

10 May 2023

Volume 12, Issue 3

Establishment of the Registry of Damage: The first element in ensuring Russia's financial accountability for the aggression against Ukraine

[Aleksandra Meżykowska](#)

Polish Academy of Sciences



Image by John Tewell (cc)

It is a principle of international law that a breach of an international obligation requires reparation in an adequate form.¹ This principle has been extensively applied in recent decades in the practice of States, international organisations, and in the case-law of international bodies, in order to recompense damage inflicted upon States and individuals during armed conflicts.

The norms of international law and international practice do not contain detailed guidelines or standards on how this responsibility should be implemented. The current practice reveals differences in the scope of reparations, as well as the rules and principles that are followed to make the determinations. This diversity has led to the inclusion of the topic of reparation to individuals in the programme of work of the International Law Commission with the aim of providing guidance to States in this field.²

The issue of enforcing financial responsibility for damage caused by the acts of unlawful States has become topical in connection with Russia's aggression against Ukraine. The present Reflection will concentrate on the establishment of a new international compensation mechanism aimed at providing

¹ The Case Concerning the Factory at Chorzow, Claim for Indemnity (1927) P.C.I.J. Series A, no. 9, 21.

² See, International Law Commission, Report of the work of seventy-first session (2019), Annex B, Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law, by Claudio Grossman Guiloff.

reparation for Ukraine and the Ukrainian people. It will discuss the emergence and evolution of the idea of creating the mechanism, the legal challenges ahead of its establishment, possible modalities, and the role of international organisations in its creation.

Emergence of the idea of a comprehensive compensation mechanism for Ukraine

The idea that Russia must pay for the devastation that it caused was not in the foreground of political statements at the beginning of the war, in contrast to the issue of accountability for international crimes.³ With the passage of time, when it became apparent that the war would not end quickly, the issue of establishing a mechanism by which Russia and its oligarchs have to compensate Ukraine for the damage and cover the costs of rebuilding the country attracted more international attention, especially in the Council of Europe (CoE) and the United Nations (UN).

Under visible pressure from Ukrainian authorities, references to the need to establish a compensatory mechanism began to appear explicitly in the documents adopted within the CoE during the second half of 2022. The Committee of Ministers (CM), the decision-making body of the CoE, initially only noted with interest the Ukrainian proposals and welcomed ongoing efforts by States to secure full reparations for the damage, losses or injuries caused by Russia's violations of international law in Ukraine.⁴ It was the Parliamentary Assembly (PACE), whose resolutions are however not binding, that went a step further and called on the States to set up a comprehensive international compensation mechanism, including an international register of damage, and to actively cooperate with the Ukrainian authorities on this issue.⁵

On 14 November 2022 the General Assembly of the United Nations (UNGA) adopted a resolution in which it recognized that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including any damage caused by such acts. The UNGA recognised the need for the establishment of an international mechanism for reparation for damage, loss or injury arising from the Russian Federation's internationally wrongful acts, and recommended the creation by Member States, in cooperation with Ukraine, of an international register of damage.

³ Discussions and actions in regard to ensuring Russia' accountability have been carried out in three areas: accountability for serious violations of international humanitarian law (realised through the proceedings before International Criminal Court, Ukrainian and other States national jurisdictions), accountability for crime of aggression (discussions about setting up a specialised court to investigate and prosecute Russia's crime of aggression) and accountability for material damage, loss and injury.

⁴ Committee of Ministers of the Council of Europe, **CM/Del/Dec(2022)1442/2.3**, '2.3 Consequences of the aggression of the Russian Federation against Ukraine – Accountability for international crimes', **15 September 2022**; Committee of Ministers of the Council of Europe, Reply to Recommendation: 'The Russian Federation's aggression against Ukraine: Ensuring accountability for serious violations of international humanitarian law and other international crimes', [Recommendation 2231 \(2022\)](#), Doc. 15645, 18 October 2022.

