we have the General Assembly, although it's not as much legitimacy as you would hope, we have some legitimacy here. Can I just come in on a few of these points, if you don't mind, please? Very quickly, and I'm mindful of the time, Jared, don't worry. Just a very quick... I obviously have a tremendous respect for Judge Zaffir and I take his points as very, very helpful and very appreciative. These are obviously incredibly difficult questions. Just a few very brief reactions. One, the 94 votes. What is not seen in the press or by the vote count is the fact that the African voting bloc and the Caribbean voting bloc were in favor of reparations but politically took the decision not to vote on this resolution because they too want reparations and they think their reparations program should come first because it was first in time. So that's 74 votes right there. But notwithstanding, ending just the vote count, what we have heard from the United States and the European Union and Japan and others was that it was essential, take this for what it's worth, it was essential that we get a UN resolution as a predicate for this through the General Assembly. And that, for better or worse, demonstrates, at least for domestic cover, so that they can pass their own domestic implementing legislation for whatever multilateral treaty we create to create the actual mechanism. It was important to have UN General Assembly buy-in for the concept. So we took that as a necessary first step. I too do not place any instrumental value in what the General Assembly did, right, because obviously it is a resolution that has no force other than saying it calls upon the member states to create this mechanism, which we are now trying to do multilaterally outside of the UN framework

And outside of the UN framework is a very important point. We established the United Nations to ensure that there were no future wars of conquest on the European continent, point one. And here we have a war of European conquest, and the question is whether the United Nations itself, and here I'm echoing remarks that Fiona Hill herself made, whether the UN system has any value. And if the UN system is to have value, which I believe it still does, although I share some of the skepticism of Judge Zaffir, if the UN system is to have any value, we need to, as an international law polity, adjust to the fact that a P5 member has committed an Article 2(4) violation of the Charter, a wanton act of aggression by a P5 member. And what do we do with that? That was not in the minds of those wise and sage people, including my former Professor Lou Hankin, when they met in San Francisco to create this system, right? So what do we do? What do we do? And that's, you can see what happens when the UN P5 members get involved

in these issues in a way to subvert. That is the reason the Israeli mechanism is such an embarrassment. It is lock, stock, and barrel controlled by the Russians. The Russians have the Secretariat and the Russians have two board members. There will be nothing there because there's no interest in having an international adjudicative process connected to a reparations mechanism. So we are taking it outside of the UN. But those 94 votes, I think, are historic in the fact that it is the first time that any number of states have gotten together to say that an international wrongful act by a state requires reparations, and therefore, a mechanism should be created. That syllogism itself is, I think, a pretty significant advancement. Two more things, and then I'll, I promise, to pass it along. One, we've already identified significant monies to create the first and second phase.

We anticipate more monies to flow soon, and then the third on just immunities, we're gonna need to fund it. It would be great if this looked more like the Iran-US claims tribunal and Russia starts funding it the way that Iran has funded the Claims Commission, the claims tribunal which I worked on. It probably will look something more like the UNCC, the Iraq-Kuwait context that Judge Sofaer mentioned, but the reality is there needs to be a critical, credible threat for the attachment or use of assets that Russia has placed at risk by its wanton aggression. And the US has already taken 5.4 million dollars from a Russian oligarch and has appropriated it to Ukraine for its reconstruction. 5.4 million dollars is a drop in the bucket, but it shows proof of concept, and we're using established US law to do this. And then the point on immunities, and then I promise to stop. In 1940, when the Allies set up the Nuremberg Commission, started to talk about the Nuremberg Commission, state immunity for aggression was impossible to imagine. Heads of state were per se immune. And yet, here we are. They are not per se immune for their acts, as we've seen time and time again. In the 1960s, it was unthinkable. It would destroy global commerce if we allowed states acting as commercial parties to have non-immune assets. And yet, we got together and we created exceptions to foreign sovereign immunity that allow for commercial attachments when a state is acting as a commercial actor. And the world didn't collapse. And now we're at a point where a P5 member has committed a 2(4) violation of the charter, and we have universal condemnation in 141 votes saying that what Russia has done is illegal.

