Reparation for Civilians Living in the Occupied Palestinian Territory (OPT): Opportunities and Constraints under International Law

POLICY BRIEF
May 2010

PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH
HARVARD UNIVERSITY

Introduction

A prominent issue in contemporary international law and policy involves civilians living in the Occupied Palestinian Territory ("OPT")[1] who wish to seek reparation for damage allegedly sustained as a result of Israel's activities vis-à-vis the OPT, whether in the course of belligerent occupation or armed conflict. This policy brief provides humanitarian practitioners with a basic understanding of the legal framework applicable to that issue.

Given the sensitive nature of the topic it examines, this policy brief aims to equip readers with the conceptual tools necessary to understand the various arguments from different viewpoints. The main question to be addressed is whether in the above-outlined context a victim of a violation of international law has a right to compensation. This paper does not take any position as to whether Israel has, or has not, violated international law in any of the instances discussed. Nor does the paper address whether individual persons acting *on behalf of* the State of Israel may be held criminally liable for their acts. Also outside the scope of this paper is the situation of Israeli civilians having suffered damage as a result of the situation.

International humanitarian law (IHL) provides the primary legal framework for assessing the issue as to whether there exists a right to reparation for civilians living in the OPT. In addition, this paper will refer to international human rights law, to the extent that it is applicable.[2] As will be further explained below, there is a trend, in ascertaining whether a right to reparation exists under international law, to refer to both international humanitarian law and international human rights law.[3]

Due to the complexity and range of issues pertaining to reparation in the OPT, this paper proceeds sequentially in six Parts, beginning with general principles and proceeding to more specific assessments. Part I discusses the issue at its most basic level: does international law accept the idea that a State that violates this legal framework must provide reparation for the damage inflicted through that violation? Even if the answer to this first question is "yes," the question of whether individual victims have a *right* to claim such compensation remains open. Part II, therefore, deals with that issue. Increasingly, evidence indicates that the international community of States accepts the principle that there exists, as a matter of law (and therefore not of pure political rhetoric), a right for individual victims to claim reparation for a violation of IHL or of international human rights law.

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[1] For the purpose of this policy brief, the "Occupied Palestinian Territory" is composed of the Gaza Strip and the West Bank, including East Jerusalem. This policy brief does not take a position on the status of the Gaza Strip, i.e. as to whether the Gaza Strip is under occupation in the sense of international law.

[2] This policy brief does not deal with the question whether – and, if so, to what extent – international human rights law applies to the OPT. For a discussion, see HPCR Policy Brief, *From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory*, May 2007, available via <www.hpcrresearch.org/pdfs/IHRLbrief.pdf>.

[3] A prominent example of this trend can be found in the title of a Resolution adopted in 2006 by the General Assembly of the United Nations (A/RES/60/147, adopted 21 March 2006), entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law." The latter document will be referred to extensively below.

Yet, in international law, the notion that there may exist, as a matter of principle, a right for individual victims to claim reparation must be distinguished from the question whether the individual may actually *enforce* that right in front of a relevant authority, for example a court. This distinction – which may seem illogical at first sight – is crucial for practical purposes, as will be explained in greater detail Part III. Often, it is considered sufficient under international law that a State deals with the reparation claim *on behalf of its citizens*, whereby the latter do not actually exercise any individual right to make their individual claim for reparation.

Against this legal and conceptual backdrop, Part IV begins to apply these general principles in the specific context of the OPT, first by asking whether avenues are open in front of Israeli domestic courts, then by briefly looking at the question of whether avenues exist in front of domestic courts of other States. In essence and for practical purposes, the answers to the questions raised in Part IV are largely in the negative. Part V looks at the same issues at the international level, asking whether appropriate international or supranational bodies exist or could be established to deal with the specific context of the OPT. The discussion as to how to approach the latter question, which is currently in full swing at the political and diplomatic level, will be dealt with in Part VI.

In a sense, the present policy brief ends where reality begins: no matter what international law may provide, *future* political negotiations at the international level will likely determine whether – and, if so, to what extent – civilians living in the OPT will have a meaningful opportunity to obtain reparation for harm suffered as a result of alleged Israeli violations of international law. Nonetheless, as will be shown, there remains an important and truly meaningful role for humanitarian actors to be played *right now*.

Part I. International Law and Reparation

General Principle

In international law, there is a firmly established principle that a State which violates a rule of that legal order bears international legal responsibility for such a violation. While this may seem self-explanatory in the context dealt with in the present policy brief, it is important to pause for a moment in order to clearly understand the built-in limitation of the previous sentence: only *violations* of international law give rise to responsibility and to an ensuing obligation to provide reparation.

In this respect, one needs to keep in mind that, in the course of an armed conflict, IHL grants significant privileges to the State and its armed forces, for example, in terms of their ability to lawfully inflict a certain degree of destruction of property and in terms of their ability to lawfully inflict a certain degree of injury or even death of civilians, provided their actions are not in violation of the so-called principle of proportionality.[4] The point here is

[4] For a recent formulation of the principle of proportionality, see AP I, Art. 57 (2) (iii): "(...) attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

that, as long as an act is lawful, it will not give rise to any *legally recognized* claim for reparation, no matter how damaging the act in question may be to the civilian population. As shocking as it may seem to those who are unfamiliar with the rules and principles of IHL, this idea is consistent with the trade-off inherent to this normative framework, i.e. a balance between military necessity, on the one hand, and considerations of humanity, on the other. On the basis of the idea of military necessity, the rules of IHL allow for quite a significant scope of entitlements that are available to a Belligerent Party. Provided the Belligerent Party remains within the limits set by IHL, violence, injury, death, and destruction are recognized as an inherent part of the conduct of armed conflict.

Thus, under IHL, neither every instance of civilian death nor of destruction of civilian property will necessarily and automatically constitute a breach of IHL. The important point to keep in mind is that only those actions by the Israeli authorities which qualify as *violations* of international law will trigger the applicability of the principle that the State bears responsibility for these acts.

Furthermore, for the purposes of this policy brief, "international law" is relevant only inasmuch as a particular rule of international law is binding upon Israel, be it as a matter of treaty law or as a matter of customary international law. In short, only those acts of the Israeli authorities which are in breach of the international legal obligations binding upon Israel may trigger the obligation to pay compensation.