⁵ **Parliamentary Assembly of the Council of Europe, 'Further escalation in the Russian Federation's aggression against Ukraine', Resolution 2463 (2022), 13 October 2022.**

The register should “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”.⁶

Notwithstanding the objections raised by certain States opposing or abstaining from the adoption of the resolution⁷, the UNGA resolution marks a turning point in the discussions about Russia’s accountability for the inflicted damage, and it is a point of reference for further debate and concrete actions. It was adopted during the 11th Emergency Special Session called via the United Nations Security Council (UNSC) Resolution 2623/2022 applying the Uniting for Peace resolution and signals the UNGA’s willingness to be more involved in situations constituting a threat to international peace and security. Further, it has a comprehensive character and recommends the creation of the mechanism in direct words: it holds, applying the Articles on State Responsibility, that Russia must bear the consequences of its internationally wrongful acts, including by making reparations, and recalls relevant resolutions and activities which call for “adequate, effective and prompt reparations” to redress violations of international human rights law and humanitarian law.

The adoption of the resolution did not entail steps within the UN related to the realisation of the concept, which is understandable as the register was not meant to be part of the UN. The resolution only recommended the creation of such a register by member States. Thus, this situation can’t be compared with e.g. the United Nations Compensation Commission, created by UNSC resolution⁸, or the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (based on a resolution of the UNGA adopted following the advisory opinion of the International Court of Justice).⁹

Further development of the idea of establishing the mechanism was taken over by a regional organisation - the Council of Europe. From the beginning of Russia’s full-scale aggression against

⁶ UNGA, Furtherance of remedy and reparation for aggression against Ukraine, A/ES-11/L.6, Voting Summary: 94 in favour, 14 against, 73 abstentions.

⁷ Although the text was accepted by majority, the votes were much more divided than during the voting on resolutions condemning the aggression itself. Some delegations pointed out that the establishment of a compensation mechanism for Ukraine reveals the selective approach of UN Member States to violations of international law, given that in other cases of infringements they do not take such initiatives. Others opposed to the mechanism pointed out the lack of clarity on its composition and eventual legal status, see <https://press.un.org/en/2022/ga12470.doc.htm>.

⁸ United Nations Compensation Commission as created in 1991 as a subsidiary organ of the UNSC under its resolution 687 (1991) to process claims and pay compensation for losses and damage suffered as a direct result of Iraq’s unlawful invasion and occupation of Kuwait in 1990-1991.

⁹ United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD) was established in accordance with General Assembly resolution A/RES/ES-10/17 of 15 December 2006 following the issuance on 9 July 2004 by the International Court of Justice of the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

Ukraine, the CoE has taken decisive and multifaceted actions in response to that tragic event. The range of activities (material, financial, technical, and organisational support carried out as part of the current operations and in the framework of the dedicated Ukraine Action Plan “[Resilience, Recover and Reconstruction](#) 2023-2026”) is noteworthy, and there is also very good documentation and systematization of the activities on the organisation's website.¹⁰ Against the background of such extensive involvement of the organisation in providing support for Ukraine and the organisation's expertise in the field of human rights, the main organs of the organisation determined that the CoE should play a leading role in setting up and managing an international compensation mechanism, including an international register of damage.¹¹

Further, in its resolution of 26 January 2023, the PACE specified three desired features of the future mechanism: 1) It would be established by a multilateral treaty(s) or agreement(s), open to all like-minded States, with the support of the UN, CoE, EU, and other international organisations; 2) It would include as a first step a register of damage, which would create a record of evidence and claims on damage, loss or injury caused to all natural and legal persons in Ukraine, as well as the State of Ukraine, by violations of international law arising from the Russian Federation's aggression against Ukraine; 3) It would include at a later stage an international compensation commission, mandated to review and adjudicate the claims submitted and documented in the register, as well as a compensation fund. Operationalizing the concept presented by PACE, the CM and Secretary General of CoE proposed that the register be established on the basis of an enlarged partial agreement (EPA) concluded within the CoE.¹² Conceptual work on the relevant documents is underway.

¹⁰ The CoE has undertaken an information effort by creating a subpage on its website where all information on the activity of CoE bodies in relation to the ongoing conflict is posted on an ongoing basis, <https://www.coe.int/en/web/portal/war-in-ukraine>. The organisation's commitment to support Ukraine comes against the backdrop of its unprecedented move to exclude Russia from the CoE in accordance with Article 8 of the [Statute due to the](#) Russia's aggression being in flagrant contradiction with the common ideals and principles of member States of the CoE and in violation of international law. Committee of Ministers of the Council of Europe, CM/Del/Dec(2022)1428ter/2.3, 2.3. Consequences of the aggression of the Russian Federation against Ukraine. Procedure under Article 8 of the Statute.

