

Collecting Claims and Evidence of Damage by Russia's Invasion of Ukraine

Introduction

In February 2022, the Russian Federation (Russia) launched a full-scale invasion of Ukraine, an act of aggression in violation of basic mandates in the UN Charter. Russia since then has credibly been alleged to have committed numerous grave breaches of the 1949 Geneva Conventions on the protection of victims of war, numerous grave breaches of Additional Protocol I to those Conventions, breaches of the 1954 Hague Cultural Property Convention, and other war crimes and crimes against humanity.

Russia has state responsibility for the damage caused by any such internationally wrongful acts and is obligated to make full reparation for the injury it has caused. With the war still in progress, it is not possible at this date to have a final assessment of the damage. Moreover, since Russia is a permanent member and has a veto on the UN Security Council, it is not possible to set up a mandatory claims process (as was done in 1991 for claims against Iraq stemming from its unlawful invasion of Kuwait).

Therefore, inspired by the model of the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD), on May 12, 2023, the Council of Europe established, by an Enlarged Partial Agreement, the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine (the Register). This *Insight* reviews the background leading to creation of the Register and some of its main features.

The Damage Caused by Russia's Unlawful Acts

Article 2 of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state,¹ and Russia's invasion of Ukraine was in clear violation of that provision.² Further, reports of UN fact-finding bodies, non-governmental organizations, and the world media indicate that the Russian armed forces and allied private military forces are engaged in attacks decimating cities, towns, and villages of Ukraine, targeting civilian populations, institutions, buildings, and property, killing thousands of civilians, and deporting civilian residents of Ukraine to the territory of Russia.³ Under the 1949 Geneva Conventions⁴ and the 1977 Additional Protocol I thereto,⁵ to all of which Russia is a party, Russia is obligated not to make civilians or civilian objects the object of attack and to distinguish between civilians and civilian objects on the one hand and military objectives on the other.⁶

There are other relevant, binding law of war obligations for which there are also widespread and credible reports that Russia is violating. For example, under Article 25 of the regulations annexed to the Fourth Hague Convention of 1907, "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."⁷ Russia is reported to be violating the restrictions on the use of mines, booby-traps and other devices set out in Protocol II to the Convention on Conventional Weapons.⁸ In addition, Article 53 of 1977 Protocol I prohibits "any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."⁹

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The Need for an International Claims Collection Mechanism

Ukraine, many countries, and many non-governmental organizations are in the process of collecting evidence of the damage caused by Russia's unlawful acts. Unfortunately, Russia has refused to cooperate in fact-finding.¹²

Many observers interested in accountability initially suggested the creation of a claims commission to adjudicate claims against Russia and a compensation fund for payment of such claims.¹³ For example, the Iran-United States Claims Tribunal established by the Algiers Accords¹⁴ and the United Nations Compensation Commission¹⁵ were cited as ways the claims problem could be approached. However, it appears clear that, at least at present, Russia would not be willing to negotiate an agreement establishing a tribunal and that Russia would veto any effort in the UN Security Council to establish a UN compensation commission. In any event, with the war still in progress and damage still

mounting, and with the way in which the war would be concluded remaining unclear, it seemed premature to pursue such options.

Thus, the focus turned to establishing a unified international mechanism for collecting claims and evidence of the damage caused. UNRoD was an example of such a mechanism. It was created in 2007 by the Tenth Emergency Special Session of the UN General Assembly,¹⁶ following which it established eligibility criteria for the registration of claims and continues to this day to receive such claims.¹⁷

On November 14, 2022, the Eleventh Emergency Special Session of the General Assembly recommended “the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering.”¹⁸ The American Bar Association also called for the establishment of such a mechanism.¹⁹

Creation of the Register

The Register was established, with its seat in The Hague, by an agreement among members of the Council of Europe and the European Union that was signed during the Council of Europe Summit in Reykjavik, Iceland, on May 12, 2023, and entered into force on May 16, 2023 (the Enlarged Partial Agreement).²⁰ The United States expressed its intention to join the Enlarged Partial Agreement on May 15, 2023.²¹ On May 17, 2023, the 44 participating countries and the Council of Europe publicly announced the establishment of the Register.²²

The Enlarged Partial Agreement established the Register’s statute in an appendix.²³ Under the statute, only claims for damage caused on or after February 24, 2022, within the territory of Ukraine, by Russia’s internationally wrongful acts in or against Ukraine, are eligible for the Register.²⁴ The Registry has a seven-member Board, whose functions include making the ultimate decision on the registration of claims and proposing rules and regulations to the Conference of Participants.²⁵ The Registry’s Executive Director is responsible for overseeing and administering the work of the secretariat and forwarding claims to the Board for approval for recording in the Register.²⁶

On June 27, 2023, the Conference of Participants in the Register met and elected the Permanent Representative of the United Kingdom to the Council of Europe, Sandy Moss,

as Chair, and elected the Permanent Representative of the Netherlands to the Council of Europe, Tanja Gonggrijp, and Emil Ruffer, Director of the International Law Department, Ministry of Foreign Affairs of the Czech Republic, as Vice-Chairs; it also designated Markiyanyan Kliuchkovskyi, who had been Advisor to the Office of the President of Ukraine and was instrumental in the development of the Register, as its Executive Director.²⁷ On July 17, 2023, the signing of a host state agreement between the Council of Europe and The Netherlands was announced.²⁸

A Future Compensation Mechanism?

