

**INTERNATIONAL MONITORING AND IMPLEMENTATION MECHANISM
FIRST SUBMISSION FROM THE
“COMPENSATION FOR OCCUPATION” FILE**

I. INTRODUCTION

Palestinians are entitled to compensation for all losses, damages and injury suffered as a direct result of the unlawful acts carried out by Israel during its belligerent occupation of the West Bank, the Gaza Strip and East Jerusalem.

During Israel’s ongoing occupation of the West Bank and the Gaza Strip, Israel has developed systematic and institutionalized mechanisms that violate its legal obligations pursuant to the legal regime of belligerent occupation. For example, Israel has established an administrative and judicial system which permits it to appropriate private Palestinian property and use it for constructing settlements and related infrastructure; it has engaged in extensive appropriation of Palestinian water resources; it has carried out policies that have resulted in severe environmental damage in the occupied territories; it has engaged in wholesale destruction of private and public property; and it has collected tax revenues which were not reinvested in whole into the occupied areas. Coupled with these policies that have affected the physical and legal integrity of the occupied territories, Israel has, as a matter of policy, deported, tortured, and killed Palestinians that sought to resist Israel’s occupation policies.

The law of state responsibility, which has been codified in the International Law Commission’s Draft Articles on State Responsibility, provides, at the outset, that “[e]very internationally wrongful act of a state entails the international responsibility of that state.” The Draft Articles provide remedies available to the injured state, among them, reparations consisting of restitution and compensation.

Accordingly, under international law, the Government of Israel is liable for any direct loss, damage and injury, including environmental damage and the depletion of natural resources, resulting from its illegal actions conducted during its belligerent occupation of the West Bank (including East Jerusalem) and the Gaza Strip.

Below are heads of compensation which reflect internationally wrongful acts committed by Israel against the Palestinian population in both the Gaza Strip and the West Bank. A complete accounting of the value of the losses is underway and will be presented to the Israeli government in the context of a negotiated settlement.

- *Israel’s use of Palestinian territory*: Israel consolidated its domination over the occupied territories through the promulgation of hundred of military orders, including those preventing Palestinians from cultivating and developing their

land, hence facilitating the maintenance and expansion of Israel's settlement enterprise. As noted above, the Occupying Power may not pursue its own national, economic or social interests in the occupied territory. The only considerations guiding the conduct of the Occupying Power toward the occupied territory are the security of its armed forces and the benefit of the local population.

- *The establishment of Israeli settlements and by-pass roads and other settlement related infrastructure:* including compensation for persons displaced and property confiscated in the course of building the settlements, compensation for the use of the land on which the settlements were constructed, and compensation for the use of natural resources, particularly water resources. In addition, Israel is responsible for compensating Palestinians for damage and loss inflicted by Israeli settlers.
- *Israel's use and/or depletion of and/or damage to Palestinian natural resources including water, electromagnetic spectrum, and natural gas:* including compensation for any use of Palestinian resources intended exclusively to serve Israel's settler population or Israel's national economy.
- *Israel's use of Palestinian financial resources, including seignorage, taxes and custom duties not benefiting the local population:* Pursuant to the Hague Regulations, Israel is to invest taxes collected from the occupied populations back into the occupied territories. As Israel has failed to comply with this requirement, Israel must refund all fiscal revenues collected from Palestinians, which were not used to benefit the civilian population.
- *Destruction, confiscation and loss of and damage to Palestinian archaeological artifacts:* including the confiscation or destruction of documentary film materials and archeological artifacts found in the Gaza Strip since 1967, irrespective of whether their destruction was caused by the acts or omissions of the Israeli authorities or others acting on their behalf.
- *Damage to the environment:* Any damage that can be attributed directly to Israel's misconduct must be remediated, including damages resulting from legal and administrative obstacles that prevented Palestinians from developing their own environmental protection systems.
- *Deaths, personal injuries, detention and expulsion of Palestinians caused by acts or omissions of the Israeli authorities or others acting on their behalf, including those deaths, injuries, detentions and expulsions that occurred during the Palestinian uprising*
- *Loss of income, revenue and profit of Palestinian individuals and businesses as a result of the institutionalized system of checkpoints, roadblocks, back-to-back transportation requirements, closures and curfews.*