The General Principle Applied to IHL and International Human Rights Law

The following paragraphs look in greater detail at how the above-mentioned general principle plays out, at the conceptual level, within the context of IHL and international human rights law.

Since 1907[5] and as reaffirmed[6] in the 1977 First Additional Protocol to the Geneva Conventions, IHL has firmly stipulated that a violation of that legal framework calls for compensation by the State in question (referred to as the "Belligerent Party" in IHL[7]). Thus,

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combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (…)."

[5] 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[6] Art. 91 of the 1977 First Additional Protocol to the Geneva Conventions reads: "Responsibility. A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." See also common article 51/52/131/148 to the four Geneva Conventions: "No High Contacting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article." This "preceding Article" deals with the so-called "grave breaches." Finally, see also Art. 38 ("State Responsibility") of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict: "No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation."

[7] For an accessible article going deeper into the intricacies of this question, see Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 International Review of the Red Cross 401 (2002), via <www.icrc.org/web/eng/siteeng0.nsf/html/5C6B83>. Similarly, see Markus Rau, *State Liability for*

the idea that a State must pay compensation for those acts of its armed forces that were in violation of IHL is by no means an idea outside the mainstream of IHL. On the contrary, the principle is generally, and uncontroversially, accepted to be customary international law,[8] i.e. the principle is binding upon all States, irrespective of whether they have ratified the 1977 First Additional Protocol (which Israel has not done). It is interesting to note, in this respect, that the IHL texts referred to in this paragraph only speak of "compensation," i.e. a notion which, as will be explained below, is different in scope from the broader notion of "reparation."

For its part, international human rights law is characterized by a wide variety of treaties, many of which are regional in scope. Thus, a specific assessment must be undertaken, for each treaty belonging to that legal framework, as to whether the treaty in question applies to the situation at hand. Some of these treaties contain a provision for individuals to claim reparation against the State for an alleged violation of the human rights treaty, though that is by no means a standard provision. Furthermore, international human rights law has not always coupled its lofty declarations with practical means for individual victims to obtain reparation, let alone financial compensation granted by courts or other supervisory bodies. In practical terms, this often means that the assessment depends upon the question of whether the State, after having ratified a particular human rights treaty, has taken legislative steps at the domestic level to enable victims of an act going against the human rights treaty in question to take their complaint, and claim for compensation, to court.

As far as international human rights law is concerned, Israel has ratified the 1996 UN International Covenant on Civil and Political Rights. However, nowhere in that Covenant has an individual right to obtain compensation been established. Rather, all the Covenant does in this regard is invite its Member States to enact appropriate national legislation to that effect.[9] While the Optional Protocol to the Covenant does provide for – under certain conditions – an individual right to have one's case reviewed by a UN-based supranational body, Israel (along with many other States) has not become a party to that Optional Protocol. Thus, for practical purposes, the question as to whether an individual has the possibility to have a case reviewed by Israeli domestic courts depends entirely on the domestic Israeli legal framework. The latter will be dealt with in Part III, below.

"Reparation" versus "Compensation"

Distinguishing the particular terminology used in this field is important. In international law, the concept of "reparation" is a very broad one, used as the overarching concept encompassing a variety of possible *forms* of reparation. The payment of (financial) "compensation" is but one of the possible forms which "reparation" can take. "Restitution," for example, is also considered to constitute reparation under international law. Such

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Violations of International Humanitarian Law – The Distomo Case before the German Federal Constitutional Court, 7 German Law Journal 701 (2006), via <www.germanlawjournal.com/article.php?id=743>.

[8] International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press (2005), at 530.

[9] Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 Tulane Journal of International and Comparative Law 157 (2002), at 167: "It could even be argued that (...), under the law of the Covenant, individuals are not meant to enjoy a right to reparation or compensation."

restitution can take the form, among others, of returning property to the original owner, or of allowing the original owner renewed access to his or her confiscated land.

The previous observations are promising from the perspective of those wishing to increase the protection of victims of IHL violations. Yet, for all the promises the notion of "reparation" seems to entail at first sight, and to which it effectively gives rise when such reparation takes the form of compensation or restitution, "reparation" can also take the form of much less tangible and, some will argue, less satisfactory forms. Thus, for example, reparation can also take the form of a full disclosure of the facts, or of a public apology with an acceptance of responsibility.[10] In this way, reparation can also be a symbolic act, rather than one that is financial or otherwise concrete.

The important point for practitioners dealing with this topic is to use the appropriate terminology at all times, recognizing that "reparation" is the umbrella concept underneath which a range of possible measures can materialize. Thus, it is important to be aware that limiting a claim to "compensation," per the terminology currently used in international law, does not include, for example, a claim for "restitution."

Part II. Compensation: A Right for the Individual Victim?

It is one thing to say that, as a matter of principle, a State must pay compensation for violations of international law; it is quite another thing to say that a State would need to pay such compensation *directly to the individual victims* of said violations and that, even further, the said victims would have an individual *right* to obtain such compensation. Each of these related questions will be addressed in turn.

The Traditional View of International Law

For a long time in the development of international law, individual victims did not enter into the picture of compensation.[11] Compensation was to be paid to the other State, often taking the form of a "lump sum" agreement that was reached upon as part of a more comprehensive peace treaty. Subsequently, it was considered to be entirely within the discretion of the State receiving this compensation to decide whether it would transfer some of the money to its nationals – the individual victims. While the treaty texts of IHL did not specify the identity of the entity (State or individual) asking for compensation, no notion of "rights of victims" entered into the picture.

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[10] For a complete overview of the terminology regarding possible measures, see "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law," Principles 19 through 23, respectively dealing with restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

[11] *Cfr.* the statement made by Jean Pictet, one of the most influential authors having drafted an extensive commentary to the Geneva Conventions, who wrote in 1952: "It is not possible, at any rate as the law at present stands, to imagine an injured party being able to bring an action individually against the State in whose service the author of the infraction was." ICRC, Commentary to the First Geneva Convention, edited by Jean Pictet (1952), at 373.