We have ICJ opinions saying what Russia has done is illegal. The question about reciprocity is one that we all need to take into consideration. But if the United States or Britain were to create a war of conquest with universal condemnation by the United Nations and multiple ICJ awards saying that reparations are therefore due, query whether their immunities, their sovereign immunities in that context, should persist. So I'll leave it there. Thank you, Patrick. I think I'm inspired by your passion, and it makes me excited to get involved in everything that you're doing. Yeah, I think that all of us in this room know that this isn't going to be easy. Our careers as lawyers, as arbitrators, are built doing things that aren't easy. We find a way to get things done, and I have every confidence that we'll be able to get these things done. I think Judge Sofaer has laid out some great tripwires, some sage advice based on his history, and we thank you for that, Judge. Let me turn it over to Jerry to talk about the role of arbitrators. I know there are at least three, four, five, or six different ways I'm intent the thing that we can get involved, and let me turn it over to you.

Yeah, let me just start by saying what an honor to be on the panel with this group. Patrick, Marquee, and your work is extraordinary. This is the worst violation of international law in my lifetime and in the lifetime of many. So the fact that you've come this far is extraordinary. And yet, Judge Sophia has laid out some really important challenges that we have to overcome in trying to get reparations for Ukraine. I mean, just ticking through a few that I've heard listening to all three panelists: limited jurisdiction of international courts, blockage of the Security Council by Russia, limited funds for payment of reparations, limited participation if any by Russia and its lack of consent, the risk of performative show trials, legal immunities, the inefficiencies that Judge Sophia alluded to from prior claims processes, the fact that we're still in a war and there are ongoing hostilities, the lack of resolve from half of the world who either didn't vote for or voted against this process, the real concerns about disappointed expectations if we go through a huge reparations process and don't actually pay out money to the victims of what's gone on in Ukraine, the concern about what Russia will do in the years after any reparations process (we don't want to create another Germany after World War I situation, obviously), and perhaps something we haven't talked about, there are going to be competing claims to what might be a relatively small pot of money compared to the damage that's been caused, which could create separate divisions within Ukraine and actually victimize the victims. This is something that really needs to be thought about and avoided.

At least I see all of this as a call to action to arbitrators because the arbitration community around the country and around the world has to respond to these challenges with our expertise. Lawyers around the world are actually doing this outside the arbitration community. There are NGOs that are bringing lawsuits throughout Europe against Russia based on various jurisdictional bases that are available in Europe. Bar associations have teamed together to help Ukrainian lawyers. If any of you are interested in those efforts, I'm happy to share them, and there are ways for American lawyers to participate both financially and legally. The ICC, as much as Judge Sofaer has pointed out, as much as its record, it's not a particularly successful one, has just opened an investigation. It was just announced three days ago into the Russian invasion of Ukraine, which I take is good news, even if only symbolic.

And lawyers' groups around the world are considering additional legal action that could be taken in international courts, trying to overcome some of these problems that I think Mark and Patrick both alluded to. But what can we do, given the time? I just want to tick through 10 possible roles we can play, and by "we" I mean the arbitration community internationally, but with the California arbitration immunity playing a really important role.

I think the first one, and the most necessary one right now, is advocacy. If we're going to have statutes that need to be enacted in the United States and around the world that will allow this kind of process to go forward and the collection of funds, we're going to need advocacy. This is going to be a political issue, and if the arbitration community can come together in favor of this and legitimize it, I think that would be an extraordinary contribution to moving this forward. When I asked Patrick a few days ago what the most important thing we can do is, he said,

"Advocate on our behalf, on behalf of this process." I think that is something the California arbitration group could start doing, day one, today.

The registry, number two. We can assist with that registry in The Hague. We have done this before. Many arbitrators and the arbitration council are familiar with the various processes for dealing with mass claims, for dealing with huge numbers of claims, and trying to collect evidence, collate that evidence, organize them into some kind of usable fashion, and retain them in a way that can be used in court proceedings or in any kind of claims proceeding. That can be, as Patrick mentioned, enhanced by the use of AI. Now, there are new ways. We heard yesterday about the risks and dangers of AI, but there are benefits, and I think dealing with this kind of these kinds of amounts of claims and complexity could really benefit from AI, and I think it's something the U.S. arbitration community could bring to the table.

