



CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE

T: +44 (0)20 7957 5700 E: contact@chathamhouse.org

F: +44 (0)20 7957 5710 www.chathamhouse.org

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International Support for Reparation Processes and the Palestinian Refugee Issue

Heike Niebergall and Norbert Wühler

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SUMMARY POINTS

- Most large-scale reparation claims processes have received considerable assistance from third parties, both during the period leading to establishment of the programme and during the programme's implementation. The support has ranged from facilitating negotiations leading to the establishment of a programme to its full implementation by an international body.
- A final resolution of the Palestinian refugee crisis will require extensive international support. Political support by sponsor governments should be complemented by technical assistance from international organizations with experience in large-scale claims programmes and the implementation of residency options for refugees and displaced persons.
- While the preparatory technical work on the Palestinian refugee file has been primarily aimed at assisting the parties in the negotiations for a two-state solution, the comparative overview shows that in other contexts the start of a reparation process has not hinged on the existence of a negotiated peace agreement by the parties and that international support has been helpful in bringing about such a process in other ways as well.
- Both the volume and shelf life of the preparatory work performed to date on the Palestinian refugee file raise issues about its validity, accessibility and usability in future and require monitoring and stocktaking to avoid repetition and inefficiency. International sponsors might also wish to take on a more active role to ensure that expectations and messages regarding available support to the Palestinian refugee issue are realistically and constructively managed.

1. INTRODUCTION

A solution to the displacement and dispossession of the Arab population of Palestine during the 1948 war is widely viewed as one of the most sensitive and complex issues in the search for a resolution of the Arab-Israeli conflict. Not surprisingly, therefore, the Palestinian refugee question has been a central issue ever since the opening of the Israeli-Palestinian peace process in Madrid in 1991 and during permanent status and peace negotiations at Camp David, in Taba and in Annapolis.¹ It has equally received attention during the so-called Track II processes that were led independently through diplomatic efforts by various stakeholders and that sought to build the capacity of the Palestinians to sustain future 'permanent status' negotiations on refugees.²

One aspect of these processes has been preparatory work at the technical level on various aspects of the Palestinian refugee issue. This work has primarily aimed at assisting the parties in preparing negotiation positions as well as in considering and addressing these positions during actual negotiations. As such, a key assumption underlying the work has always been that there will be a negotiated peace agreement between Israel and the Palestinians and this agreement will provide for a comprehensive solution for Palestinian refugees.

This technical work has continued over a number of years and even during times when, as at present, the parties were not engaged in formal negotiations. The preparatory work has been based on the firm belief that there is a role for technical research to inform not only the parties but other national and international stakeholders as well about preconditions and consequences of options on how to resolve certain aspects of the issue of Palestinian refugees.

Recent developments, such as the Palestinian request for recognition of Statehood by the UN and Israel's refusal to halt the construction of new settlements, have led to a persistent stalemate in the peace process, and could also be seen as indications that the search for a bilaterally negotiated agreement that was started following the Oslo Accords has been all but officially abandoned by the parties. While it is not for this paper to discuss the political prospects for a negotiated solution of the Israeli-Palestinian conflict and with it of the Palestinian refugee issue, it should be kept in mind that the usefulness and relevance of the technical work conducted on the Palestinian refugee file goes beyond supporting a negotiated solution. Past and future preparatory work, such as comparative or valuation studies, provides valuable technical know-how and background information for all policy-makers who are searching for a solution for Palestinian refugees.

The particularities and complexities of the Palestinian refugee file certainly need to be borne in mind when evaluating the comparative examples outlined in this paper, which looks at the type and extent of support that third parties, in particular governments, have given in other contexts to past reparation processes.³ Yet, while the uniqueness of the Palestinian refugee situation

¹ Rex Brynen, *The Past as Prelude? Negotiating the Palestinian Refugee Issue*, Chatham House Briefing Paper, MEP/PR BP 08/01, June 2008, p. 1.

² One of the governments strongly engaged in these processes has been that of Canada. Over the years it has continuously supported the Palestinian refugee file through the Middle East Programmes of the International Development Research Centre (IDRC), a Canadian Crown Corporation. Since 1992, through its Expert and Advisory Services Fund (EASF), the IDRC has funded projects aimed at increasing the capacity for policy planning and coordination by Middle Eastern parties on the Palestinian refugee issue and to promote greater understanding of key aspects of a solution. Information on IDRC's EASF engagement can be found at the IDRC website at www.idrc.ca. See also various research projects at the University of Aix-en-Provence, Exeter University and McGill's Research Centre.

³ For the most comprehensive general studies on the practice of claims and reparation programmes see P. de Greiff (ed.), *The Handbook of Reparations* (2006); H. M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (2007); H. Van Houtte, B. Delmartino and Y. Iasson, *Post-War Restoration of Property Rights Under International Law, Volume I: Institutional Features and Substantive Law* (2008); H. Van Houtte and H. Das, *Post-War Restoration of Property Rights Under International Law, Volume 2: Procedural Aspects* (2008); and H. Niebergall and N. Wühler (eds), *Property Restitution and Compensation: Practices and Experiences of Claims Programmes* (2008).

needs to be acknowledged, a comparative look at different tools developed and used in other political contexts and at best practices and lessons learned in other reparation processes may help to generate new ideas. It may also enable better evaluation of existing assumptions about what (additional) role the international community could and might be willing to play in working towards a fair and comprehensive solution for Palestinian refugees, be this solution found as part of a comprehensive resolution of the Middle East conflict or otherwise.

2. COMPARATIVE OVERVIEW

Most large-scale reparation claims processes have received some if not considerable assistance from third-party sponsors, usually governments with an interest in the process.

Two phases can be distinguished during which support is provided: (1) support during the phase before or leading up to the establishment of a programme; and (2) support during the implementation phase. During the first phase, the responsible government or governments may not yet have decided that a programme should be established at all or what it should look like, either because the conflict and/or violations are still ongoing or because the political will to provide redress has not manifested itself. In contrast, during the second phase a political decision has been made and the responsible government or governments are faced with the challenges of implementation.