Put in the context of IHL's historical development, this is logical: historically, IHL sought exclusively to regulate the relationships among States in their capacity as Belligerent Parties fighting against each other. As part of a post-war settlement, a State having violated that legal framework would be liable to provide for compensation (as per the terminology used in the 1907 and 1977 treaty texts) for the damage inflicted as a result of the violation. Part of the equation in this regard was that only the other State (i.e. the former enemy State)[12] would be entitled to make such a claim.[13]

In this conception of regulating inter-state relations, and of regulating to what extent armed forces of a State are entitled to inflict harm on the enemy, there was no room for conceiving of an individual victim's "right" to anything. In this way, in classic IHL individual civilians were at the receiving end of the law and were not thought of as entities worthy of separate legal consideration, let alone standing. The traditional view of international law, in short, did not even consider the possibility of conceiving of the victims of IHL violations as holders of individual rights.

Recent Challenges to the Traditional View

For the last two decades, this traditional view has been challenged in academic writings and, most importantly, in UN documents. Several authoritative documents point towards that direction.

In its 2004 Advisory Opinion entitled *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* – a text referred to in detail further below – the International Court of Justice seemed to suggest that, for the particular case of the "Wall" in the OPT, an obligation to pay compensation *to the individual victims concerned* arose.[14] While the International Court of Justice, in this Advisory Opinion, did not go so far as to suggest that these individual victims would have an individual "right" to claim compensation, subsequent texts originating within the realm of the UN have taken that step.

Thus, the 2005 "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General" stated: "(…) there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those

[12] Mention must be made of the fact that, in January 2010, Israel has paid the United Nations (i.e. not a State but an intergovernmental organization) over 10 million USD for damage sustained by the United Nations to its property during the December 2008–January 2009 Israeli actions in the Gaza strip. In turn, the UN stated that "With this payment, the United Nations has agreed that the financial issues relating to those incidents ... are concluded." Available via <www.cnn.com/2010/WORLD/meast/01/23/israel.un.gaza/index.html>.

[13] As demonstrated by the examples of Germany and Japan after WWII, historical practice suggests that it will often only be the losing State which ends up paying such financial compensation. Due to the power dynamics at play, the IHL violations of the State having won the armed conflict have very often remained without any financial consequences.

[14] International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 09 July 2009, I.C.J. Reports 2004, 136, paragraph 152 at 198: "Moreover, given that the construction of the Wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all natural or legal persons concerned." (underlining added).

abuses."[15] Thus conceived, in this text one unequivocally speaks of the individual "rights" to reparation of victims of these particularly egregious violations.

The clearest recognition of the acceptance, by the international community of States, that there would indeed be such a right came in a Resolution adopted by the UN General Assembly in 2006, entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law." One of the provisions of this Resolution is worth quoting in full: "Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (...) (b) Adequate, effective and prompt reparation for harm suffered (…)."[16]

The Notion of "Victim"

It is one thing to say there is a right for a victim of a violation of IHL to claim compensation; it is another thing to know who qualifies as a "victim." In situations of occupation and armed conflict, even if they are being carried out in full compliance with IHL, all civilians suffer, or are, at the very least, adversely affected by the violence of the situation and the wide variety of inconveniences it creates. Yet, for purposes of international law, not all of them will qualify as "victims." Nonetheless, international law does adopt a rather broad understanding as to who can be considered a victim, a notion which can be so wide as to include family members of the direct victim.[17] On this issue, the sheer revolutionary character of the above-mentioned 2006 General Assembly Resolution cannot be overstated. While human rights law is very familiar with, and indeed often organized around, the notion of "victim," this notion did not previously appear in the vocabulary of traditional IHL.

From the perspective of those wishing to advocate for greater protection of individual victims, all of these recent developments are good news. Conceptually, these developments add up to a solid argument that there is, at the very least, an emerging recognition of the idea that individual victims of serious violations of IHL have a right to compensation for harm suffered. It must be emphasized, however, that at present this argument is largely formulated at the conceptual level: it remains to be seen, in the years ahead, to what extent (if any)

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[15] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, UN doc. S/2005/60 of 11 February 2005, paragraphs 593 to 597, citation to be found in para. 597 (underlining added).

[16] A/RES/60/147, 21 March 2006, citation from paragraph 11 (underlining added).

[17] "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law," Paragraph 8: "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." and Paragraph 9: "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim."

courts are prepared to apply these "Basic Principles," especially where such "Basic Principles" seem to break with traditional principles of international law.

While the preceding section dealt with what may be considered positive developments by those looking for a solid legal framework for protection of victims of IHL violations, the next section deals with aspects that may not be considered quite as encouraging from that angle of analysis.

Possessing a Right versus the Capacity to Actually Enforce that Right

The fact that an individual has a right under international law – in this case, the arguable (though by no means universally guaranteed or accepted)[18] right to compensation for violations of IHL – does not necessarily mean that there exists the corresponding capacity to enforce that right in front of a court or another supervisory body.

Thus, if one assumes, for the sake of the argument, that international law has now crystallized to the point of accepting the notion that victims of IHL violations have a "right to compensation," it remains a separate question as to whether they have a right *to assert this right*. This state of affairs amounts to, in the words of the UN Commission of Inquiry in the 2006 Israel-Lebanon conflict, a "serious lacunae in international law."[19]

In fact, nowhere in IHL has such a "right to enforce the right" been recognized. Thus, the truth of the matter is that IHL, while arguably[20] affirming that victims of IHL violations have a conceptual right to compensation, does not take that one step further to actually allow victims to enforce that right. Certainly, IHL does not say that victims cannot do so; it is simply silent on the matter and does not provide for any specific mechanism that would allow a victim to actually be guaranteed to be able to enforce his or her claim to compensation.

While this is the end of the road as far as IHL is concerned, other legal frameworks or institutional arrangements may go further toward converting the conceptual right to compensation into one that can actually be enforced in practice by an individual victim of a

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[18] Dieter Fleck, *Invidual and State Responsibility for Violations of the Ius in Bello: An Imperect Balance*, in Wolff Heintschel von Heinegg and Volker Epping (editors), International Humanitarian Law Facing New Challenges, Springer Verlag Berlin Heidelberg (2007), at 198: "The Basic Principls (...) have not met with much support by states. Insofar as they aim at full compensation for victims, they have rightly been criticized as being unrealistic and politically flawed."

[19] Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, 23 November 2006, page 8, point (n).