I think we could play a huge role as consultants or advisors to the structure that Patrick and Markiyani are talking about. Who are the clients? Who will be the eligible claimants? How do we look at the various ways arbitrators and the arbitration community deal with class actions and other types of litigation where you have to make these kinds of very difficult judgment calls? Will they be spatial? Is it just people in Ukraine, or is it people in Ukraine or Ukrainians who have left Ukraine? Is it non-Ukrainians who have been damaged? And there have been millions of people who have been hurt in many ways, apart from Ukrainians. Is it individuals or is it collective? Is it towns, governments, or each individual person whose home was destroyed, who lost a relative, whose career was destroyed, or who lost a business? Is there going to be a citizenship requirement? What about soldiers? What about Ukrainian soldiers who were killed in the course of battle? Do they count, or are they just considered collateral damage because they're in the military? That has been an issue that has come up in other claims processes and will come up here. Do you exclude the Ukrainians who collaborated with the Russians? Unfortunately, we know that has happened with respect to some citizens of Ukraine who have collaborated with the Russians, many of them originally from Russia. Do we exclude them from this process, or if they were injured, are they included? That has been an issue that has come up in many claims processes as well.

Who are the defendants? Is it Russia, government officials, individual soldiers who fought for Russia, or companies that supported the Russian government? For example, Wagner, the mercenary group who probably caused the most damage, are they potential targets of these reparations processes? And what about other countries such as Belarus who have supported the Russians in this? What's the burden of proof going to be? Are you going to impose a burden of proof on a person whose home was destroyed and has lost all of their records? How do you deal with that? It is something arbitrators have dealt with in many types of litigation we have handled.

What types of claims? Personal injury, kidnapping, displacement, mental injury, and trauma, infrastructure damage, environmental damage. The environment right now in Ukraine is disastrous in terms of pollution and danger to the population. Disruption to food, health, safety, schools have been obliterated. There's no educational process or education available for many

Ukrainian children. Separated families, destroyed careers. All of these things have to be considered. Will they fit into a reparations process?

Types of damages: direct, consequential, causation. How tight does the causation have to be? What are you going to have to prove in order to establish that it was caused by the Russian hostilities, by the Russian invasion?

Priority of claims, who comes first? In many claims processes, there have been priorities given to children, the elderly, widows, various groups, and amputees, starting with people who have been killed. How do you categorize those claims? And what about the kind of funds you get from Russian assets frozen in the United States? Are those earmarked for some particular type of claim in Ukraine, or does it all go into a general pot available for payment to everyone? I think probably yes, but these are all issues where I think the arbitration community could help advise a process like the one Patrick and Markiyan are putting in place right now.

We could play a role in helping the commission either evaluate claims beforehand so that the commission is not faced with literally millions of claims in the first instance, or we could evaluate types of claims and help adjudicate them, subject to review and approval by whatever this commission structure might be. There is no way that a commission of 20 people, let's say, if they set up a commission of 20 prominent people from around the world, is going to be able to review and analyze the millions of claims, even if they're categorized, that are going to come before it.

Role as case evaluators beforehand, role as decision-makers during the process. Five, can the claimants have advisors? Are they going to have lawyers when they go in? Are Ukrainian widows whose husbands were killed, houses destroyed, children killed, what are they going to do in front of a claims process? I want to be with her. Okay, that's the bottom line. I want to be at her side when she is facing this process, trying to serve her claim, and I suspect the arbitral community around the world will want to do the same thing.

What about making sure that defendants, and it might just be Russia, but what if it's a broader group, do we need to do something about representing them or looking out for their due process rights? You know, that's a huge issue for the ICC. There's a whole ICC defense bar, very controversial because we're spending a lot of money defending the people. It's one of the reasons I think it's just so fair that so much money has been spent for so little results. A lot of the money is going to the representation of the defendants. Could we provide an oversight role of this commission? Because if the United States is going to enact legislation to put monies seized from Russian assets, for example, into this process, don't we need a process to make sure that whatever the commission is doing is meeting requirements of fairness and justice, and that the money is going to the right place?