In both phases the type and extent of the support given have varied greatly depending on a number of factors, including involvement of the sponsor government or international organization in the conflict; the interest of the sponsor in a sustained resolution of the conflict; the extent to which nationals of the sponsor government have been affected by the conflict or the other circumstances; and the general attitude of the sponsor towards the right to reparations of victims of conflict and large-scale human rights violations and towards transitional justice efforts. Last but not least, the support has depended on the financial and technical capacity of the sponsor.

The support given has ranged from taking on a mediator role or providing shuttle diplomacy services during the negotiation phase to assisting with in-kind contributions, financial support or technical assistance during the implementation phase. Financial contributions to reparation processes undoubtedly represent the most prominent form of support that third parties give. It should be noted, however, that financial support is not limited to funding the compensation payments themselves, but includes the financing of technical assistance work undertaken by international organizations or of seconding experts to assist national implementers in the establishment and implementation of programmes.

Supporting the establishment of a claims programme

While the most visible contributions of sponsors to claims programmes have typically happened once the decision has been made to establish a programme, their involvement has often started earlier.

Important roles have been played by sponsors who have attempted to mediate the resolution of a conflict or who have facilitated direct negotiations of a peace agreement that included provisions for the establishment of a claims mechanism. With regard to the latter, two points are worth mentioning. On the one hand, only a small number of peace agreements have contained provisions for restitution or compensation for property damage and other losses, and most of these provisions were never implemented.⁴ On the other hand, those agreements that provided for the establishment of a claims programme and that were actually implemented have usually been brought about with considerable involvement of international sponsors, either governments or international organizations. It is also noteworthy that the greater the international sponsor support in bringing about the programme in the first place, the larger the continuing international role in the implementation of the programme.⁵

⁴ According to a 2007 report by the Centre for Humanitarian Dialogue, out of 77 peace agreements in this period only eight contained provisions for restitution or compensation for property damage and other losses, and these provisions were only implemented for one of these agreements (L. Vinjamuri and A.P. Boesenecker, *Accountability and Peace Agreements, Mapping Trends from 1980 to 2006*, the 'hd Report').

⁵ This does not obviate the need to have as much national 'ownership' of a claims programme as possible for the programme to be accepted and successful. As the hd report notes (p. 31): 'It may be that peace agreements concluded under the auspices of the international community are more likely to contain instruments for justice and accountability as well as resources for implementing them. However, the success of these agreements may be limited if domestic actors do not embrace the recommendations.'

The following are some of the most pertinent examples.

Facilitating peace

During the 1992–95 conflict between Bosnia and Herzegovina, Serbia and Croatia, half of Bosnia's population were displaced from their homes. A solution to the property issues of these internally displaced persons and refugees was central to the establishment of a sustainable peace. The United States, which had been heavily involved in the military campaign to end the war, became equally engaged in the facilitation of a peace agreement. The US government not only provided the venue for the peace negotiations in Dayton and the logistical support, but also contributed concrete proposals for a claims mechanism to realize this key objective of the agreement. Annex VII of the Dayton Peace Agreement, which contained the final provisions on the claims mechanism, is largely based on the proposals prepared by the US government.⁶ In accordance with this Annex, a *Commission for the Resolution of Property Claims of Displaced Persons and Refugees* (CRPC) was established as an independent international body to deal with the property claims. The CRPC was recognized as such by the Republic of Bosnia and Herzegovina in a Headquarters Agreement, and when the CRPC ceased to exist at the end of 2003 the unresolved claims were handed over to the Republic's authorities.⁷

This type of support is well known with regard to the Palestinian refugee issue. Many efforts have been directed towards facilitating a peace agreement between Israel and the Palestinians. The US government, the European Union and the Arab League as well as other individual governments have repeatedly tried to facilitate an agreement through mediation and negotiation support. While recent experiences seem to indicate that these efforts may not bear fruit in the near future, it is likely that international stakeholders will stay dedicated to facilitating peace in the region, and as such support negotiations and a peace agreement when and if the political climate allows for them.

Records show that the Palestinian refugee issue and technical options for the implementation of a solution have been discussed during these past peace negotiations.⁸ The discussions foresaw, in some form or another, a comprehensive process to implement refugee choices with regard to durable residency options for all refugees as well as a claims component to deal with Palestinian property rights.

Silent diplomacy

A significant role in a process leading to the establishment of a claims mechanism, albeit little known and hardly visible at the time, was played by the Algerian government in helping to resolve the so-called Tehran hostage crisis between Iran and the United States. In November 1979, shortly after the Islamic revolution in Iran and the resulting establishment of the Islamic Republic of Iran, the US embassy in Tehran was occupied and the embassy personnel were taken hostage. Consequently, the US government froze large amounts of Iranian assets, in particular in banks in the United States and abroad. Another consequence of the hostage crisis was the departure of many US individuals who had lived and worked in Iran up to that time and had to leave behind their belongings, and of US companies that had done business in and with Iran and had to abandon their businesses. It took until January 1981 to find a solution to the hostage crisis which included an end to the occupation of the US embassy, the freeing of the hostages and eventually the release of frozen Iranian assets. Crucial for this solution was

⁶ While the Agreement as such was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, its Annex VII was signed and endorsed only by the Republic of Bosnia and Herzegovina and its entities.

⁷ On the work of the CRPC, see its 'End of Mandate Report' at www.pict.pcti.org/publications/Bibliographies/MR-Part1-CoverExec1-Summary-EMR.pdf.