[20] At best, this affirmation can be sustained because of, and only as of the adoption of, the 2006 Basic Principles, referred to elsewhere in this policy brief. See Dieter Fleck, *Invidual and State Responsibility for Violations of the Ius in Bello: An Imperect Balance*, in Wolff Heintschel von Heinegg and Volker Epping (editors), International Humanitarian Law Facing New Challenges, Springer Verlag Berlin Heidelberg (2007), 171-206, at 179 on "the gap between the obligation to make full reparation and corresponding rights of individual victims": "individual victims of violations are hindered if not practically excluded by procedural and substantial problems from submitting claims." Also at 193: "State practice and jurisprudence have denied so far, that international law offers rights to individuals corresponding to the duties of states to comply with international humanitarian law. To expect a shift of attitude and even a general regulation of this complex issue within foreseeable time would be less than realistic."

violation of IHL. Considered in the abstract, there are three types of mechanisms that can provide for the possibility for an individual to directly obtain reparation, thus potentially filling in IHL's "serious lacunae": (i) an *ad hoc* mechanism agreed upon at the inter-state level; (ii) a unilateral decision by a State to adopt the necessary domestic legislation;[21] or (iii) the willingness of a State's domestic court system to grant reparation through its case law, irrespective of any domestic legislation on the matter.[22]

Reducing the matter to its core, it will be up to either of the following two processes to determine whether an individual victim may have his or her case heard. These are, first, the domestic courts of a State (Israel or another State), and, second, a supranational or international body that could hear the case and provide some form of reparation.

Both of these avenues will be discussed in turn: Part III deals with the question at the level of domestic courts, and Part IV deals with the question at the international level.

Part III. Reparation by a Domestic Court?

To summarize what preceded, it can be stated that IHL is gradually developing so that an individual who has been the victim of a *violation* of IHL by another State may have a right to reparation. But, at the same time, IHL provides no answer to the question as to whether this victim actually has a right to bring his or her claim to court. It is, therefore, either up to the domestic courts of the State where the case is brought to decide the issue (dealt with in this Part), or up to the existence of some supranational or international body to do so (dealt with in Part IV).

For present purposes, there are two sorts of domestic courts: Israeli domestic courts, on the one hand, and the domestic courts of any State other than the State of Israel, on the other hand. Each will be dealt with in turn.

Reparation by an Israeli Court?

Can a civilian living in the OPT who considers himself to have suffered damage as a result of a *violation* of IHL by Israel bring his case to a domestic Israeli court? On this, the answer provided by domestic Israeli law as of 2010 is likely to be in the negative, due to a series of

[21] This possibility will not be dealt with further in the present policy brief. Recent examples thereof, pursuant to an international diplomatic policy process, are the establishment, through acts of domestic legislation, respectively in Austria and in Germany, of the "Austrian Reconciliation Fund" and the German Foundation "Remembrance, Responsibility and the Future," where compensation possibilities were being provided for as pertaining to World War II activities, in particular as pertaining to slave labor or forced labor during that period. In a number of other States, domestic initiatives have taken the form of so-called "truth and reconciliation commissions," some of which (though not all) have included the possibility of awarding compensation under certain conditions.

[22] *Cfr.* also International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press (2005), at 541.

domestic legal provisions[23] which effectively preclude access to the Israeli domestic court system for actions in so-called "conflict zones."

Of course, this domestic legislative framework could one day be modified. For the time being, however, the Israeli domestic legal system does not provide a venue for such claims, and in this matter it nonetheless remains in accordance with international law.

Even the "Basic Principles" (para. 12 (d)) merely formulate in terms of a recommendation the idea that States "should" "make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law." Thus, there is no strict obligation under international law for States to actually provide victims with the means to enforce their right to compensation.[24] It is a matter of "should" vs. "shall." A significant number of States have, in this respect, not taken any domestic measure at all. In practical terms, this means that victims in these jurisdictions are left empty-handed.[25] In the further development of this area of the law, much will depend on the extent to which the authority of the "Basic Principles" grows over the course of the next decade.

Reparation by the Domestic Courts of Another State?

What about the chances of introducing, by a private plaintiff who considers himself to be a victim of violations of IHL committed by the State of Israel, a case against the State of Israel in front of the domestic courts of another State? Equally, here, for reasons that have nothing to do with the particular situation of the OPT but everything to do with well-established principles of international law, the action is most likely going to fail. The legal obstacles here are "sovereign immunity" and "invocability of IHL." Each will be dealt with in turn.

There is a well-established rule in international law, frequently applied by courts, that a State benefits from "immunity" in front of the courts of another State. While this so-called "sovereign immunity" has gradually been eroded in some respects (for example, immunity is no longer granted when a case concerns commercial activities[26]), wartime behavior

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[23] Report of the United Nations Fact Finding Commission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, paragraphs 1870-1873 (with further references to domestic legal provisions in Israel), concluding: "It is the view of the Mission that the current constitutional structure and legislation in Israel leaves very little room, if any, for Palestinians to seek compensation." Unofficial and unauthenticated translations in English of this legislation are available via <www.hamoked.org.il>, section "Compensation Law."

[24] See Dieter Fleck, *Invidual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance*, in Wolff Heintschel von Heinegg and Volker Epping (editors), International Humanitarian Law Facing New Challenges, Springer Verlag Berlin Heidelberg (2007), at 199: "[the Basic Principles] vigorously confir[m] the responsibility of states to provide remedies and reparation for gross violations, but [do] no longer address the controversial question of individual rights, except for a plea to provide equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms."

[25] Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 International Review of the Red Cross 497 (2003), at 507.

[26] There is relatively rich, and recent, case law attempting to have domestic courts recognize other exceptions to the principle of sovereign immunity. Especially relevant here are cases arguing that no sovereign immunity should be granted when the act in question raises questions of egregious violations of human rights. While there have recently been some judgments accepting this principle (in Italy and Greece), all have been related to acts that were committed on the territory of the State whose court system has been seized of the

generally[27] remains solidly within the confines of that doctrine. The underlying idea is that, for all matters that are within a State's national discretion, the domestic courts of another State are not to pass judgment upon such acts. According to this view, if compensation is to be paid, it is to another State and pursuant to an inter-State settlement to that effect, i.e. not through a series of discrete claims for compensation introduced by individual claimants in front of domestic courts of other States. It is not uncommon for domestic courts, when called upon to issue a judgment in such cases, to make it understood that they feel ill at ease with having to do so, and to indicate that domestic court mechanisms, inherently able to do no more than to offer relief to only a single claimant at once, may not be the most appropriate mechanism for dealing with compensation issues related to armed conflict.