- *Destruction, confiscation and loss of and damage to private and public property.*
- *Israel's use of Palestinian human resources without adequate remuneration, including compensation for discrimination against Palestinians in human rights standards, labor standards and benefits.*

II. THIRD-PARTY ROLES

There are six broad areas in which third-party contributions would be invaluable and – in many cases – indispensable. First, according to international law, third parties are obligated to lend their legal and political expertise regarding the duty to compensate and must help the negotiating parties reach agreement as to the claims that will be accepted. Second, in order to facilitate that duty, a third party should help develop valuation models for the Palestinian claims. Third, a third party should help develop the mechanisms and institutions that will handle the compensation claims. Fourth, third parties should create a funding package and help Israel make financial determinations as to funding the compensation mechanism. Fifth, a third party should support and help create a reconciliation program to deal with non-compensable issues such as human rights violations and claims of wrongful death, and finally, a third party can help ensure that the decisions made by any compensation body and any reconciliation commission are properly enforced.

A. Negotiations regarding duty to compensate and agreement as to elements

Claims for compensation have, thus far, enjoyed little recognition as legitimate claims. Israelis reject out of hand Palestinian demands for compensation because they are seen as a call for Israeli acceptance of responsibility for the illegal acts of its occupation. For its part, the international community, fearing that it might jeopardize any movement towards a peace deal, has remained noticeably silent on the issue of compensation. Moreover, because the principle of compensation was never included as one of the final status issues of the Oslo process, it has become increasingly difficult to insert the issue into the negotiated process.

For this reason, Palestinians have worked to reframe the issue of compensation to take into account the foregoing, including developing strategies for getting the issue on the negotiating table. Palestinians have worked, for example, to shed the claims of their retributive character, hence, making them more politically viable. Rather than raise the issue in a vacuum, they have sought to link it to a larger political process, either in the context of the Gaza Evacuation or in the context of the ICJ opinion. In addition, Palestinians have reframed the claims, treating them not as a political platform for condemnation but rather, as a call for recognition of injuries suffered and a vehicle to redress wrongs. In sum, on the Palestinian side, Palestinians have sought to frame

demands for compensation as a means to bring closure to the experience of occupation and create a launching point for a new Palestinian narrative.

It is the duty of members of the international community, as Contracting Parties to the Fourth Geneva Convention, to ensure compliance with the Convention and with humanitarian international law. Indeed, as Jean Pictet has noted in his commentary to the Fourth Geneva Convention noted:

The Contracting Parties do not undertake merely to respect the Convention but also to *ensure respect* for it.... It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Convention are applied universally.¹

Accordingly, in fulfillment of their duty as Contracting Parties to the Fourth Geneva Convention, third parties should ensure first that that Israel complies with all provisions of the Convention, and second, that violations are redressed through the appropriate legal means.

Third parties hence should ensure that the issue of compensation is given due attention in the course of talks leading up to negotiations and in negotiations themselves. For example, the international community, through its representatives at the United Nations, could adopt a resolution in the General Assembly calling for the compensation to be paid in the event of violations. This should be done in the international community's capacity as guardian of the Geneva Conventions, for failure to insist on strict compliance – and on reparations in the event of violation – indicates a failure of the system of protection with which the international community has been entrusted.

In addition, once the international community has adopted the issue of compensation, third parties can be instrumental in helping the two negotiating partners to reach agreement on the specific violations which are subject to claims for compensation. The Palestinian determination as regards the heads of compensation is laid out above. Third parties can lend their legal expertise to help determine whether those heads are appropriate, and having done so, can lend their political authority to ensure that they are accepted as the legitimate basis for claims.