⁸ See Brynen, *The Past as Prelude?*

an agreement between the Iranian and US governments to establish the *Iran-United States Claims Tribunal*. This was tasked with dealing with compensation claims by nationals of one of the State Parties against the other State Party and of certain claims between the State Parties.⁹

During the fourteen months of intense efforts to resolve the hostage crisis, no direct negotiations ever took place between government representatives of the United States and Iran. There were mostly secret efforts by some of the international banks that held frozen Iranian assets and by the Bank of England to address in particular the financial consequences of the crisis affecting them. In addition to these efforts by the private sector, the German government made certain mediation attempts. The most sustained and important contribution, however, came from the Algerian government, which offered its good offices to assist in the resolution of the crisis when it became clear that there would be no face-to-face negotiations. A very small group of high-level Algerian government officials, mostly at the ministerial level, conducted an intense 'shuttle diplomacy' between Tehran, Algiers and Washington/New York which was authorized and used by the parties to transmit their positions, offers and demands to the other side. After it became apparent that any solution would have to include a mechanism for dealing with the respective compensation claims of the two states and their nationals, the Algerians transmitted the positions of the two sides in this respect and also made suggestions of a technical nature for such a mechanism. These related in particular to the complicated banking arrangements that were eventually needed for the de-freezing of the Iranian assets, the use of such assets for the compensation claims, and the role of the Algerian Central Bank in the payment mechanism for the claims.¹⁰

Much of the detail of the role that the Algerian counterparts played remains unknown since shortly after the resolution of the crisis several of them, including the Foreign Minister and the Head of the Central Bank, died in a plane crash. There can be no doubt, however, that their contribution was significant, a fact that has been acknowledged in the reference to the two key documents providing the framework for the resolution of the crisis and the claims mechanism as the Algiers Accords.¹¹

In contrast to the break in diplomatic relations between the United States and Iran following the Tehran hostage crisis, there have been numerous rounds of direct negotiations between Israel and the Palestinians. Given the complexities of the Palestinian refugee issue and its interlinkages with other issues, it is unlikely that silent diplomacy alone will lead to a comprehensive solution. However, it might well help to overcome lack of trust between the parties and to prepare the ground for compromise on certain aspects of the peace deal.

Special-envoy negotiations

The negotiations and the settlement leading to the creation of the *Compensation Programme for German Forced Labourers* under the Nazi regime provide an example of a complex interchange where a number of governments and non-governmental actors were involved

⁹ A list of the extensive literature on the Iran–US Claims Tribunal can be found on the Tribunal's website at www.iusct.org.

¹⁰ The banking arrangement foresaw an unusual role for the Algerian and the Dutch Central Bank in the payment process of awards of the Iran–US Claims Tribunal. The instruction for the payment of an award in favour of a US claimant was issued by the President of the Tribunal to the Algerian Central Bank; the Algerian Central Bank reviewed and forwarded the payment request to the Settlement Bank that had been set up within the Dutch Central Bank for the sole purpose of holding the Security Account in which Iran had to keep funds sufficient to satisfy awards of the Tribunal in favour of US claimants; the Settlement Bank reviewed the payment request and transferred the necessary funds to the Federal Reserve Bank in New York, which paid out the award amount to the US claimant.

¹¹ See P. Juillard, 'Le rôle joué par la République Populaire et Démocratique d'Algérie dans le règlement du contentieux entre les Etats-Unis d'Amérique et la République Islamique d'Iran', *27 Annuaire Français de Droit International*, p. 19 (1981).

to different degrees in the whole range of activities that led to the establishment of a claims programme – from lobbying, advice and technical assistance, to supporting and participating in negotiations, to becoming a party to the agreement itself and continuing support for it throughout the implementation of the programme.

In the late 1990s, a wave of class action lawsuits was brought in US courts against Germany and German companies, seeking compensation for forced and slave labour and for certain property losses suffered under the Nazi regime. In order to avoid protracted court proceedings and damage to their reputation, the defendant companies, later joined by other leading German companies which had exploited forced labour during the Second World War, engaged in negotiations with plaintiff lawyers in order to reach an out-of-court settlement. The negotiations then expanded beyond the initial parties to include the governments of those East European countries from which the majority of the forced labourers had been deported, as well as the State of Israel and the Conference on Jewish Material Claims Against Germany (JCC). Some of the participants in the negotiations were advised and supported by legal and other experts and by Nazi victim associations. When the negotiations dragged on without a result, the German Chancellor appointed a special envoy to negotiate an overall solution with his counterpart appointed by the US government. Eventually the two governments reached an agreement, which provided for the creation of a compensation programme by Germany, funded with DEM 5 billion each to be paid by the German government and German companies. In exchange for this, the US government undertook to support dismissal of all lawsuits against German companies for any similar claims by intervening whenever legal action would be initiated in US courts for slave and forced labour and property loss. Following the agreement, any lawsuits pending in US courts against German companies arising from the National Socialist era and Second World War were dismissed by victims' lawyers. The governments of Israel and participating East European states undertook to implement measures in their national legal systems to bring about an 'all-embracing and enduring legal peace'.¹² Furthermore, the agreement between the German and US governments to which the other parties had acceded provided for the text of a statute to be enacted in Germany to establish the compensation programme under German law. After this statute was passed into law by the German parliament, a Federal Foundation was created to implement the compensation programme.¹³

The Middle East Peace Process has seen a number of special-envoy initiatives by the US government, the United Nations or, since 2002, in a joint fashion through the activities of the Special Envoy of the Quartet on the Middle East. Unlike in the example from Germany shown above, these envoys generally do not represent one of the parties and thus cannot themselves negotiate an agreement on behalf of this party, including an agreement that would foresee the establishment of a reparation process. Rather, the envoys have had the role of mediators for Israel and the Palestinians.

Taking charge

An extreme example of support can be found with regard to the Iraqi property restitution programme. In 2003, the United States, having been the main force in the preceding military campaign, was a major driver in supporting the establishment of a claims commission in Iraq to deal with the consequences of the forced displacement and expropriation policies of the Ba'athist regime. In addition, as governing authority at the time, it ensured that the necessary

¹² O. Graf Lambsdorff, 'The Negotiations on Compensation for Nazi Forced Laborers', in M. J. Bazylar and R. P. Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (2006), at p. 170; R. J. Bettauer, 'Keynote Address - The Role of the United States Government in Recent Holocaust Claims Resolution', 20 *Berkeley Journal of International Law* (2002), at p. 6.