The actual meaning of a judgment in which the State called to appear as the defendant is granted sovereign immunity is often misunderstood. The fact that a judge has recognized the defence of immunity does not mean that the plaintiff's argument was necessarily without merit. In fact, the substance of the case was not considered. The plaintiff may or may not have had a worthy case on the merits, but that part of the plaintiff's argument was simply never assessed by the court. The whole debate about "immunities" is of a purely procedural nature.

Irrespective of the "sovereign immunity" argument, an additional obstacle that is likely to emerge when an individual claimant seeks to have his case heard by the domestic courts of another State relates to another well-established doctrine in international law: individuals cannot necessarily "invoke," in such a forum, a treaty in their favor.[28] The idea underlying this doctrine is that since States, not individuals, concluded the treaty between each other, then the treaty confers rights and obligations only to States, not directly to individuals. For the specific field of IHL, contrary to what is the case in human rights law, this view still very much prevails in many domestic courts, which generally tend to accept the argument that IHL sets out rights and obligations between and for States, not for individuals.

In recent years, some domestic tribunals, mostly in Europe, have been willing to allow for the type of individual claim that is being contemplated here. However, this is still rare, and the vast majority of case law adheres to the old, well-established principle that individuals cannot invoke IHL in front of a domestic court, unless the relevant domestic legislature has decided differently. Hence, for practical purposes, not much is to be expected from litigation in front of a domestic tribunal, be it one of Israel or of any other State. Such litigation could

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matter. Thus, unless otherwise instructed by their domestic legislation, judges will maintain the principle of sovereign immunity, even for cases alleging egregious violations of human rights but where the alleged act in question took place *outside* the territory of the State whose court system has been seized of the matter. In short, current practice indicates that the defendant State will be granted immunity from jurisdiction, and the case will never be heard on the matter, no matter how meritorious it may be.

[27] In recent years, some Italian courts have explicitly decided to refuse to grant sovereign immunity to Germany, sued in front of domestic Italian courts for Nazi Germany's WWII behavior. In turn, confronted with a serious of civil actions introduced against it in front of domestic Italian courts, in December 2008 the Federal Republic of Germany instituted proceedings against Italy in front of the International Court of Justice. This case is still pending, and will hopefully provide an indication of international law's status on the issue of sovereign immunity. For the text of Germany's application to the International Court of Justice, see <http://www.icj-cij.org/docket/files/143/14923.pdf>.

[28] For an overview of case law on this point, see Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 International Review of the Red Cross 497 (2003), at 507–513.

certainly attract significant media interest, which may be valuable in and of itself from an advocacy perspective. From a legal angle, however, claimants should understand that the actual chances of obtaining something concrete are low to nonexistent.

The previous observations are by no means specific to the context of the OPT: several UN-established Commissions of Inquiry have observed in different contexts that, since the system of domestic courts is not considered promising for these purposes, the international community should establish additional or alternative mechanisms to allow victims to introduce claims for compensation.[29] Are there, at this time, any mechanisms available that allow a case to be brought before an appropriate body at the international level? This question is taken up in the next part.

Part IV: Reparation at the International Level

The International Court of Justice and the International Criminal Court

The two household names when it comes to international courts and tribunals are largely unavailing for present purposes. Neither the International Court of Justice nor the International Criminal Court, indeed, offer a forum in which civilians living in the OPT could introduce a claim for compensation.

The jurisdiction of the International Court of Justice, indeed, is limited to disputes between States, and therefore individuals have no rights whatsoever at the level of this Court, let alone any possibility to initiate proceedings there.

As to the International Criminal Court (ICC), it initially needs to be emphasized that its primary focus is to deal with individual criminal responsibility, i.e. punishment of individual perpetrators for acts of genocide, crimes against humanity, and war crimes. An innovative feature of the ICC is that it provides the possibility for a particular victim – once his or her victim status is recognized by the Court – to seek to obtain compensation for his or her individually sustained damage.[30] There are two considerations to be kept in mind in order to

[29] Report of the United Nations Fact Finding Commission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, paragraph 1873: "The international community needs to provide an additional or alternative mechanism of compensation by Israel for damage or loss incurred by Palestinian civilians during the military operations."; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, U.N. Doc. S/2005/60 of 11 February 2005, paragraphs 601–603, proposing the establishment of an "International Compensation Commission," which should be able to hear claims even if the perpetrator of the act in question has not been identified); Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, 23 November 2006, at page 78, recommending the "creation of a commission competent to examine individual claims".

[30] Art. 75 of the Rome Statute of the International Criminal Court (1998, entered into force 1 July 2002), entitled "Reparation to Victims," provides *inter alia* (para. 1) for the following: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting." In order to facilitate the actual materialization of

assess the likelihood of the ICC's getting involved. First, Israel has not signed onto the Rome Statute. In principle, therefore, the ICC may not exercise jurisdiction over the OPT unless the Security Council confers jurisdiction over acts committed in the OPT to the ICC, which, in the current political environment, is an unlikely possibility. Second, in January 2009, Palestine submitted to the ICC a "Declaration Recognizing the Jurisdiction of the International Criminal Court."[31] Since this issue is currently under full investigation and discussion, it will not further be addressed here.[32]

Policy Arguments in Favor of Compensation at the Supranational Level

In spite of the impossibility of the International Court of Justice and the strong unlikelihood of the International Criminal Court offering some form of relief to civilians living in the OPT in the immediately foreseeable future, it is still worth completing a thorough assessment as to why, as is often argued, compensation mechanisms at the international or supranational level are preferable to those at the domestic level.

There are a number of compelling policy arguments advanced *against* the usefulness and feasibility of the notion that every individual victim should have a right to initiate legal proceedings at the domestic level in order to be compensated for his or her individually sustained damage. Three such arguments are briefly presented here.

First, the argument is made that allowing the effective operationalization of such individual rights, by an innumerable number of individual claimants, would lead to chaotic results. Domestic courts, it is argued, are simply not in a position to handle an endless, dispersed, and uncontrollable flood of litigation brought by individual claimants who wish to have their individual cases heard.