¹ ICRC (ed. Pictet), *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva 1958) 16.

B. Valuation Models

Data summaries and valuations models will need to be developed to get a broad sense of the types and scope of claims that Palestinians will make. Here, third parties would be instrumental for capacity-building: to provide targeted help in developing the institutional framework necessary to conduct this work, to help enhance coordination, and to ensure that data and information are shared.

Data summaries will set forth the relevant data for each of the categories identified above for which compensation is sought. The data will form the basis of valuation and therefore should be developed as objectively as possible in order to minimize the effect of a potential Israeli challenge. Local expertise is available to develop the work, but external consultations from third parties will be invaluable.

The economic analyses and valuation reports will attempt to reach actual compensation figures based on the data collected for each form of compensation. Preliminary analyses – which are necessary to inform the key policy decisions in the final status negotiations – may be performed by resident economists at the relevant PA ministries, or by individual experts retained specifically for this task. However, because of the susceptibility of these analyses to challenge, Palestinians have considered engaging a reputable international accounting firm to perform these tasks at their final stage in order to reinforce the credibility of the resulting reports. Here, the third party could play a role as observer and objective outsider in order to ensure transparency and credibility.

C. Mechanisms

Various types of mechanisms have been established throughout the world, either bilaterally or multilaterally, to deal with the different types of compensation claims arising in various conflict areas. Among them are lump sum settlements between states, structured settlements, national commissions, international claims tribunals, individual claims adjudication, as well as other examples where claims of a national scale were pursued before international bodies. No standard model can apply to every claims undertaking. Instead, the mechanism must be tailored to the particular context in which the claims process became necessary and the objectives it must fulfill.

In the case of Palestine, the mechanism will need to define precisely who can claim and for what loss, create claimant outreach and claims intake programs, develop a governing instrument, determine what substantive and procedural law will apply, and outline the functional roles of policy-makers, decision-makers and the secretariat. The mechanism

must provide for specific remedies to its claimants and ensure that any decision is legally effective.

In due course, Palestinians will develop a proposal for the appropriate mechanism, but it will need to be done in consultation with third parties, who should lend expertise in the process. Whether the proposed mechanism will be run entirely by Palestinians or will be part of a larger international effort remains to be determined. In either case, there will be a significant third-party role both in the development of the mechanism and in its eventual implementation.

In all likelihood, the Palestinians will create a national commission to adjudicate compensation claims and to distribute allocated funds. No negotiations with Israelis will be likely at this stage.

D. Economic Package

The funding for any compensation mechanism will have to come in large part from the international community. While Israel should be responsible for a symbolic sum, the funding for its own compensation package to Gaza settlers is said to come in large part from the United States, and hence, it will not likely be able to foot the relatively large bill that the Palestinian compensation claims will generate.

Compensation mechanism, however, cannot operate effectively if they are without a source of funding both for the operation of the funding mechanism and for the payment of awards. In creating the United Nations Compensation Commission (UNCC), for example, the Security Council ensured that damage claims would be satisfied from future Iraqi oil revenues secured in a Fund. The Security Council delegated to the UNCC Governing Council the power to determine the appropriate level of Iraq's contribution to the Fund. In contrast, the Commission for Real Property Claims for Displaced Persons and Refugees in Bosnia and Herzegovina (CRPC) illustrates the problem of setting up a compensation fund/mandate on paper but without the backing of actual funds. Although CRPC has not awarded any compensation, it has issued certificates confirming property rights that if implemented permit refugees and displaced persons to repossess and deal with their property or to be considered for reconstruction assistance. Those awards, however, have proven very difficult to enforce.

In this case, the international community will need to be integrally involved in developing a funding package both for the operation of the mechanism and the payment of awards. In addition, it will have to be integrally involved in ensuring that the funds are properly distributed, managed, and accounted for.