¹³ For the involvement of international and national partner organizations in the implementation of the claims programme, see section below on 'Supporting the implementation of a claims programme'.

first steps were taken.¹⁴ Immediately after the fall of the Ba'athist regime, the Coalition Provisional Authority (CPA), which was run by the US Civil Administrator, regarded as a priority the sustainable return of refugees and internally displaced persons and with it the resolution of property disputes. It therefore decided to establish a property restitution and compensation programme. The *Iraq Property Claims Commission* (IPCC) was formally established by the interim Iraqi government structure, the Iraqi Governing Council. But this move was authorized by and closely coordinated with the CPA, which together with lawyers from the US State Department had played a leading role in the drafting of the Governing Council resolution. In its authorization the CPA reserved the right to alter the IPCC legal framework or to intervene in the claims resolution process 'if required in the interests of justice'. In addition, through funding administered by USAID, the US government financed the involvement of international organizations that provided expert advice during the early implementation phases, particularly with regard to the underlying legal framework and the required organizational structures of the property restitution and compensation programme.

The programme was restructured several times. In 2006, the Commission for the Resolution of Real Property Claims (CRRPD) was created by Iraqi legislation to take over the programme, and in 2010 the Commission was again restructured and renamed the Real Property Claims Commission (RPCC). While the property restitution process was thus initiated by the CPA in Iraq, the programme became an entirely national one with the transition to a new Iraqi state and government structure, and today it is an independent body of the Iraqi government.¹⁵

Such an extreme form of support might be called for in situations only where the responsible government is incapable of addressing the issue itself owing to destruction or disempowerment following a conflict or crisis. Given the various stakeholders involved, however, the Palestinian refugee issue cannot be resolved unilaterally by any sponsors without the active participation and agreement of the Palestinians and Israel.

Acting through the United Nations

Another way in which the international community has engaged in activities aimed at creating a claims programme has been through the United Nations. The first such engagement led to the creation of the *United Nations Compensation Commission* (UNCC) in 1991. As part of the ceasefire resolution passed at the end of military activities following Iraq's invasion of Kuwait, the UN Security Council established Iraq's legal responsibility for losses resulting from Iraq's invasion and occupation of Kuwait. In this resolution, the Security Council decided to create a fund to pay compensation for claims falling within this legal responsibility and to establish a Commission to administer the fund. On the basis of a report by the Secretary General that the Security Council had requested, the UNCC was established as a subsidiary organ of the Security Council to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait.¹⁶

The second engagement of the United Nations in the establishment of a claims mechanism was following the conflict in Kosovo through the UN Interim Administration Mission in Kosovo

¹⁴ While not involved in the conflict between Eritrea and Ethiopia in the 1990s, the United States, together with the Organization for African Unity and the UN, through sustained diplomatic engagement also played a major role in bringing about the so-called Horn Peace Deal between the two countries in 2000. This Peace Agreement established the *Eritrea–Ethiopia Claims Commission* to decide all claims for loss, damage or injury suffered during the armed conflict and resulting from violations of international humanitarian law or other violations of international law. For the awards of the Commission and information on its work, see the website of the Permanent Court of Arbitration at www.pca-cpa.org.

¹⁵ On the Iraq programme see M. Hakimi, Remarks to 'International Claims Litigation I: Is Rough Justice too Rough?', in 99 *American Society of International Law Proceedings* (2005), at p. 87.

¹⁶ The UNCC website provides extensive information on the work and decisions of the Commission; see www.uncc.ch. For the role of the United Nations in the implementation of this claims programme, see section below on 'Supporting the implementation of a claims programme'.

(UNMIK). As part of this mission, the Security Council in 1999 gave the Special Representative of the Secretary General (SRSG) in Kosovo the authority to establish institutions responsible for the restitution of property in Kosovo. Pursuant to this authority, the SRSG issued a UNMIK Regulation which established the Housing and Property Directorate and the *Housing and Property Claims Commission* (HPCC). The Regulation defined the jurisdiction of the Commission for claims of repossession of residential property, outlined the staffing of the HPCC, and provided the general structure for its operations. The HPCC completed its work in 2006.¹⁷

UNMIK then created a second claims commission in Kosovo in 2006, this time to resolve claims resulting from the 1998/99 conflict in respect of ownership over private immovable property, including agricultural and commercial property. Following Kosovo's declaration of independence in 2008, the Kosovo Assembly issued a law that incorporated the provisions of the UNMIK Regulation establishing and regulating the *Kosovo Property Claims Commission* (KPCC). Following the reconfiguration of the UN Mission in Kosovo and the engagement of the EU there, the support of the KPCC has now been taken over by the European Rule of Law Mission (EULEX) in Kosovo.

The last attempt by the United Nations to help establish a major claims mechanism was included in the efforts culminating in the Draft Comprehensive Settlement of the Cyprus Problem, the so-called *Annan Plan for Cyprus* of 2004. The Annan Plan had been developed over a number of years by the United Nations under its then Secretary-General Kofi Annan to resolve the conflict between the Southern and Northern parts of Cyprus and their respective populations. Annex VII to the Plan's Foundation Agreement set out the property regime to govern all properties from which people were displaced because of the events between 1963 and the time of the Plan. This regime contained elaborate provisions on, *inter alia*, the exercise of property rights, the claims process and its decision-making bodies, compensation arrangements, measures in favour of current users, and property in areas subject to territorial adjustment. In the required referendum the Plan was rejected in the Southern part of Cyprus, and consequently the settlement never entered into force.

Without doubt the United Nations will continue to play a key role in facilitating peace efforts in the Middle East and with it a fair and comprehensive resolution of the Palestinian refugee crisis. The Palestinian request for recognition of statehood to the United Nations Security Council in September 2011 is one of the many examples testifying to the weight that is given to UN Security Council or UN General Assembly resolutions when it comes to supporting or 'blessing' a political solution. Having said this, the United Nations has neither the mandate nor the political power to act as a substitute for the parties in concluding peace. Its role will thus be limited to that of a facilitator as well as a guardian of the Palestinian refugee interests through UNRWA during the pre-peace agreement phase.¹⁸

Advocacy

A less 'official' way to support efforts aimed at establishing a claims mechanism has been through advocacy by civil society organizations. Often NGOs that promote transitional justice (such as the International Centre for Transitional Justice) and the rights of victims of human rights violations to reparations (such as REDRESS) are engaged in advocacy and policy advice at the stage of the establishment of a claims mechanism, both for victims and their organizations and for designers of the programme. In addition, they seek to ensure that reparation programmes comply with applicable human rights and international humanitarian law standards. A similar role is usually played by the UN High Commissioner for Human Rights (UNHCHR).