Second, reaching a State-to-State settlement pursuant to a situation to which IHL was applicable may involve a delicate and complex process of mutual concessions at the State level. It is argued that, if private citizens would be allowed to initiate lawsuits as they deem fit for their purely private purposes, the larger equilibrium attained in the State-to-State settlement could be easily disrupted. Between conflicting demands of victims seeking individual compensation for damages, on the one hand, and States seeking to reach a "once

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such compensation, a Trust Fund (Art. 79 of the Rome Statute) has been established, and mechanisms (which have proven rather contentious already in the Court's short history) have been put in place to allow for victims' participation to the proceedings. The fact that the Rome Statute allows for victims' participation, and for the possibility to grant them compensation, has radically altered the position of individual victims at the level of international criminal tribunals. In line with the Nuremberg and Tokyo proceedings after WWII, neither the Statute establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) nor the Statute establishing the International Criminal Tribunal for Rwanda (ICTR) paid any attention to the position of victims, let alone to the possibility for victims to obtain compensation. It has recently been argued that international criminal tribunals are ill-suited to deal with claims for compensation by victims, see Liesbeth Zegveld, *Victims' Reparation Claims and International Criminal Courts: Incompatible Values?*, 8 Journal of International Criminal Justice 79 (2010).

[31] Available via <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

[32] For further analysis, see Yaël Ronen, *ICC Jurisdiction Over Acts Committed in the Gaza Strip: Art. 12 (3) of the Rome Statute and Non-State Entities*, 8 Journal of International Criminal Justice 3 (2010).

and for all" comprehensive reparation settlement, on the other hand, it is argued that the law should privilege the collective (State) interests.

Finally, it is argued that domestic courts have no expertise in handling claims of this specific nature.

Permanent versus Ad Hoc Claims Commissions

Whatever the merits of these policy arguments, they have not led the international community of States – so far, at least – to establish a permanent adjudicatory body at the international level which would have the competence to hear automatically all claims pertaining to alleged wartime damage.

The institutional landscape on this issue is perhaps best described as consisting of ongoing *ad hoc* international political negotiations. Put bluntly: a claims commission will exist only in the event that political pressure and willingness rise to a level sufficient to establish such an international body – perhaps in the wake of an armed conflict or another type of incident engendering a significant amount of damage.

Coming back to the situation of Israel and the OPT, there is, in short, no guarantee whatsoever that such an international body will be established once the armed conflict, or occupation, has ended. However, this does not mean that humanitarian practitioners cannot do anything meaningful while the armed conflict or occupation is still ongoing, especially when it comes to compiling evidence of damage (a point which will be further addressed below). Be that as it may, the core of the matter is and remains that not all victims of armed conflicts are on equal footing when it comes to the availability of avenues to raise individual claims for compensation. The international political environment influences which situations are and are not referred to the International Criminal Court.

Yet, there have been instances in which a political agreement has been reached to create, for a specific situation, a claims commission at the international level. The phrase "claims commission" is important, in that these are not courts and thus do not function in the same manner.

Recent history offers three prominent[33] examples in which the political environment was such that an international claims commission was created, or designated, with the authority to hear claims pertaining to compensation for violations of IHL. This was the case, for example, after the 1979 crisis (not an armed conflict) between Iran and the United States, when negotiations led to the establishment of the so-called Iran-United States Claims Tribunal,[34] in which claims for compensation were introduced, mainly by corporations. Only one paradigmatic example exists in which the United Nations itself became involved in the establishment of such a body. This is the example of the "United Nations Compensation

[33] Other examples are the "Commission for Real Property of Displaced Persons and Refugees in Bosnia and Herzegovina," established under Annex 7 of the Dayton Peace Agreement, see <www.law.kuleuven.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm>.

[34] Available via <www.iusct.org>.

Commission"[35] which, contrary to what its name suggests, is not a body with a general mandate. This body, created by the UN Security Council, deals with compensation claims against Iraq (including claims by individuals) for acts related to its invasion of Kuwait in 1990.[36] Finally, another example of an *ad hoc* agreement[37] is the Eritrea-Ethiopia Claims Commission, concluded in 2000 between the former belligerent parties, in which individuals could bring claims for loss, damage, or injury resulting from violations of IHL.[38]

Specific Features of Mass Claims Proceedings

These claims commissions have developed a rich body of case law, addressing, for example, how to financially assess various types of damage (e.g. loss of property) sustained as a result of an armed conflict.

They function according to the mode of so-called "mass claims proceedings," i.e. they often develop standardized forms for applicants to fill out and apply a common matrix to assess claims. All such measures are designed to ensure that, as far as possible, each claim can be heard correctly yet within manageable bounds of time. This means that the attention accorded to each individual claimant will not necessarily be as detailed as what would be expected in an ordinary tribunal, as handling such a large number of claims precludes the possibility of a detailed analysis of each individual case. Often, the proceedings take place entirely on paper, i.e. with no court hearings. Hence, these claims commissions do not necessarily grant victims the opportunity to testify publically about the harm that was done to them. Furthermore, it is often the case that only those individuals whose claims meet a minimum threshold of financial damage may apply, meaning that not necessarily all victims will be entitled to do so.

In these respects, considerations of efficiency have trumped sensitivity towards the particular details of each case. Individualized judicial review of every case is not necessarily guaranteed, even if an *ad hoc* compensation mechanism is provided. Experience with these claims commissions has shown that justice may be slow, expensive, and not necessarily comprehensive.

Furthermore, though it has been somewhat relaxed by many of the claims commissions, there will always be a certain standard of proof that needs to be met. Given the context of armed conflict, individual claimants may be unable to produce the evidence required to meet

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[35] Available via <www.uncc.ch>.

[36] The starting point was UN Security Council Resolution 687 of 3 April 1991, paragraph 16 of which reads: "(...) Iraq (...) is liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a results of its unlawful invasion and occupation of Kuwait.", followed by paragraph 18: "Decides also to create a fund to pay compensation for claims that fall within paragraph 16 and to establish a Commission that will administer the fund." The practical details hereof have been further set out in UN Security Council Resolution 692 of 20 May 1991, establishing the United Nations Compensation Commission.

[37] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, available via <www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf>. Art. 5 of this Agreement creates the Claims Commission.

[38] Further information on this Commission is available via <www.pca-cpa.org/showpage.asp?pag_id=1151>.

that standard of proof. For example, how does one prove title of ownership over a house that has been entirely destroyed in the course of an armed conflict?

Finally, the ability of these international claims commissions to function depends fundamentally upon their having the necessary funds to actually disburse compensation. The source of these funds is part of the agreement that leads to the establishment of the claims commission in the first place.