E. Reconciliation program to deal with non-compensable issues

One component of the compensation mechanism would include a reconciliation committee, which would institute programs for dialogue, through which individual Israelis and Palestinians could come to terms with their collective history.

The end of any conflict represents a complete turn-around in perspective, especially when approached from the standpoint of promoting lasting peace. No matter the modalities of the committee, it should be tasked with determining the “true facts,” and ensuring they are officially acknowledged, and widely publicized. Independently of subsequent negotiations concerning responsibilities and sanctions, the acknowledgement of truth is the centerpiece of successful conflict transformation and of a future lasting peace.

In a conflict marked so strikingly by competing narratives and competing claims, a forum for recognizing factual events and making them known can go along way to depolarizing Israeli and Palestinian societies. Ideally, a reconciliation committee will work to enhance social and political tolerance and to inculcate the notion of accountability among both Israelis and Palestinians alike.

In this context, the engagement of third parties will be absolutely critical, to the extent that they can (1) act as mediators, (2) participate in the structural organization of the committee, (3) ensure the proper implementation of the reconciliation program and (4) ensure the protection of the civilian population and the prevention of future violence, including violations of international conventions and international humanitarian law.

F. Enforcement Function

Once the compensation commission or the reconciliation committee makes a finding or determination, that decision and the attendant remedy will have to be enforced. In many cases, the remedy will be purely monetary, and no enforcement function will be necessary. In other cases, the remedy will involve a determination on property rights, and where there are competing claims, it may be necessary to employ enforcement measures. In those cases, third parties, working in cooperation with Palestinian law enforcement, may be indispensable in ensuring that the remedy awarded is in fact enforced.

In the case of the CRPC in Bosnia and Herzegovina, for example, Annex 7 of the Dayton Peace Accords made domestic government authorities responsible for the enforcement of CRPC decisions regarding property rights. Soon after it began issuing decisions, however, CRPC discovered that the responsible domestic authorities were widely and willfully refusing to enforce them. Without enforcement, which frequently meant physically evicting the current occupant (who was often displaced from his or her home too) of the property in question, decisions represented nothing more than pieces of paper. Only after CRPC became actively involved in advocating change in domestic property legislation, was enforcement of its decisions possible. In the end, CRPC decisions would

not have been widely implemented without the concerted pressure of the international community on the domestic authorities.

III. SPECIFIC FUNCTIONS

- Create a working group to draft and advocate for a resolution on compensation for illegal practice of Israel during its occupation of the West Bank and the Gaza Strip.
- Designate a team to work, in conjunction with Palestinians, on collecting and organizing compensation claims.
- Create a specific negotiating session for negotiating compensation.
- Provide targeted help in developing the institutional framework necessary to develop data summaries and valuation models and ensure that data and information are shared.
- Lend international expertise to the development of a compensation mechanism.
- In conjunction with the World Bank, the IMF, Israel, Palestine, and individual donor states, create a funding package to cover the bulk of public and private compensation claims.
- Develop a monitoring and enforcement authority which would ensure the proper enforcement of commission determinations and reconciliation committee recommendations.

IV. TIMING

Much of the work described above will take place in a pre-negotiation phase, prior to any final status negotiations. Palestinians, in coordination with third parties, will develop the appropriate mechanisms, and at that point, other roles for third parties will become clearer.

After negotiations, once agreement is reached as to the types of claims and the nature of the compensation mechanism, implementation will be the most significant problem. Third parties can then be involved in ensuring that the mechanisms developed are properly implemented, and they can bring to bear any dispute resolution process where appropriate.

V. SPECIFIC MECHANISMS

The pre-negotiations issues will necessarily need to be addressed within the scope of the IMIM. However, I don't believe that specific mechanisms would be appropriate, as much of the involvement will be consultative, rather than institutional.

Because the compensation mechanisms for this file will likely be closely tied with the refugee file, post-negotiations implementation, on the other hand, should be addressed within that framework, which will be outside the scope of IMIM, other than issues related to monitoring and dispute resolution.