There is also by now a substantial body of practice of Truth and Reconciliation Commissions (TRCs) that have been set up after conflicts or large-scale human rights violations to promote

¹⁷ For information about the HPCC and its work see its Final Report at www.kpaonline.org/hpd/pdf/HPCC-Final_Report.pdf.

¹⁸ This was different in Kosovo, where UNMIK was the quasi-government after the Serb authorities had practically fallen away and no Kosovar government existed yet.

the transition to a just and peaceful new society. TRCs have usually recommended that victims receive reparations and that a claims mechanism be set up to provide such reparations. While TRCs are and should in principle be a national endeavour, the setting up of TRCs and their work has often been supported by international governmental and non-governmental actors, both financially and by making staff and expertise available.¹⁹

In this regard, it remains to be seen what impact the new UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence will have in the future regarding the promotion and establishment of reparation programmes for victims of conflict. This position was established by the UN Human Rights Council during its 18th Session in September 2011, and the mandate includes making recommendations concerning judicial and non-judicial measures when designing and implementing strategies, policies and measures for addressing gross violations of human rights and serious violations of international humanitarian law.²⁰

A large number of civil society organizations are engaged in various aspects of the Palestinian refugee issue. They represent a broad spectrum, both in terms of their affiliation (Palestinian, international and some Israeli), and as regards the focus of their work (humanitarian, political, advocacy, legal etc.) While none of them is working exclusively on preparations for or assistance in the establishment of a mechanism for Palestinian refugee claims, many support Palestinian refugees in the pursuit of their rights and thus make an indirect contribution to efforts at a solution to the issue.

Supporting the implementation of a claims programme

In some of the examples described above, the engagement of the sponsors did not stop at the establishment of the claims programme concerned, but continued throughout the programme during its implementation. In other cases sponsors had no involvement during the phase leading to the establishment of a claims programme and their support started at the implementation stage only.

The different forms of support can include any combination of the following: complete management and implementation of a claims programme; secondment of staff;²¹ participation in the bodies of the claims mechanism or in the appointment of their members;²² provision of facilities and equipment; financial contributions; provision of advice and technical assistance for different stages of the claims process; making records, archives or databases available for the verification of claims; assisting in the enforcement of the decisions of the mechanism; and ensuring exclusivity and closure. Assistance to the programme implementers tends to be particularly important during the early phases of implementation since it helps to accelerate the start-up of the programme, thereby allowing earlier delivery of the benefits to the victims.

¹⁹ After protracted political negotiations, and following a number of recommendations and proposals from the UN, governments and NGOs, the most recent TRC has just been agreed in Nepal, and its mandate includes elaborating a reparations programme for the victims of the recent conflict. A comprehensive study has examined the work of more than 40 TRCs since the 1970s; see P. Hayner, *Unspeakable Truth: Transitional Justice and the Challenge of Truth Commissions* (2nd edn 2010).

²⁰ See Doc. A/HRC/18/L.22.

²¹ One country, Norway, has a particularly strong track record of seconding staff from its government offices to international claims mechanisms; it has continuously done this, for instance, for the HPCC and the KPCC in Kosovo.

²² This could be limited to being the appointing authority only in the event of lack of agreement on an appointment between the parties, e.g. as in the case of the Permanent Court of Arbitration, which appoints the third-country members of the Iran–US Claims Tribunal if Iran and the US cannot agree on them.

Embedding or outsourcing

The most comprehensive support to a programme, i.e. its full implementation, has been provided by international organizations, meaning that the administrative structures and procedures of each organization were available for the new claims programmes: the United Nations in the case of the UNCC (the programme was 'embedded' in the UN), and the International Organization for Migration (IOM) in the cases of the *German Forced Labour Compensation Programme* (GFLCP) and the *Holocaust Victims Assets Programme* (HVAP) (the programmes were 'outsourced' to IOM).

Since the UNCC was 'embedded' in the UN structure, it could start to work immediately. This did not mean that it could use existing UN staff or UN budget, but it was provided with office space and administrative support by the UN. On the other hand, it then had to follow the administrative rules and procedures of the UN, in particular in recruitment and procurement, which limited its flexibility in these areas compared with what it would have been in a stand-alone situation. A similar type of arrangement has been made for the Eritrea–Ethiopia Claims Commission at the Permanent Court of Arbitration (PCA) which makes office and staff support available.²³

A different model was used by the German Federal Foundation, which 'outsourced' programme implementation to seven national and international partner organizations. One of these, the IOM, could rely on its extensive network of field offices to commence very quickly with outreach and claims intake for the GFLCP in more than 60 countries around the world.²⁴

Both the UN and IOM provided initial logistical support and made limited staff resources available during a short preparatory period. Otherwise the claims programmes were treated like large projects for which new staff and other resources required were recruited and procured, and which needed their own funding for all their administrative costs. A significant difference exists, however, in the extent to which the two organizations have maintained and reapplied the expertise and claims processing know-how they developed in these large programmes. Whereas the UNCC has remained the only UN-administered claims programme,²⁵ IOM has developed this area of expertise further and has since 2002 provided legal advice and technical assistance to a whole range of other national and international compensation and restitution claims programmes. It has thus been able to maintain knowledge and staff in this very specialized area and to institutionalize this expertise.²⁶

Other programmes were able to draw on the structures of existing organizations during the early phases of their work until their own structures had been fully established. For example, IOM hosted preparatory meetings at its headquarters in Geneva and at its local office in Sarajevo,

²³ See E. Kristjánsdóttir, 'International Mass Claims Processes and the ICC Trust Fund for Victims', in C. Ferstman et al. (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2009), at p. 170.