Thus, for all of the hopes that are often placed in the establishment of a potential claims commission for the OPT, it must be clearly kept in mind that justice dispensed by these bodies will be inherently imperfect; these commissions seek to provide practical resolutions to claims by thousands of individuals. Yet, for all their imperfections and given the constraints, these commissions often turn out to provide a relatively effective way to deal with an immense number of complex claims.

One must, in this respect, accept the philosophical paradigm shift from the context of ordinary domestic courts to the context of international claims commissions. Rather than viewing the situation from the perspective of each individual applicant, such international claims commissions are set up from the point of view of managing the entire situation in as correct a manner as possible, given the circumstances. They deal with floods of complaints originating from events – such as an occupation or an armed conflict – in which massive numbers of individuals have suffered damage.[39]

From a practical perspective, such a claims commission may provide the most effective reparation mechanism for the situation in the OPT. Due to the fact that Israel is not a party to the Optional Protocol to the International Covenant on Civil and Political Rights, nor a party to any of the regional human rights treaties, it will not be possible to frame a claim for compensation at the international level in the language of human rights law. From the perspective of strategizing about litigation, this matters tremendously; if one is eventually able to bring a claim in front of a supranational human rights body, this often encourages litigants (and their lawyers) to frame their claim in the language of a human rights violation, rather than to seek to bring it under the confines of IHL. As to the situation of civilian victims in the OPT, there may be little practical possibility, therefore, from a litigation perspective to frame a claim under human rights law, with the exception of possibly invoking human rights arguments in front of Israeli domestic courts.

Against this backdrop, it is clear that the issue of reparation for civilians living in the OPT contains both possibilities and constraints. The next Part turns to some of the latest developments that are relevant to the specific case of the OPT.

[39] *Cfr.* on the UN Compensation Commission regarding Iraq; see David D. Carron and Brain Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 European Journal of International Law 183 (2002), at 187: "(...) the problems are twofold: (1) to be fast but fair and (2) to collect and divide a clearly inadequate pie."

Part V. Reparation and the OPT

There are two basic documents underpinning any discussion specifically dealing with the link between the issue of reparation and civilians living in the OPT.

First, the historical starting point for any discussion on compensation for civilians in the OPT is UN General Assembly Resolution 194 (III) of 11 December 1948 in which the General Assembly "Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or equity, should be made good by the Governments or authorities responsible."

Second, the International Court of Justice's Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[40] dealt with the issue of compensation, among many other issues. However, it dealt with compensation only as it pertains specifically to the "wall," i.e. not to the OPT in general.

It is important to emphasize that from a legal perspective such an Advisory Opinion constitutes, as the name indicates, *advice*, and this to the UN General Assembly in particular. In and of themselves, the views propounded therein are not binding as a matter of international law.

Building upon its general assessment that Israeli actions regarding the "wall" were in violation of international law, the view of the International Court of Justice as to the issue of compensation was as follows:

> "(…) given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all natural or legal persons concerned. (…) Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction."

Thus, the logic proposed by the International Court of Justice is as follows: restitution is to be regarded as the primary form of reparation. If restitution is impossible, then (financial) compensation needs to be provided as a fall-back option in order to address the

[40] International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 09 July 2009, I.C.J. Reports 2004. The citations are from paragraphs 152 and 153, at page 198.

consequences of the act considered to have been in violation of international law. Thus, the International Court of Justice introduced a clear hierarchy in terms of the various forms of reparation: restitution is the preferred mode of reparation.

In reaction and as a follow-up to this Advisory Opinion, the UN General Assembly adopted a Resolution[41] in which it (paragraph 2) "demands that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion" and, most importantly for the purposes of this policy brief, "requests the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion." The next paragraphs provide an overview of the main relevant documents and steps toward the establishment of this "register of damage."

The United Nations Register of Damage

Pursuant to the Resolution of the UN General Assembly referred to in the previous paragraph, the Secretary General submitted his proposal[42] for the structure and functioning of this so-called "register of damage," which has not been conceived of as an international claims commission along the mode of other examples described above. Rather, its sole function is to do exactly as its name indicates: inventory and assess damage. Most importantly, its mandate is limited to the registration of the damage or loss suffered as a result of the construction of the wall in the OPT, i.e. it does not encompass any other form of damage sustained in the OPT, and totally excludes the Gaza Strip. For any damages sustained as a result of violations outside of the context of the "wall," no similar *ad hoc* institutional structure for recording them currently exists.

The Register of Damage is best understood as a fact-finding body which receives input in this regard from those considering themselves to have suffered damage. In the words of the Secretary-General (paragraph 1 of the letter): "It is important to understand that the Registry is not a compensation commission or a claims-resolution facility, nor is it a judicial or quasi-judicial body. The act of registration of damage, as such, does not entail an evaluation or an assessment of the loss or damage." In short: the "register of damages" is an encyclopedic approach to the issue, currently precluded from going beyond that mandate.

Essentially, natural or legal persons who believe that they have a claim to compensation for damage suffered as a result of the "wall" may request to be included in the register. While it is limited to material damage (as per the Advisory Opinion), the notion of "damage" adopted by the Secretary General is a rather broad one.[43]

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[41] UN General Assembly, A/RES/ES-10/15, 2 August 2004, on the "Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, including in and around East Jerusalem."

[42] UN General Assembly, A/ES – 10/294, 13 January 2005, "Letter Dated 13 January 2005 from the Secretary-General to the President of the General Assembly." While the latter deals with the "general framework," see A/ES-10/361 of 17 October 2006 for a description by the Secretary General as to the proposed "institutional framework."

[43] Paragraph V (2) of A/ES-10/294: "In paragraphs 133 and 153 of its advisory opinion, the International Court of Justice described the kinds of damage sustained as a result of the construction of the wall. They include: destruction and requisition of properties, seizure or confiscation of land, destruction of orchards, citrus groves, olive groves and wells and the seizure of other immovable property. Moreover, material

Established as a subsidiary organ of the UN General Assembly in 2007[44] and situated in Vienna, the Board of the "United Nations Register of Damage" issued its "Rules and Regulations Governing the Registration of Claims" in June 2009.[45] The only "claim" that can be made vis-à-vis this Register is a claim to be included therein; the issue of assessing the actual damage is not in the picture.