Could we play a role in oversight after the fact, external to the project? There are all kinds of third-party claims that can be, and frankly are being, brought against Russia. There are companies that were investors in Ukraine and have been bringing claims. Some of these are

arbitrating claims. There may also be U.S. litigation by Russians challenging the use of their funds for this process. Somebody's going to have to handle those cases, and I think the arbitral community could play a role in that as well.

What about U.S. companies that are, I think you alluded to this, seeking fair retribution against U.S. assets? That is going to happen, I think, whatever we do in terms of reparations. There is going to be an effort by Russia and perhaps its allies to bring retribution against multinational companies and assets around the world, and somebody's going to need to be involved in providing parameters for how those cases are handled. Some of those may be arbitral cases.

And finally, when you read reparations literature, it is really one of the critical points that reparations is to compensate victims, but it is not the end of the story. It's not a truth commission. That is a separate process that perhaps can and should happen here. It doesn't impose criminal responsibility, and you alluded to that as your last point. Couldn't agree more. There may need to be other processes here, if not before the ICC, somewhere to bring true accountability, true reconciliation, truth commissions that are separate from the reparations process. I think the arbitral community could play a huge role in that process.

So, if you counted, those were 10. I have about 10 more, but I'll stop there. I thank you for listening. Thanks, Jerry. That's really interesting. There's a huge role for all of us to play. If I could bring in Patrick and engage Jerry in a discussion of really what, given the timeline, a lot of what Jerry's points are sort of dovetail off to the back end of what's going to be involved, but let's talk about the here and now for the next year or so. What are the top three things that we in the legal community can be doing to assist you, Patrick, in your endeavors?

Well, I mean, the first, we made a very strategic choice in consultation with the president's office to start to roll this out as much as possible to the practitioners, primarily because the thing that we need most, in addition to your vocal support if you believe in it, is exactly what Judge Sofaer did, which is identify and crystallize all of the challenges. To the extent we don't already know them, and then say, "Okay, now we need to figure out how to react to those challenges, whether they can be overcome, whether they need to be augmented, whether we need to find ways to augment what we're doing in order to take account of a challenge.

So, in addition to vocal support, the thing that everyone could be doing is taking a very critical eye on this. The kind of 10 points that Jerry just provided are some of which I thought of, others I hadn't, and that process needs to continue. We, as a community of lawyers, need to have these robust discussions because the concept of how justice is administered in this context is one for all of us. So, that's the point. Those are the two things: one is vocal support if you believe in it, and two is to do exactly what Judge Sofaer and others have done, which is to think through some of the challenges with us. And then, the third thing, and this is probably more like 2.5, is to be as creative as possible. One significant advantage that arbitration practitioners have over those who are pure U.S. court litigators is that arbitration is generally a species of contract and mutual agreement. As a result, we have an innate talent for creating dispute resolution mechanisms and being creative when we see problems. And I think that's really important, a

role that arbitration practitioners can play in the infancy of this process, which we still are very much in.

So, creativity, identify challenges as you see them, and support it in concept. Those are the three things.

Great, I know we're running out of time here. I apologize. We can open it up for questions before I thank our panelists. It just came to me that I'd like to keep this conversation going. I would like to provide a medium by which people can participate. We will be the interface with Patrick and his group. I'm going to create an email, ukraine@fedarb.com, which is my company that I'm the CEO of. Then, Patrick, I will collect that, and we can use that as a process by which we can forward information, keep people updated in terms of what's happening, if their advocacy efforts. We can use that as a medium to tell people what's been happening and to reach out to their representatives and what have you. So, ukraine@fedarb.com, and maybe we can use that as a tip of the spear in terms of getting the California community pointed your way and being resourceful. Let me thank all of our panelists, Markiyan, Patrick, Judge Sofaer, Jerry, for your incredible insights. I think this is very, very helpful.

Join me in thanking your panelists and then also, uh, my yearly book was this book. I have some extra copies of it if anyone wants. It's a fascinating story of the ambassador to Ukraine who was there and was let go by Donald Trump. So I have some extra copies here for anyone who wants those copies. Thank you, everyone.