

LEGAL LIABILITY AND REPARATION MECHANISMS

PRESENTATION TO THE EPL CONFERENCE ON
IMPACTS OF THE HOSTILITIES IN UKRAINE ON THE
ENVIRONMENT AND HUMAN RIGHTS: CIVILIZATIONAL
CHALLENGES FOR HUMANITY

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OUTLINE

- **Scope and Documentation of Environmental Damage**
 - Environmental Damage Caused
 - Documentation & Impact on Legal & Reparation Processes
- **Applicable International Laws**
 - Overarching Principles and Customary Rules
 - Geneva Conventions (Additional Protocol I)
 - Violations of Fundamental Human Rights
- **Legal and Reparation Mechanisms**
 - Agreements and Commissions
 - Litigation & Sanctions
 - Permanent Mechanisms
 - Ad Hoc Mechanisms



SCOPE AND DOCUMENTATION OF ENVIRONMENTAL DAMAGE

ENVIRONMENTAL DAMAGE CAUSED

- **Oil Depots & Oil and Gas Complexes**
 - 3 Oil Depots causing an estimated UAH of 225 million alone (9.8 million CAD; 7.6 USD)
 - Damage to Oil and Gas Complex - estimated UAH 140 Million
- **Groundwater & Soil Impacts**
 - Heavy Metal Contamination , among other forms of contamination
 - Release of asbestos and other chemicals
 - Expected pollution to last 4 years or longer
 - Estimated total losses UAH 370 Million
- **Water Facilities**
 - Freshwater Intake, Purification, Supply, Sewage Treatment Facilities Damaged
- **Nuclear Power Plants**
 - Zaporizhzhya Nuclear Power Plant
 - Ukraine has made a public call to the International Atomic Energy Agency to assist Ukraine in withdrawal of Russian Troops and stop shelling of Ukraine with missiles that could lead to planetary catastrophe
- **Other Plants**
 - Thermal Power Plant, Solar Power Plants, Ammonia Pipeline damage caused 250 tons of ammonia to leak in a 4 km radius, Azot Plant shelling lead to nitric acid leaks (can lead to acid rains, etc), Hydroelectric plant damage
- **Wildfire Reserves and Protected Areas**
 - Flooding to Nova Kakhovka, local park
 - Damage to Kakhovka reservoir will threat the Kherson and Dnipro floodplains, a unique protected area
 - Shelling by Kinburn Spit, a unique protected area
- **Black and Azov Seas**
 - Attacking ships at anchor has resulted in the spread of toxins into the seas
- **Forests**
 - Forest Fires
 - At least 350 Hectares of Wildfires impacted
 - Destruction of Carbon Sinks

Sources:

Louise Guillot, "How Ukraine Wants to make Russia pay for war's environmental damage" (14 June 2022) *Politico*, online: *Politico* <<https://www.politico.eu/article/how-ukraine-want-make-russia-pay-for-war-environmental-damage/>>

Ministry of Energy and Environment Protection of Ukraine, "Briefing on the environmental damage caused by the Russia's war of aggression against Ukraine (26 May - 1 June 2022)," 3 June 2022, online: <<https://mepr.gov.ua/en/news/39252.html>>.

Environmental Protection Agency, "Environmental Impacts of the Russian Invasion of Ukraine," (2022), p. 10.

Documentation & Impact on Legal & Reparation Processes

“Probably one of the most environmentally documented conflicts in history”

- Doug Weir, Research and Policy Director at the Conflict and Environment Observatory

Ukrainian Government Mobile App EcoZagroza (Environmental Threat)

- People can upload pictures and videos of environmental damage
- Displays statistics on information about radiation levels, air quality, and indicators of environmental health

Ecological Inspectorate of Ukraine Special Task Force

- Collecting Evidence of Environmental Damages (pictures, videos, satellite imaging, sample collections, travel to polluted areas)
- Estimated 257 Instances of Environmental Crime
- Estimated Damage 204 Billion Hryvnia (€6.6 billion Euro; 8.9 Billion Canadian Dollars; 6.9 USD)

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APPLICABLE INTERNATIONAL LAWS

OVERARCHING PRINCIPLES & CUSTOMARY RULES

- Principle of Intergenerational Equity
- Precautionary Principle
 - Proportionality
- State Sovereignty Over Natural Resources
 - UNGA Res 1803 at 15
- Obligation for States to Avoid Causing Environmental Damage Beyond their Borders
 - UNGA Res 1803 at 15 para 5, 7
 - 1972 Stockholm Declaration - Principle 21 (UNGA Res 2996 (XXVII))
- Obligation for States to Respect the Environment in General
- Right to a Healthy Natural Environment
- Humanitarian Law