A future claims mechanism is yet to be designed. Article 14 of the Register's statute envisages transfer of the work of the Register to such a mechanism. The collection and preservation of claims and evidence by the Register will contribute to the success of such a mechanism and is an important step.

On May 19, 2023, the G7 Leaders' Statement on Ukraine welcomed the creation of the Register and, keeping in mind the need for a potential future compensation fund, stated:

[W]e will continue to take measures available within our domestic frameworks to find, restrain, freeze, seize, and, where appropriate, confiscate or forfeit the assets of those individuals and entities that have been sanctioned in connection with Russia's aggression. We are taking steps to fully map holdings of Russia's sovereign assets immobilized in our jurisdictions. We reaffirm that, consistent with our respective legal systems, Russia's sovereign assets in our jurisdictions will remain immobilized until Russia pays for the damage it has caused to Ukraine.²⁹

Recognizing that it was not possible at present to establish a claims adjudication and payment mechanism right away, Article 2.5 of the statute of the Register states:

The work of the Register, including its digital platform with all data about claims and evidence recorded therein, is intended to constitute the first component of a future international compensation mechanism to be established by a separate international instrument in co-operation with Ukraine (hereinafter "a Compensation Mechanism"). The exact form of a future Compensation Mechanism is to be determined, but may include a claims commission and compensation fund mandated to examine and adjudicate claims and/or pay compensation for damage, loss or injury caused by the Russian Federation's internationally wrongful acts in or against Ukraine. The Register, through its Executive Director and with the support of its Secretariat, shall participate in and facilitate, as appropriate, the work

aimed at the establishment of such a Compensation Mechanism, and take the necessary steps to prepare for the Register to be transferred to a Compensation Mechanism in accordance with this Statute.

The parameters of such a mechanism will depend on the outcome of the current conflict, what Russia's ultimate role is, and the ability of the states participating in the Register to negotiate how the claims registered should be adjudicated and what the source of funding should be. At this point, it is not possible to predict what the outcome might be.

About the Author

Ronald Bettauer is a former State Department Deputy Legal Adviser and was a member of the Board of UNRoD. He is currently a visiting scholar at George Washington University Law School.

¹ 59 Stat. 1031; TS 993; 3 Bevans 1153 (1945).

² See G.A. Res. ES-11/1 (Mar. 18, 2022), <http://www.undocs.org/en/A/RES/ES-11/1> (stating that it “*Deplores in the strongest terms* the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter”) (emphasis original). The resolution was adopted by a vote of 141 in favor, 5 against, with 35 abstentions. See <https://press.un.org/en/2022/ga12407.doc.htm>.

³ See, e.g., Report of the Independent International Commission of Inquiry on Ukraine, U.N. Doc. A/77/533 (Oct. 18, 2022), <https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf>.

⁴ See, e.g., Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>. Russia became a party on May 10, 1954. Ukraine became a party on August 3, 1954.

⁵ Additional Protocol I to the Geneva Conventions of Aug. 12, 1949, art. 48, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>. Russia became a party on September 29, 1989. Ukraine became a party on January 25, 1990.

⁶ For a discussion of the obligation to distinguish civilians and civilian objects from military objectives, see sections 4.2.1, 5.3.2 and 5.6 of the Department of Defense 2015 Law of War Manual, https://dod.defense.gov/Portals/1/Documents/law_war_manual15.pdf.

⁷ See <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907>.

⁸ See Protocol II at <https://ihl-databases.icrc.org/en/ihl-treaties/ccw-protocol-ii-1980?activeTab=default>. The text of the Convention in full is available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=7A690F9945FF9ABFC12563CD002D6D8E&action=openDocument>.

⁹ See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D76C3391F1A412C5C12563CD0051DCEB>. In addition to the protection of cultural objects under Article 53 of Protocol I, they are protected under the 1954 Convention for the Protection of Cultural Property in the Event of Armed

Conflict, <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention>. See, ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT (2006).

¹⁰ Damage estimates have varied widely. The World Bank in March 2023 estimated reconstruction costs at \$411 billion, <https://www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment>. In September 2022, Ukraine is reported to have estimated the direct and indirect damages at \$1 trillion, <https://www.wionews.com/world/russian-invasion-has-caused-1-trillion-worth-of-damage-to-ukraine-report-518716>. The World Bank estimate does not appear to include compensation to individuals for death, and other losses as a result of internationally wrongful acts and it is unclear whether the Ukrainian estimate does.

¹¹ See Draft Article on the Responsibility of States for Internationally Wrongful Act, International Law Commission, 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. The relevant provisions are generally considered to be customary international law. See, Rules 149 and 150, ICRC Customary International Law Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule149 and https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule150.

