

Post-Ukraine conflict: Russia's obligation to compensate

Examples like Iraq's payment of US\$52.4 billion (S\$71 billion) in compensation for its invasion of Kuwait and Iran's payment to US nationals provide useful pointers

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For *The Straits Times*

The harrowing footage of civilian displacement and property destruction from Russia's invasion of Ukraine brings to mind the importance of a recent but overshadowed milestone – on Jan 13 this year, Iraq finally satisfied its compensation obligations arising from its invasion of Kuwait.

The Kuwait invasion compensation programme was administered by the United Nations Compensation Commission (UNCC). Through the UNCC, Iraq paid a total of US\$52.4 billion (S\$71 billion) to severely impacted individuals, corporations, governments and international organisations.

This was international law at work, imposing substantial consequences on one sovereign state for its grievous invasion of another. And even though the Ukraine conflict is barely into its first weeks, Iraq's experience raises serious issues about Russia's international obligations to compensate for the damage it inflicts.

The requirement that a state must provide full reparation for injuries caused by its breach of international obligations is a long-held and well-settled principle.

Despite the refusal of a minority of states to comply with this fundamental norm, states frequently make compensation payments by way of agreement or a third party finding that they have breached their international obligations.

Other examples of actual payment include Iran's payment of over US\$2.5 billion in compensation for interfering with the property of US nationals during the 1979 Iranian Revolution – via decisions of the Iran-US Claims Tribunal (IUSCT) – and Libya's payment of over US\$1.5 billion to the families of victims of



A boy standing in front of a burning warehouse after shelling in Kyiv on March 17. Iraq's experience raises serious issues about Russia's international obligations to compensate for the damage it inflicts. The requirement that a state must provide full reparation for injuries caused by its breach of international obligations is a long-held and well-settled principle. PHOTO: AGENCE FRANCE-PRESSE

the 1988 Lockerbie bombing and the 1986 attack on a Berlin nightclub.

In determining if and how post-conflict compensation could be made by Russia, the operations of the UNCC and IUSCT provide helpful guidance.

There are other bodies that have determined post-conflict settlements, such the recent Feb 9 judgment by the International Court of Justice (ICJ) in *Armed Activities in the Territory of The Congo (DRC v Uganda)*, and the Eritrea-Ethiopia Claims Commission. However, the payment execution mechanisms of the UNCC and IUSCT are of particular interest for Russia's compensation obligations.

THE EXAMPLE OF IRAQ

In 1991, the UN Security Council – including Russia – passed Resolution 687, which held that Iraq was liable under international law for any damage resulting from its unlawful invasion and occupation of Kuwait.

The UNCC had the task of verifying Resolution 687 claims and assessing the compensation. Payments were made using a percentage of Iraq's oil export sales.

The UNCC paid out US\$52.4 billion in compensation to about 1.5 million claimants (2.7 million

claimants actually lodged claims). The process took 30 years to complete.

Successful claims were made by foreign workers who fled Kuwait after Iraq's invasion, individuals who suffered serious personal injury, families of individuals who died from Iraq's actions, oil companies whose wells were deliberately set ablaze by Saddam Hussein's forces, Kuwaiti citizens, the Kuwaiti government, and foreign governments for evacuating their citizens, caring for the displaced or replacing damaged property.

To process the enormous number of claims, statistical methods were sometimes used rather than traditional approaches to valuation to assess compensation amounts.

A critical feature of the UNCC was its ability to guarantee compensation payments once claimants and payment amounts were assessed and approved. This power to pay was possible because the UNCC functioned as a subsidiary organ of the UN Security Council, and the UN controlled Iraq's oil exports.

The establishment of this type of UN Security Council-backed compensation programme is unlikely in the Ukrainian conflict – Russia would exercise its Security Council right to veto any such programme. Still, the UNCC's

verification and assessment processes may provide useful blueprints and reference points.

THE EXAMPLE OF IRAN

An alternative mechanism to guarantee payment was established to compensate US nationals whose assets were affected by the 1979 Iranian revolution.

Iran and the US entered into a settlement via Algeria as an intermediary. The terms of this settlement created the IUSCT, which was given the mandate to determine, among other things, claims against Iran by US nationals.

If the IUSCT determined that a claimant should be paid a certain amount of compensation by Iran, those payments were immediately made out of a security account. This account was funded by Iran's assets that were frozen by the US after the Iranian revolution.

Iran consented to this security account procedure because another part of the arrangement required the US to transfer the rest of Iran's frozen assets back to Iran (sources indicate that about US\$12 billion of Iranian assets were frozen by the US in 1979).

If there is resolve to apply this type of mechanism to Russia, options could be explored for the international community to allocate frozen Russian funds

located outside Russia to pay verified compensation claims. Potentially, this mechanism for compensation may be arranged even if Russia does not agree to it. But, naturally, the better approach would be to obtain its consent.

LEVERAGE FROM FROZEN FUNDS

It is too early to say whether Russia will agree to a settlement that ends the conflict, let alone agree to pay any compensation for conflict-related damages. Navigating a road to settlement will likely be difficult.

But the prospect of releasing frozen funds or lifting sanctions may provide leverage, in which case Iran's agreement to establish the IUSCT and its payment mechanism may provide some practical lessons.

Even with a cooperative Russia and an in-principle agreement on a compensation programme, many complex questions will have to be resolved, such as, who will be tasked with administering, verifying and valuing the hundreds of thousands of likely claims, what will be the causal nexus that triggers compensation, what categories of persons will be eligible for compensation, and how will payments be distributed to successful claimants?

Of additional relevance is Ukraine's case against Russia

instituted on Feb 26 before the ICJ, which seeks compensation for damage caused by Russia's actions.

Previously, in the *Armed Activities in The Congo* case, the ICJ appointed experts to assess loss and damage. But given the magnitude of the damage and massive numbers of people affected by the Ukraine crisis, could the ICJ go beyond appointing experts and order a compensation programme to be set up?

Any such programme would involve inherent difficulties, and will take many years to complete. But these problems did not prevent bodies such as the UNCC or the IUSCT from carrying out their enormous and arduous mandates.

A programme providing compensation for loss resulting from Russia's invasion of Ukraine must be given serious and careful consideration.

Post-conflict compensation to restore persons to pre-conflict positions, although not a perfect solution, is the best remedial option. It is a future cost of Russia's present aggression.

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