²⁴ IOM was also appointed to implement parts of a second Holocaust claims programme by the US court that administered the settlement in the Swiss banks litigation. In the HVAP, IOM used the experience and synergies from the similar and partly related GFLCP.

²⁵ In their early phase, HPD and HPCC were coordinated by the UN Centre for Human Settlements (UN HABITAT), which was also the policy body for this first restitution programme in Kosovo. After a couple of years, the UN HABITAT mandate was transferred to UNMIK, within which HPD and HPCC had an independent standing. During all their operations, the United Nations Office for Project Services (UNOPS) was contracted to provide administrative assistance on personnel and budgetary matters to HPD and HPCC.

²⁶ This is different for ad hoc claims mechanisms that are started from scratch and dismantled after their mandates expire, and for which the typical way of drawing on other programmes' experience has been to recruit individuals who have worked in several processes. One of the authors of this paper pointed this out from his own experience when he observed in connection with the completion of the claims work at the UNCC: 'Migration of experienced UNCC staff to other claims institutions has occurred and is likely to continue with respect to other mechanisms that are on the horizon or that may be created in the future, for example in Cyprus, Palestine, and the system currently being set up by the International Criminal Court and its trust fund for the compensation of victims'; see N. Wühler, 'The UNCC and Future International Claims Practice', 99 *American Society of International Law Proceedings* (2005), at p. 339. See also L. Reed, 'International Claims Tribunals: What International Criminal Prosecutors Might Need to Know, Talk at the Second International Humanitarian Law Dialogues' (2008).

and organized the initial travel of the international members of the CRPC and of an expert consultant. Similarly, the Permanent Court of Arbitration made its offices and staff available to the Iran–US Claims Tribunal during the Tribunal's start-up phase.

Discussions on the Palestinian refugee issue have also considered the benefits of embedding the implementation of the Palestinian refugee solution within an existing international organization or organizations, such as the UN in general, UNRWA or one of the UN's other specialized agencies. There are undoubtedly a number of international organizations and agencies with expertise likely to be relevant for the implementation of a solution for Palestinian refugees.²⁷ To what extent embedding the process within one of them will be feasible and desirable will, in addition to questions relating to their respective mandates, depend on the details of the measures agreed upon in the end. In this respect the United Nations Conciliation Commission for Palestine (UNCCP) is a unique entity. While the UNCCP has for many years been a body without any operational activities, its mandate under UN General Assembly Resolution 194 could certainly be interpreted as allowing it to provide support for or even being the host of a mechanism to deal with Palestinian refugee claims. Should the UNCCP be considered for such a role, it would still need to obtain the necessary expertise and resources, potentially also from the other international organizations mentioned above. It could, on the other hand, immediately benefit from the broad political backing that Resolution 194 would bestow on it.

Sharing know-how and lending a hand

Short of taking on complete implementation or making staff and other resources fully available to a claims programme, the most effective way to enhance the capacity of a new claims mechanism has been to make the experience from other programmes available, and to build the capacity of the staff of the new mechanism through training and accompanying technical assistance. While each programme has its own unique characteristics, which have an impact on its legal framework and the operational challenges confronting it, experience shows that a number of features can be found in practically all previous and current reparation claims programmes. Given the limited resources and capacity of many reparation programmes, it is important to ensure that know-how is shared and the wheel is not reinvented over and over again.

As such, various governments have commissioned IOM and certain UN agencies to make legal and technical expertise available to newly established reparation processes. For example, IOM has been commissioned to provide expert advice and technical assistance gained from its involvement as an adviser and implementer in a variety of claims programmes including the CRPC in Bosnia and Herzegovina, the IPCC in Iraq, the Administrative Reparations Programme in Colombia, the Reparations Programme in Sierra Leone, and the Humanitarian Assistance Programme in Nepal. Activities included holding workshops on reparation policies, programme management and claims processing, with both policy-makers and implementers; elaborating work plans; making technical assistance and experts available for the programme's IT and database support and for payment systems;²⁸ training staff; and organizing inception visits to other claims programmes. As such, these activities have extended to an involvement at all stages of the implementation of compensation and property restitution programmes.²⁹

In addition, IOM, civil society organizations and some of the pertinent UN agencies such as UNDP, UNOHCR and UN Women, regularly organize or participate in conferences and

²⁷ In addition to UNRWA, these include UNDP, IOM, UNHCR and the World Bank.

²⁸ Large-scale claims programmes cannot be operated efficiently without IT support and require in particular hardware, software and expertise in database development and management. Depending on their geographical reach, they also need significant communications infrastructure. On the role of modern computer technology in claims programmes see, for instance, V. Heiskanen, 'New Uses of Information Technology', in Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (2006), at p. 27.

²⁹ The countries where IOM has worked with national programmes include Bosnia and Herzegovina, Colombia, Guatemala, Haiti, Iraq, Kenya, Nepal, Sierra Leone, Timor Leste and Turkey.

workshops aimed at sharing experiences and knowledge and at developing reparation policies and distilling best practices from the implementation experiences of reparation processes. It goes without saying these efforts depend on the support of donors who are willing to fund these events.

The technical assistance and other support given to the Palestinian refugee issue during the preparatory pre-implementation phase will provide a good basis for the assistance provided during the implementation phase. In this regard, the longevity of the refugee crisis raises concerns about the 'shelf life' of technical preparatory work and research, i.e. its accessibility and usability during a future implementation process. To ensure that the assistance provided during the implementation can build on work conducted over the years, e.g. as part of the Track II processes, it will be necessary to continuously take stock and possibly update existing research.