¹¹ Parliamentary Assembly of the Council of Europe, 'Legal and human rights aspects of the Russian Federation's aggression against Ukraine', Resolution 2482 (2023), resolution of 26 January 2023, Secretary General, Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023)7, 31 January 2023.

¹² Committee of Ministers, [CM/Del/Dec\(2023\)1461/2.3](#), Consequences of the aggression of the Russian Federation against Ukraine - Proposal to establish an Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine. Partial (enlarged) agreements that can be concluded within the CoE are not international treaties but merely a particular form of co-operation within the organisation. Their construction allows Member States of CoE to abstain from participating in a certain activity advocated by other Member States and allows non-member States to take part in the agreement. From a statutory point of view, a partial agreement remains an activity of the organisation in the same way as other programme activities, except that a partial agreement has its own budget and working methods which are determined solely by the members of the partial agreement. Conditions that have to be met in order to set up a

From these discussions a clear picture emerges that a comprehensive compensation mechanism should include three components: a register of damage, an adjudicating body like an international claims commission, and a compensation fund. Given the complicated nature of the initiative as a whole and the fact that the relationship between the three components is not yet settled, the establishment of a register of damage is seen by many as the first step, which could be achieved in the foreseeable future.

Registry of damage – the first component of the compensation mechanism

There are numerous questions about the comprehensive compensation mechanism, two of which are of crucial importance: (i) who – *de facto* which international organisation – should play the leading role in setting up and supporting the functioning of the register?; (ii) how should the compensation mechanism be shaped?

The answer to the first question is rather simple. The establishment of the register is expected to take place during the Fourth Summit of Heads of State and Government of the Council of Europe (16-17 May 2023, Reykjavik), and the Netherlands has expressed its willingness to host the institution itself in The Hague.

However, given that the key decision on the registry was taken by the UNGA, will the establishment of the registry and the entire mechanism under the auspices of the CoE be beneficial? It seems so, for the following reasons.

Firstly, for pragmatic reasons. The CoE, although a regional organisation, offers cooperation opportunities that enable non-member States and international organisations to be involved in its work. One of the forms of cooperation are EPAs. That kind of cooperation is already familiar to current CoE observer States.¹³ Thus, interested non-European countries, especially US, Canada, Japan, and Australia may be easily involved in the creation of the register. Their involvement may dispel Ukraine's concerns that the war is losing its relevance as a conflict with global, not just regional, repercussions. Additionally, the majority of CoE members are simultaneously members of the European Union (EU). EU members, together with the remaining G7 countries and Australia, are most engaged in the process of sanctioning and freezing Russia's and Russian oligarchs' assets. Links between the EU

partial (enlarged) agreement are specified in the CM resolution **(51) 62 of 2.8.1951, Statutory Resolution (93)28** on partial and enlarged agreements of 14 May 1993, CM resolution (96) 36 establishing the criteria for partial and enlarged agreements of the Council of Europe of 17.10.1996, **Resolution CM/Res(2010)2 amending Resolution (96) 36 establishing the criteria for partial and enlarged agreements of the Council of Europe of 5 May 2010.**

¹³ Current observer States are the Holy See, the United States, Canada, Japan, and Mexico.

and the CoE resulting from overlapping membership will strengthen the capacity of the CoE in terms of the functioning of the mechanisms.

Secondly, for competence and experience reasons. The CoE has the necessary experience and organisational capacity to support the establishment of a new institution. Through supporting the creation of the mechanism, the organisation would fulfil its role as an international institution competent to take action in many areas of international law, including action with regard to respect for human rights and the international rule of law, and to ensure compliance with its principles. It will not be the first time that the organisation will take action through its institutions to deal with the consequences of armed conflicts taking place on the territory of its member States. The European Court of Human Rights (ECtHR), the main judicial body of the organisation entrusted with the task of monitoring States' compliance with basic human rights, has solid experience in examining cases related to damage caused in military conflicts. It has already ruled on several war-related cases and the CM has supervised the implementation of these judgments, thus both organs have the necessary knowledge and experience in this field.¹⁴