¹² Russia withdrew its declaration accepting participation in the International Humanitarian Fact Finding Commission established under article 90 of Protocol I. See <https://www.ihffc.org/index.asp?Language=EN&page=home>. Over 75 states are bound, https://www.ihffc.org/index.asp?Language=EN&page=statesparties_list, but Russia, which had submitted a declaration under article 90 in 1989, withdrew it in 2019, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/RU>.

¹³ See, e.g., Elisenda Calvet-Martinez, *Options for a Peace Settlement for Ukraine: Option Paper XIV – Transitional Justice in a Settlement to End the Conflict between Ukraine and Russia*, OPINIO JURIS (Aug. 11, 2022), <http://opiniojuris.org/2022/08/11/options-for-a-peace-settlement-for-ukraine-option-paper-xiv-transitional-justice-in-a-settlement-to-end-the-conflict-between-ukraine-and-russia/>; Oleksandr Vodiannikov, *Compensation Mechanism for Ukraine: An Option for Multilateral Action*, OPINIO JURIS (May 13, 2022), <http://opiniojuris.org/2022/05/13/compensation-mechanism-for-ukraine-an-option-for-multilateral-action/>; Chiara Giorgetti, Markiyani Kliuchkovsky, and Patrick Pearsall, *Launching an International Claims Commission for Ukraine*, JUST SECURITY (May 20, 2022), <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>; Laurie Blank, *War Reparations for Ukraine: Key Issues*, JUST SECURITY (May 2, 2022), <https://www.justsecurity.org/81341/war-reparations-for-ukraine-key-issues/>.

¹⁴ See <https://iusct.com/>.

¹⁵ See <https://uncc.ch/home>.

¹⁶ See G.A. Res. ES-10/17 (Jan. 24, 2007), <https://undocs.org/en/A/RES/ES-10/17>. See also www.unrod.org.

¹⁷ See Article 11 of UNRoD's Rules and Regulations, <https://www.unrod.org/docs/Rules.pdf>.

¹⁸ G.A. Res. ES-11/5 (Nov. 15, 2022), <http://www.undocs.org/en/A/RES/ES-11/5>.

¹⁹ See 2023 Mid-year Resolution 506, fourth resolved clause and pages 14-15 of the report, <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2023/506-midyear-2023.pdf>. A few of the points made in the report are similar to points made in this *Insight*.

²⁰ Resolution CM/Res(2023)3, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab2595. The resolution entered into force on May 16, 2023, <https://rm.coe.int/0900001680ab2591>.

²¹ Media Note, U.S. Mission to the U.N., Ambassador Linda Thomas-Greenfield Announces U.S. to Join Council of Europe's Register of Damage for Ukraine (May 15, 2023), <https://usun.usmission.gov/media-note-ambassador-linda-thomas-greenfield-announces-united-states-to-join-council-of-europes-register-of-damage-for-ukraine/>.

²² Press Release, Council of Europe, Council of Europe Summit creates register for damage for Ukraine as first step towards an international compensation mechanism for victims of Russian aggression (May 17, 2023), <https://www.coe.int/en/web/portal/-/council-of-europe-summit-creates-register-of-damage-for-ukraine-as-first-step-towards-an-international-compensation-mechanism-for-victims-of-russian-aggression>. Though it may seem that the United Nations would be the most appropriate body to host the Register, UNRoD's UN secretariat had refused to carry out instructions of its three-member Board, and thus the UN may not have been considered suitable. See <https://drive.google.com/file/d/1aX7O1D39fXfyU8zpSs2CqQ09Qch6X8nH/view?usp=sharing>.

²³ The Register's Statute is contained in Resolution CM/Res(2023)3, *supra* note 20.

²⁴ Statute of the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine, Appendix to Resolution CM/Res(2023)3, *id.*, ¶ 2.2.

²⁵ *Id.* ¶ 6.5.

²⁶ See also [Chiara Giorgetti](#) and [Patrick Pearsall](#), *A Significant New Step in the Creation of An International Compensation Mechanism for Ukraine*, JUST SECURITY (July 27, 2023), <https://www.justsecurity.org/87395/significant-step-in-creation-of-international-compensation-mechanism-for-ukraine/>, for a more complete description of the structure of the Register.

²⁷ Press Release, Council of Europe, The Conference of Participants of the Register of damage caused by Russia's aggression against Ukraine holds its first meeting (June 27, 2023), <https://www.coe.int/en/web/portal/-/the-conference-of-participants-of-the-register-of-damage-caused-by-russia-s-aggression-against-ukraine-holds-its-first-meeting>.

²⁸ Press Release, Council of Europe, Seat of Register of Damage: Secretary General signs agreement with the Netherlands (July 17, 2023), <https://www.coe.int/en/web/kyiv/-/seat-of-register-of-damage-secretary-general-signs-agreement-with-the-netherlands>. The text of the agreement is available at <https://rm.coe.int/0900001680abde04>.

²⁹ G7 Leaders' Statement on Ukraine, § 8, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/>. The fifth resolved clause of ABA resolution 506, cited note 19, recommended that Russia's assets continue to be frozen pending claims resolution.