Partaking in policy-making

Probably the most common role that individual international sponsors play in a claims mechanism is through their membership of the programme's policy body. This allows funders and other sponsors to continue to participate in guiding the programme and in supervising its operation, use of funds and compliance with its mandate. Practically every international claims programme, or national programme with international funding, has a policy body, and every such body includes representatives of donor/sponsor governments. The composition of the supervisory organ of the German Federal Foundation, its Board of Trustees, goes beyond this typical model in that it also includes representatives of its private (corporate) funders, international organizations and victim organizations. Another unusual case was the UNCC: as a subsidiary organ of the UN Security Council, it had as its policy and supervisory body a Governing Council composed, at any given time, of representatives of the members of the Security Council in Geneva (the Commission's seat).

There are not many instances where victims have been represented on the policy bodies of claims mechanisms.³⁰ On the Board of Trustees of the German Federal Foundation, one seat was reserved for an organization representing Jewish claimants (namely the Jewish Claims Conference) and one for a representative of Roma victims. Regrettably, the latter seat has to date not been filled since Roma organizations have not been able to agree on their representation. An inclusive and at the same time effective way for victims' voices to be heard during the implementation of a claims programme was through a Steering Group of Most Affected Victims Organizations that IOM established for its German Forced Labour Compensation Programme. This Steering Group brought together representatives of victim organizations from over ten countries. It enabled victims to bring their views into the process and stay informed about the work of the programme. It also allowed the programme management to solicit input from victims and use the group as a channel to distribute information to victims and claimants.

Policy choices in connection with the implementation of a solution for Palestinian refugees are likely to affect a large number of stakeholders beyond the new State of Palestine and Israel, most notably the current host countries, potential resettlement destination countries and financial sponsors of the process. In this regard, it can be expected that a number of them will express an interest in partaking in policy-making to ensure that their interests are protected during the implementation process. This can be a burden as well as a blessing: there is a risk that a large number of stakeholders in the policy-making body will unduly politicize the process, but on the other hand the above stakeholders are much more likely to take ownership of the decisions taken and as a result stand behind the process as a whole.

³⁰ The Sierra Leone Reparations Programme had several victim representatives on its Board.

Appointing decision-makers

Where the commission or tribunal deciding the claims includes international members, their selection and appointment constitute another way in which international sponsors play a direct, and sometimes continuing, role within a claims mechanism. For bilateral commissions or tribunals, these appointments are usually made by the two parties, and the parties or the party-appointed members select the third-country members and the chairperson. In the event that they cannot agree, a so-called appointing authority, which has been previously designated by the parties for this purpose, makes these appointments. Often the appointing authority is also entrusted to decide on a challenge to the international member of a commission or tribunal.³¹

For mechanisms with a wider international participation (financial or otherwise), this function has often been entrusted to international organizations. For the UNCC Commissioner Panels, for instance, candidates could be proposed by UN Member States, recommendations were made by the UNCC's Secretariat, the UN Secretary General made the appointments and these had to be approved by the Governing Council. The President of the European Court of Human Rights appointed the international members of the CRPC. The international members of the HPCC and KPCC were proposed by UNMIK and appointed by the Special Representative of the Secretary General in Kosovo.³²

In the Palestinian refugee context, there is equally likely to be a need for international support during the decision-making process. Internationally appointed decision-makers will be a key element in depoliticizing this body and ensuring the acceptability of the process among refugees as well as within the Palestinian and Israeli societies as a whole.

Funding

When a claims programme starts, the expectations of all concerned, but in particular those of the beneficiaries, are usually very high and results must be shown quickly to enhance confidence in its ability to deliver on all its promises and to support its overall acceptance.³³ A key factor in the establishment and successful implementation of every programme is therefore receipt of the funding it needs both to start its operations and to provide benefits to eligible claimants as quickly as possible. This also includes ensuring that the programme receives sufficient funding throughout its operation to allow it to complete the processing of all claims and pay compensation or provide other remedies to all eligible claimants. While initial funding is usually available, securing funding to see through their operations has often been one of the biggest challenges faced by claims programmes and their management. Claims programmes that have not, or not exclusively, been paid for by the legally responsible party and that therefore need to rely on donor funding have used methods as varied as the pool of international donors. The spectrum ranges from the UN Peace-building Fund providing seed funding, as in the case of the Sierra Leone Reparations Programme, to different sets of bilateral donors for the CRPC, the HPCC and the KPCC.

In the euphoria and the general goodwill surrounding the establishment of a claims programme, expectations often run high and ambitious reparation and compensation plans are formulated.

³¹ For the Iran–US Claims Tribunal, for instance, a retired judge of the Dutch Supreme Court has been designated as the appointing authority. He has an office at and receives secretariat support from the Permanent Court of Arbitration.

³² After UNMIK was reconfigured and many of its functions were taken over by the International Civilian Office, the international members of the KPCC were appointed by the International Civilian Representative.

³³ At the same time, speed – for instance in the outreach to potential beneficiaries and the setting up of the process – must be balanced against fairness and inclusiveness. The initial phase of a claims programme is particularly important for the management of expectations, and international sponsors can and should play a 'moderating' role in this respect. On the management of expectations and the balance between speed and justice in claims processes generally see, for instance, Kristjánsdóttir, 'International Mass Claims Processes and the ICC Trust Fund for Victims' (2009), at p. 178.

Unfortunately, however, in many cases adequate funding has not been sustained throughout the lifespan of the programmes, and programme activities and remedies have had to be adjusted to the emerging funding realities. For example, the compensation component initially foreseen for the CRPC in Bosnia and Herzegovina never received any funding, and this entire aspect of the Commission's mandate was left unimplemented. In Sierra Leone, the contribution from the UN Peace-building Fund, originally anticipated to provide seed funding only, has turned out to be the main and practically only funding source for the National Reparations Programme and has drastically limited the type and extent of remedies that the programme can provide to eligible victims.

The aggregated cost of a fair and comprehensive solution of the Palestinian refugee crisis has been the subject of many academic studies and political discussions. Estimates vary widely depending on the range of material losses included and the valuation standards applied. There is an equal lack of clarity with regard to who is supposed to pay for what. While the lack of clarity may be part of the parties' political negotiation strategies, it fosters assumptions and expectations among the Palestinian refugees about what will be delivered in the end and as such carries the risk of a backlash if these expectations are disappointed.