Thus, for the time being at least, the Register of Damage remains at the phase of being a paper-based registry of information. The Register might one day serve as the basis for claims to compensation, but no automaticity from one to the next should be presumed. For the time being, no provisions for adjudication, let alone actual compensation, exist. In the meantime, the Register (Art. 7 of the Rules and Regulations) undertakes outreach activities to potential claimants through awareness and information campaigns.

It is in this respect that humanitarian practitioners have a significant role and responsibility in this process: despite the very limited current mandate of the Register of Damage, it *does* inventory such damage. Though not guaranteed at the present stage, this Register might one day constitute the basis underlying the planning for an actual compensation commission. Therefore, it is argued here that it would be a mistake for humanitarian practitioners, NGOs, etc., not to seize the opportunity the existence of this Register of Damage offers for building a solid record on the issue. By the very nature of their work, humanitarian practitioners and NGOs often have unique access to certain pieces of information which would otherwise not be brought to the attention of an outside entity.

As for the Government of Israel, it maintains as its official position that it will not cooperate with the Register of Damage, being of the view that any claim pertaining to alleged damage resulting from the construction of the "wall" should be processed through the existing

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damage sustained as a result of the construction of the wall is not limited to lands and crops, but also includes impeded access to means of subsistence, urban centres, work place, health services, educational establishments and primary source of water in areas between the green line and the wall itself." This view has been confirmed by the 2009 Rules and Regulations Governing the Registration of Claims, Art. 11 of which allows for six categories of claims: A claimant may submit claims in one or more of the following six categories: category A: Agriculture, category B: Commercial, category C: Residential, category D: Employment, category E: Access to Services, and category F: Public Resources and Other."

[44] UN General Assembly, A/ES-10/17, 24 January 2007, Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory. The final paragraph of the preamble reaffirms as follows: "Recognizing the necessity of accurately documenting the damage caused by the construction of the wall for the purpose of fulfilling the obligation to make the above-mentioned reparations, including restitution and compensation, in accordance with the rules and principles of international law, and noting that the act of registration of damage, as such, does not entail, at this stage, an evaluation or assessment of the loss or damage caused by the construction of the wall." Paragraph 3 of that Resolution establishes "the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory: (a) To serve as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the wall by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem; (b) To be referred to henceforth in brief as the "Register of Damage."" The website of the UN Register of Damage is <www.unrod.org>.

[45] These can be found via <www.unrod.org/docs/UNRoD%20Rules%20and%20Regulations.pdf>.

domestic Israeli mechanism.[46] The UN Human Rights Council, for its part, concluded, regarding the implementation by Israel of the elements of the International Court of Justice's Advisory Opinion related to compensation, that "no steps toward the fulfilment of these obligations were taken by Israel (…)."[47]

This summarizes the steps taken so far, and obstacles to be expected in the future, with regard to granting civilians living in the OPT a real chance of, one day, obtaining compensation for acts, committed by the Israeli authorities, that amount to breaches of the law of armed conflict.

Other than the possible inclusion in a paper-based compendium of "damages," no mechanisms related to obtaining compensation currently exist, other than those (not) provided under the terms of Israeli legislation and in domestic Israeli proceedings.

Conclusion

By their very nature and design, situations of armed conflict and occupation are not pleasant experiences for civilians finding themselves in the affected territory. Due to the trade-offs inherent in the basic framework of IHL, the law permits, within certain limitations, that civilians will be adversely affected by the armed conflict, and may suffer significant inconveniences, deprivations, etc., without necessarily giving rise to any violation of law. Any discussion of reparation by civilians for damage suffered as a result of an armed conflict or an occupation must accept these parameters as a starting premise: all acts that remain within the boundaries permitted by IHL – no matter how much suffering they create for the civilian population – will not trigger the possibility of reparation. Only for those acts which amount to a *violation* of IHL does reparation possibly enter into the picture.

IHL has long accepted the principle that a State which violates that legal framework is liable to pay compensation for these violations. However, the notion that such compensation would be owed to individual victims, rather than to the opposing State, is relatively new. While the law may be seen to have gradually come to accept the idea that these victims, in and of themselves and irrespective of their State, have a right to compensation for damage suffered as a result of violations of IHL, the law has not yet crystallized to the point where such victims would be guaranteed the ability to *enforce* such a right under the law. In effect, IHL may rhetorically proclaim the existence of a right, yet it fails to provide the means to operationalize such a right. States are, in short, by no means obliged to open up their domestic court system for individual victims to make claims pertaining to alleged wartime damage.

Under the logic of international law, as affirmed by the International Court of Justice in its 2004 Advisory Opinion on the "wall," restitution (of goods, land, etc.) should be the primary

[46] UN General Assembly, A/ES-10/455, Letter Dated 30 April 2009 from the Secretary-General addressed to the President of the General Assembly, containing the Progress Report from the Board of the UN Register of Damage. Relevant statement in paragraph 5 thereof.

[47] UN Human Rights Council, A/HRC/7/76, 14 March 2008, paragraph 50.

form of reparation. If such restitution is not feasible, however, the law also recognizes compensation as a secondary option. Practically speaking, it is up to the parties negotiating a political settlement to agree as to whether – and, if so, under what conditions – there will be an actual possibility for individual victims to obtain compensation. The individual victims' "rights," in this context, are dependent upon what is agreed in a political settlement.

In its current form, the UN Register of Damage is not a compensation commission; rather, it inventories the damage to natural and legal persons related to the building of the "wall." Humanitarian practitioners should nonetheless seize the opportunity that the Register offers. The mere fact of having the damage recorded in an outside register may indeed one day turn out to be of tremendous value.

At the end of the day, and in view of the limited reach of the current system of international law in this regard, the primary potential hope for victims in the OPT to receive restitution or compensation lies in a political settlement of the Israeli-Palestinian conflict, part of which would contain the establishment of some form of an international claims commission. This potential claims commission would no doubt be imperfect in terms of attention to the case of each claimant, yet it would be designed to deal effectively with, and bring resolution to, a large number of claims.

The "right to"-based approach to compensation, therefore, goes only to a certain point, which may be seen as largely inconclusive and rather disappointing for those hoping to find a legal framework matching rhetorical commitments with practical mechanisms to provide actual enforcement. Nonetheless, in the realm of IHL, despite issues surrounding non-enforcement, the law *does* provide a solid conceptual vocabulary and rhetorical discourse to underpin claims for compensation for victims of violations.

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