Sources:

Kirsten Stefanik, *The Environment and Armed Conflict*,

Antoine Bouvier in “Protection of the natural environment in time of armed conflict” (1991) 285 *International Review of the Red Cross* at 1, online: *International Committee of the Red Cross* <<https://www.icrc.org/en/doc/resources/documents/article/other/57jmau.htm>> also at <<http://nalsarpro.org/Portals/23/Courses/IHL/Modules/IHL%20Module%20III%20-%20Limitations%20on%20Means%20and%20Methods%20of%20Warfare.pdf?ver=2018-07-12-192053-813>>.

Franz Xaver Perrez, “The Relationship between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental damage” (1996) 3 *Environmental Law* (Hein Online).

GENEVA CONVENTIONS (ADDITIONAL PROTOCOL I)

- “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment” (Art. 35(3))
- “Any method or means of warfare which are planned to cause, or may be expected (albeit without the intention) to cause serious damage to the natural environment, even if this effect is incidental, are prohibited.” (Art. 55(1))
- “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces” (Art. 91)

VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

- Protected by the Universal Declaration of Human Rights and/or the First Optional Protocol to the International Covenant on Civil and Political Rights ('ICCPR')



LEGAL & REPARATION MECHANISMS

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AGREEMENTS & COMMISSIONS

CEASEFIRE AND PEACE AGREEMENTS

- 1992 Chapultepec Agreement
- 1998 Northern Ireland Peace Agreement
- 2003 Sun City Agreement

TRUTH AND RECONCILIATION COMMISSIONS

- Pros:
 - Identify and Prioritize Areas to Focus on Post-War
- Cons:
 - Non-Binding
- Examples:
 - Liberia
 - Sierra Leone

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LITIGATION & SANCTIONS

LITIGATION

- Lawsuits in Foreign National Courts to Freeze and Seize Assets (Foreign Currency Reserves) to pay for Damage
- Negligence Actions
 - Ex. Kenyan Victims Filing Suit with High Court in London (2002)
- Key tool to increase pressure and force negotiations (through ad hoc institution or otherwise)

Sources:

Louise Guillot, "How Ukraine Wants to make Russia pay for war's environmental damage" (14 June 2022) *Politico*, online: *Politico* <<https://www.politico.eu/article/how-ukraine-want-make-russia-pay-for-war-environmental-damage/>>

Kalina Oroschakoff and Louise Guillot, "The global campaign to make environmental destruction an international crime," (2021) *Politico*, online: *Politico* <<https://www.politico.eu/article/ecocide-environmental-crime/>>.

SANCTIONS

- Pros
 - Continuing/Additional Sanctions to Pressure Russia into Negotiations on Compensating Ukraine for its impacts on Ukraine's environment
- Cons
 - Rising Interest Rates
 - High Debt Loads
 - High Cost of Transitioning to Renewable Energy
 - Disproportionate impacts to most marginalized populations

See Mary Ellen O'Connell, "Using Trade to Enforce International Environmental Law: Implications for United States Law" online (pdf): <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1012&context=ijgls>.

See Nicholas Mulder, "Economic sanctions deliver bigger global shocks than ever before and are easier to evade," online: <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder>



PERMANENT MECHANISMS

PERMANENT MECHANISMS

- Pros:
 - Permanent Mechanism that can begin investigating/adjudicating more quickly,
 - Draws on existing legitimacy,
 - Relatively fixed and predictable costs
- Cons:
 - May not have the expertise needed for unique/novel issues
 - Limited flexibility (ex. may not be able to negotiate terms like an ad hoc body)

PERMANENT MECHANISM: INTERNATIONAL COURT OF JUSTICE

The Court has two functions:

- To settle, in accordance with international law, **legal disputes submitted by States**, and
- To give **advisory opinions** on legal questions referred to it by authorized UN organs and specialized agencies.