Thirdly, for maintaining coherence and a victim-centred approach. Linking the new institution with the CoE should ensure coherence with the actions that States have already undertaken within the framework of the organisation to hold Russia accountable, mainly through joining the inter-State proceedings before the ECtHR. The establishment of the mechanism with the support of the CoE would naturally imply the engagement of the ECtHR, because it has already been involved in the examination of individual and inter-State applications related to the war in Ukraine: a) in connection with the military activities of Russia that started in 2014¹⁵, and b) in connection with the current full-scale invasion. Therefore, in the future, it will be necessary to ensure coherence between the methods of adjudication of applications already submitted to the Court and submissions that will be made in the

¹⁴ Cyprus v. Turkey (appl. no. 25781/94), judgment of 10.05.2001; Chiragov and Others v. Armenia (appl. no. 13216/05), judgment of 16 June 2015, Sargsyan v. Azerbaijan (application no. 40167/06), judgment of 16.06.2015 (conflict between Armenia and Azerbaijan/Nagorno-Karabakh); Marguš v. Croatia (appl. no. 4455/10), judgment of 27.05.2014 (war in Croatia); Palić v. Bosnia and Herzegovina (appl. no. 4704/04), judgment of 15.02.2011 (war in Bosnia and Herzegovina); Isayeva, Yusupova and Bazayeva v. Russia (appl. nos. 57947/00, 57948/00 and 57949/00), judgment of 4.2.2005 (conflict in Chechnya); Georgia v. Russia (II) (appl. no. 38263/08), judgment of 21 January 2021. In the current discussions some arguments have been put forward that it would be relevant to take into account the experience of the International Criminal Court in the field of the fund operating there when creating the compensation mechanism. However, it should be emphasized that the ICC can only issue reparation orders against convicted individuals and not against States. This circumstance makes the ICC experience limited compared to that of the ECtHR. The forms and types of reparation are also limited in the ICC reparation system, with only 4 cases, see E. Salamon, J.-P. Perez-Leon-Acevedo, Reparations for victims of serious violations of international humanitarian law: New developments, *International Review of the Red Cross* (2022), 104 (919), pp. 1337 – 1338.

¹⁵ Admissibility decisions in the cases of Ukraine v. Russia (Re: Crimea) (appl. nos. 20958/14 and 38334/18), decision of 16 December 2020; Ukraine and the Netherlands v. Russia (appl. nos. 8019/16, 43800/14 and 28525/20), decision of 25 January 2023.

future to the register. It is worth remembering that, in resolution 2482 (2023), the PACE even made a suggestion that the rulings of the ECtHR in cases related to the current war be enforced through the new mechanism. Referring to the coherence argument, it would be desirable to ensure that the newly created mechanism provides for equal treatment of all claims, regardless of whether the applicant submitted the complaint to the ECtHR or only reported it to the register.¹⁶

Challenges for the future – claims commission and fund

The answer to the second question – concerning the shape of the comprehensive compensation mechanism – is much more complicated and involves numerous perspectives.

A decision has to be taken about the legal form of each of the components of the mechanism and the relations between them. The register is meant to be the first element of the mechanism. Its mandate shall encompass gathering of evidence and claims information on damage, loss, and injury (according to the UNGA resolution). Considering that its functions are meant to concentrate on the collection of data, it seems sufficient to use the EPA as the basis for its creation. Bearing in mind that the conflict is still ongoing, States should ensure that the agreement creating the register is as general as possible, which will facilitate the adoption of flexible internal rules and procedures for registering and processing the submissions and for future inclusion/linking of the register to the comprehensive mechanism. As far as the creation of the claims commission and the fund are concerned, the EPA will not be a sufficient basis. These bodies will be entrusted with powers to issue and implement decisions imposing obligations upon interested parties, mainly Russia. International claims mechanism are generally created by a binding international instrument: a resolution of the SC (Iraq - Kuwait) or an international agreement (Ethiopia - Eritrea).¹⁷ The position that the mechanism must be based on a binding instrument is additionally confirmed by the fact that, with regard to the Palestinian claims, the UNGA by its resolution was able to establish only a register of claims and not the entire compensation mechanism.