3. CONCLUSIONS

A comprehensive resolution of the Palestinian refugee crisis will be challenging because of the level of complexity involved. A fair and sustainable solution for Palestinian refugees will need to be multi-dimensional and, beyond the classical restitution and compensation claims programme, will also need to address the issue of durable residency options for all refugees. Politically, these options have for long been regarded as hinging on the permanent status agreement and most notably an agreement on the implementation modalities of the right of return.

In the absence of such an agreement the Palestinian refugee issue has been in a 'pre-implementation phase' for decades, with a wide range of efforts dedicated to supporting its resolution. These efforts have largely been aligned with the 'nothing is agreed until all is agreed' approach of the parties and the requirement that all aspects be comprehensively dealt with in a Peace Agreement. From a technical point of view, however, neither a two-state solution nor any kind of peace agreement would be required to at least start a process for Palestinian refugees that would either provide redress for their losses (even if only partially) or prepare for such redress in a systematic and sustainable way.³⁴ The comparative overview has shown that reparation processes might also be started following the initiative of international sponsors or the UN, even though these processes do not attempt or achieve a full and final resolution of the conflict as such or even of all reparation claims.

The Palestinian refugee file has seen practically all types of support measures from which other reparation processes have benefited. The large number of initiatives undertaken and the long duration of the refugee crisis have in themselves resulted in new challenges. One of them relates to the so-called shelf life of existing academic and empirical research, which needs to be carefully monitored with regard to its validity, accessibility and usability in the future. The other relates to the need to regularly take stock of and better coordinate ongoing support work. Both the monitoring and stocktaking are indispensable to ensure that further preparatory work builds on rather than repeats previous efforts if the resources of donor governments are to be spent efficiently and effectively.

In one specific area, continuing support could be particularly beneficial – namely the collection, examination and consolidation of relevant data sets that could serve as important reference and verification material during the implementation of a solution for Palestinian refugees. The records of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the records of the Israeli Custodian of Absentee Property and the records of the UNCCP are the most prominent examples of existing data sets that might need to be made available and technically adapted to a future restitution and compensation process. Such technical examination and electronic preservation of records is time-consuming and costly and, as such, undoubtedly represents an area of work to which international sponsors could direct their support.

Looking ahead at the implementation of a solution for Palestinian refugees, many questions remain about the likely respective roles played and extent of support provided by the international community in future. The potential menu of support activities required is particularly long in the Palestinian refugee context in view of the wide range of rehabilitation and reparation measures that might form part of a comprehensive solution.³⁵ One of the main challenges might be to channel and allocate the tasks efficiently among the potential supporters with relevant expertise across the world. Organizations such as UNRWA, UNHCR, IOM and the World Bank all have a vast amount of experience and expertise to offer that should be drawn upon before and during

³⁴ The United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD) established in accordance with General Assembly resolution A/RES/ES-10/17 of January 2007 is an example for such an approach.

³⁵ In this regard, a comprehensive mechanism is discussed that deals with claims for property restitution and other compensation for Palestinian refugees as well as with the implementation of durable residency options for Palestinian refugees, namely return to Israel, repatriation to the new Palestinian State, integration in host countries and resettlement to third countries.

the implementation process. While they would all need to be specifically mandated to take on such a role, the UNCCP could be considered to already have a mandate for supporting or even hosting a mechanism for Palestinian refugee claims. The UNCCP, on the other hand, would need to obtain or be provided with the necessary expertise and resources, given that at present it is only a 'shell' without any operative capacity. In addition, some creative thinking might be useful on mobilizing other types of support, in particular from the private sector through in-kind contributions or expert secondments.³⁶

The current host countries of the largest Palestinian refugee populations merit particular mention when considering potential sponsors of the Palestinian refugee issue. Host countries have a special role, as they are likely to act as sponsors as well as implementers in future reparation and rehabilitation programmes. This multi-functional role would ideally also make them prime addressees of targeted international technical support during the pre-implementation phase in order to assist them in preparing for the tasks ahead.

Finally, the comparative overview above should serve as a reality check as to the type and extent of support that can be expected for the Palestinian refugee issue from the international community. Experience shows that donors take a pragmatic approach and prioritize support for issues closest to their own national interests. As shown above, one of the biggest threats to lengthy reparation processes has been donor fatigue and/or a shifting donor focus, which has left a number of reparation programmes struggling to see their activities through to the end. International sponsors of the Palestinian refugee file themselves might wish to take on a more active role in order to ensure that expectations and messages regarding available support to the resolution of the Palestinian refugee issue are realistically and constructively managed.

³⁶ One area for consideration is the IT support that will be required for the implementation of any solution and possible in-kind contributions from the private sector in the form of IT equipment, free or preferential use of software, databases and user licences etc.

ABOUT THE AUTHORS

Heike Niebergall is a Senior Legal Officer in the Land, Property and Reparations Division at International Organization for Migration (IOM) in Geneva.

Dr Norbert Wühler is the former Head of the Legal Service of the United Nations Compensation Commission (UNCC) and former Director of Reparations Programmes at IOM.

The opinions expressed in this paper are those of the authors and do not necessarily correspond to those held by IOM or the UNCC. The authors can be contacted at hniebergall@iom.int and nwuehler@iom.int.

Chatham House Palestinian Refugees Project (The Minster Lovell Process)

The Chatham House project on the Palestinian Refugee Issue in the Middle East Peace Process, ongoing since 1999, aims at an in-depth examination of the regional, legal and political complexities of the issue. By the end of 2011, 32 gatherings had been held, mostly in the Oxfordshire village of Minster Lovell, and also in Europe and the Middle East. The activities over that period have been funded by the European Union, the International Development Research Centre (Canada), the Swiss Agency for Development and Cooperation and the UK Foreign and Commonwealth Office.

The Minster Lovell Process provides an informal mechanism to bridge some of the communications gaps that exist between parties directly concerned with the Palestinian refugee issue. It seeks to raise awareness of the issue and to highlight the importance of its regional dimension through continuous dialogue in the absence of, and in preparation for, formal negotiations.

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