May be a useful forum for Ukraine:

- But it has a complex jurisdictional scheme

PERMANENT MECHANISM: INTERNATIONAL CRIMINAL COURT

- Preparation Required
 - Amendment to the Rome Statute to recognize ecocide as a crime (must be adopted by a $\frac{2}{3}$ Majority)
- Jurisdiction
 - ICC still has jurisdiction to prosecute crimes committed by nationals of non-member countries
- Pros
 - This could provide an opportune moment for change in International Environmental Law to shift towards also considering criminal aspects of Environmental Destruction (which has historically had a human-rights focus)

PERMANENT MECHANISM: INTERNATIONAL CRIMINAL COURT

- Barriers

- Floodgates argument

- Limitations

- Not historically having dealt with environmental harms
- Ecocide is not yet recognized
- Concerns that the burden of proof would need to be very high (as in genocide) (severity, impacts widespread and long-term, and intentionality)
- Russia is not a member of the ICC so lacks a corresponding national authority for enforcement

- Exceptions

- There may already be recourse through the IHL Prohibitions on attacks against cultural property to protect certain features considered protected or culturally valuable

Sources:

Louise Guillot, "How Ukraine Wants to make Russia pay for war's environmental damage" (14 June 2022) *Politico*, online: *Politico* <<https://www.politico.eu/article/how-ukraine-want-make-russia-pay-for-war-environmental-damage/>>

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AD HOC INSTITUTIONS

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Pros:

- Can provide a tailored response to the situation in Ukraine
- May be valuable if they are capable of engaging Russian negotiation and reciprocity through the negotiation of terms

Cons:

- Expensive,
- Time-consuming,
- Must build legitimacy,
- Likely to be vetoed by Russia given their position on the U.N. Security Council

AD HOC INSTITUTION: UNITED NATIONS COMPENSATION COMMISSION

- The UNCC environmental program served notice that the environmental damage caused in relation to an armed conflict can be a culpable offence, advancing international law significantly
- Example: Iraq's Invasion of Kuwait
 - Iraq government accepted the establishment of an International Civil Tribunal to assess reparations payable by Iraq to states harmed by Iraq's aggressive acts
 - UNCC established in 1991, began winding down in 2015
 - Nearly 85 Billion in USD Sought for Environmental Damage Sought

AD HOC INSTITUTION: IRAN-UNITED STATES CLAIMS TRIBUNAL (IUSCT)

- Key Elements
 - Formed with Consent of the United States and Iran
 - **Application to Ukraine and Russia:** Necessary to have agreement of Russia and Ukraine to enter into arbitration
 - Aim Was the Termination of all Litigation through Binding Arbitration
 - **Application to Ukraine and Russia:** Russia and Ukraine terminating litigation between each other and their nationals with respect to arbitrated issues
 - U.S. Agreement to Non-Intervention in Iran
 - **Application to Ukraine and Russia:** A similar agreement would include a commitment from Russia to no longer interfere in Ukraine
 - Nullification of Sanctions and Claims
 - **Application to Ukraine and Russia:** Nullification of Sanctions and Claims against Russia (likely on an international scale)
 - Return of Iranian Assets
 - Return of Ukrainian/Iranian Assets
- Likelihood:
 - Russia's Seat on the Security Council Could Bar the Creation of Such a Tribunal if Russia did not consent
 - A vigorously litigious approach and high number of international sanctions may pressure Russia into accepting arbitration

Sources:

General Declaration online: <https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration_.pdf>.

Louise Guillot, "How Ukraine Wants to make Russia pay for war's environmental damage" (14 June 2022) *Politico*, online: *Politico* <<https://www.politico.eu/article/how-ukraine-want-make-russia-pay-for-war-environmental-damage/>>

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NEW LEGAL TOOL IN CANADA

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Special Economic Measures Act (June 23, 2033 amendments)

Purpose of Act

3.1 The purpose of this Act is to enable the Government of Canada to take economic measures against certain persons in circumstances where an international organization of states or association of states of which Canada is a member calls on its members to do so, a grave breach of international peace and security has occurred, gross and systematic human rights violations have been committed in a foreign state or acts of significant corruption involving a national of a foreign state have been committed.

NEW LEGAL TOOL IN CANADA

Payment out of Proceeds Account

5.6 After consulting with the Minister of Finance and the Minister of Foreign Affairs, the Minister may — at the times and in the manner, and on any terms and conditions, that the Minister considers appropriate — pay out of the *Proceeds Account*, as defined in section 2 of the *Seized Property Management Act*, amounts not exceeding the net proceeds from the disposition of property forfeited under section 5.4, but only for any of the following purposes:

- (a) the reconstruction of a foreign state adversely affected by a grave breach of international peace and security;
- (b) the restoration of international peace and security; and
- (c) the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption.

ACTIONS AS OF JUNE 7, 2022

- \$123M in Russian assets frozen
- \$289M in transactions blocked since Ukraine invasion
- Sanctions website: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/ukraine-sanctions.aspx?lang=eng