The documents establishing the register should specify the currently rather unclear nature of the submissions. By using the expression “information claims on damage, loss, and injury”, the international documents seem to suggest that the submissions will contain not only evidence but also claims. This is a somewhat unclear situation, because the possibility of submitting claims should be

¹⁶ This problem occurs to a much lesser extent in relation to individual communications submitted against Russia to the Human Rights Committee (HRC), mainly due to their very small number. The Committee registered 1 communication against Russia in 2021 and 7 in 2022 (all concerning the removal of the applicant from one prison in Crimea to another) compared to 8,500 applications to the ECtHR against Russia pending at the end of 2022.

¹⁷ The Eritrea-Ethiopia Claims Commission was established under Article 5 of the “Algiers Agreement” (12 December 2000) between Ethiopia and Eritrea.

conditional on indicating not only the factual circumstances but also the legal basis of the claims. In the current legal situation, such a legal basis cannot be unequivocally stated, apart from the general statement that reported damage undoubtedly results from, among others, violations of international humanitarian law or the ECHR. Thus, a preferable solution – at this stage of establishment of the mechanism – would be to entrust the register with competences concentrated on gathering evidence and information. Further, it would be advisable to adopt procedures enabling future complainants to supplement their submission if the situation changes with the passage of time.

It is necessary to decide on the relation between the submissions to the register and complaints or proceedings conducted by other international bodies and courts involving the issue of reparation in connection with the Russian aggression (e.g. ECtHR, International Criminal Court, Human Rights Committee), mainly to avoid duplication of complaints and awards. It could be assumed that each of the bodies to which the complaints were submitted makes its own decision regarding the admissibility and recognition of the claims, while the amounts of reparation are awarded and paid only under the compensation mechanism. The adoption of such an approach would solve the problem of Russia's non-compliance – formally from 1 January 2023 - with ECtHR judgments (at the end of 2022 there were 8,500 applications against Russia still pending before the ECtHR, many of them concerning the consequences of the aggression).

Decisions must be made about the types of damage that are eligible to be reported. Documents and statements adopted by UN and CoE organs refer generally to “reparation for damage, loss, or injury” which can be interpreted as embracing all kinds of harm: property damage (violations of the right to property of natural and legal persons) and also damage resulting from violations of other rights, both of material and non-material character (victims of displacement, war crimes, conflict-related sexual violence, personal injury, or death). Given the extent of the losses caused by the aggression, preference should be given to a solution that covers all kinds of damage.

The initial eligibility criteria for making the entries in the register should be not restrictive: there should be no time limits, simple forms, the group of persons and entities eligible to make submissions should be wide and should include all natural and legal persons in Ukraine as well as the State of Ukraine and its entities.

As far as the efficiency of the functioning of the register is concerned, it has to be decided how the current online application of the Ukrainian government collecting, on an ongoing basis, information about the destruction suffered by the inhabitants of Ukraine due to the invasion will be linked with the register.¹⁸ The same concerns all other platforms dedicated to gathering evidence.

¹⁸ <https://visitukraine.today/blog/249/how-to-file-a-claim-for-damaged-property-during-the-war>.

Finally, the funding should be guaranteed. Current debates reveal that there are two potential sources of financing: 1) by using (re-investing) assets of Russia and related entities that were seized by States in the framework of the sanction regimes¹⁹; 2) by direct contributions by Russia, which is currently unrealistic. Assuring financing of the fund would be of critical importance to the success of the entire project.

Conclusions

The imminent Reykjavik summit will be an excellent occasion to announce the creation of the register. However, more intense debates are needed regarding the creation and functioning of the whole comprehensive compensation mechanism. The establishment of this new institution is a major challenge for the international community and an important element in shaping the practice of States in the field of reparations to individuals, legal entities, and States. The discussed mechanism will be innovative in several respects, e.g. in its legal basis and financing. Its creation will be also a challenge for the CoE because the organisation, unlike the UN, has not previously dealt with such mechanisms.

¹⁹ Council of the European Union, 6282/23, Ad hoc Working Party on the use of frozen and immobilised assets to support Ukraine's reconstruction: establishment and mandate – Approval. Similar discussions as in the EU, about exploring options aimed at using frozen assets for the reconstruction of Ukraine have been conducted in UK, US and Canada.

Cite as: Aleksandra Mężykowska, 'Establishment of the Registry of Damage: The first element in ensuring Russia's financial accountability for the aggression against Ukraine', ESIL Reflections 12:3 (2023). © 2023. *This work is licensed under a [CC BY-NC-ND 4.0 licence](#).*