

**PROPOSAL FOR THE DESIGN OF AN INTERNATIONAL
MECHANISM TO ADMINISTER A SOLUTION FOR THE
PALESTINIAN REFUGEES**

Veijo Heiskanen*

10 September 2008

1. BACKGROUND TO THE PALESTINIAN REFUGEE QUESTION.....	2
2. APPLICABLE ADMINISTRATIVE AND LEGAL STANDARDS.....	8
2.1 Separation of Functions.....	8
2.2 Administrative and Technical Requirements.....	11
2.3 Applicable Legal Standards.....	13
3. BASIC DESIGN OF THE INTERNATIONAL MECHANISM.....	20
3.1 The Institutional Framework.....	20
3.1 Composition.....	21
3.1.1 <i>Policy-Making Body</i>	21
3.1.2 <i>Return Process</i>	23
3.1.3 <i>Claims Process</i>	24
3.2 Function and Mandate.....	28
3.2.1 <i>Policy-Making Body</i>	28
3.2.2 <i>Return Process</i>	29
3.2.3 <i>Claims Process</i>	32
3.3 Procedures.....	36
3.3.1 <i>Policy-Making Body</i>	36
3.3.2 <i>Return Process</i>	36
3.3.3 <i>Claims Process</i>	37
4. FUNDING.....	40
4.1 Participation and Contributions.....	40
4.2 Administration of the Compensation Fund.....	41
5. SUMMARY.....	44
Annex: Composition of the Policy-Making Body.....	46

*This memorandum has been commissioned by Adam Smith Institute for the exclusive use of the Negotiations Support Unit of the Palestinian Liberation Organization.

1. BACKGROUND TO THE PALESTINIAN REFUGEE QUESTION

On 19 November 1947 the United Nations General Assembly adopted resolution 181 approving the partition of Palestine into an Arab and Jewish state.¹ The approval of the Partition Plan, which was intended to terminate the League of Nations mandate for Palestine, triggered an internal armed conflict that subsequently, after the declaration of independence of the State of Israel in April 1948, escalated into the first Arab-Israeli war.

During the conflict, which involved a terror campaign against the Palestinian population and their forcible expulsions, approximately 750,000 Palestinians – almost half of the entire Arab population of Palestine – fled their homes. Most refugees fled to what is now known as the West Bank and the Gaza Strip; the rest went to Lebanon, Syria, Jordan and other countries within and outside the region. By the end of 1948, four fifths of the Arab Palestine population had fled from Palestine. In the course of their flight, the refugees left behind their belongings and properties, including their homes, private property, livelihood, farms, shops, factories and financial assets. In the years following the conflict, the State of Israel denationalized the refugees and systematically expropriated their assets.

Sixty years later, in 2008, the refugees and their descendants number approximately seven million people. Very few of these have been able to return; more than 1.3 million live in refugee camps in West Bank, Gaza, Lebanon, Jordan and Syria. The properties that the refugees left behind when fleeing Palestine have not been restored to their owners; on the contrary, they were subsequently confiscated by the Israeli State. Nor has any compensation been offered to the refugees for their losses, or for their suffering as a result of their long-standing displacement.

¹ United Nations General Assembly resolution 181 of 29 Nov. 1947, U.N. Doc. A/RES/181. The Partition Plan, which formed part of the resolution, foresaw that the mandate for Palestine would terminate no later than 1 August 1948 and that “[i]ndependent Arab and Jewish States and the Special International Regime for the City of Jerusalem ... shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948.”

The Palestinian refugee issue was further aggravated in 1967, when in the aftermath of the Second Arab-Israeli war another 325,000 Palestinians fled the West Bank to Jordan and other countries within and outside the region. Many of these were refugees from the 1948 war and thus became refugees for the second time. The great majority of these individuals remain displaced today.

From a historical and political perspective, the Palestinian refugee issue is the root cause of the conflict in the Middle East. If this issue is resolved, other aspects of the conflict are likely to be much easier to resolve. If the Palestinian issue is not resolved, a realistic prospect of peace in the Middle East is bound to remain elusive. The Palestinian refugee issue has rightly been identified as one of the “permanent status” issues since the beginning of the Middle East peace process in the early 1990s.²

The Palestinian refugee issue is, first and foremost, a *Palestinian* problem. Not only are the refugees Palestinians in the sense that they are residents of the historic Palestine. The refugee issue is also a Palestinian problem in the very real sense that the long-standing displacement of the refugees is, first and foremost, a problem to the Palestinian refugees themselves – their *own* problem. While the responsibility for the creation of the problem belongs to other parties, including in particular Israel and the international community, any proposed solution to the Palestinian refugee issue must respect the Palestinian ownership of this problem. This means, in practical terms, that the solution must be based on premises that are acceptable to the refugees themselves, and that those responsible for the creation of the problem recognize and accept their responsibility for the suffering of the refugees.

² The other issues are: Settlements, borders, Jerusalem, and security arrangements, relations and cooperation with other neighbors, and other issues of common interest. See *Declaration of Principles on Interim Self-Government Arrangement*, 13 Sept. 1993, art. 4, para. 3. See also *Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (“Roadmap”)*, at 6 (listing borders, Jerusalem, refugees and settlements as elements of the “final, permanent status resolution”).

In order to ensure that these premises are not overlooked, the initiative in the matter should be taken by the Palestinian side. The purpose of the present document is to seize the initiative by outlining an institutional framework within which the eventual solution can be implemented. While the substantive aspects of the solution remain a matter for negotiation between the parties, it is assumed that the eventual solution will be based on premises that are acceptable to the Palestinian refugee community. These premises include, in particular, the requirement that the solution be comprehensive in the sense that it addresses the principal aspects of the Palestinian refugee issue, including, in particular, the right of return and compensation.³ While the precise scope and role of these two elements must be negotiated and agreed between the parties, it is assumed that they are necessary components of a just and sustainable solution.⁴

It is generally assumed that, given the history, scope and complexity of the Palestinian refugee question, an international mechanism should be established to administer the agreed solution. For the present purposes, it is not necessary to define the precise scope and role of the various components of the mechanism; these can and must be left for the parties to settle in the course of their negotiations. It is anticipated that the return component of the solution will include, in one form or another, a scheme for the repatriation, resettlement and rehabilitation of the refugees. It is also assumed that the claims component will include a scheme for property restitution, compensation for property losses, and compensation for human suffering as a result of long-standing displacement.

These two basic components as part of an acceptable solution were endorsed by the United Nations General Assembly in resolution 194 (III) of 11 December 1948, in which the General Assembly resolved that

³ These fundamental elements were affirmed in paragraph 11 of General Assembly resolution 194 (III) of 11 Dec. 1948; see below.

⁴ See also United Nations Security Council resolution 242 (1967), which affirmed the necessity “[f]or achieving a *just* settlement of the refugee problem.” (emphasis added)

“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 and in equity, should be made good by the Governments or authorities responsible[.]”

In the same resolution, the General Assembly also instructed

“the [United Nations] Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation”

Compromises will be required to achieve a solution that is acceptable to all parties; however it is not necessary at this stage to identify the precise issues on which compromises may be needed. In order to reach a solution that is acceptable to the refugees themselves, however, it is understood that certain fundamental principles must be respected. Chief among these is the requirement that the solution be comprehensive and based on respect for individual justice. Only a solution that seeks to address the refugee population’s fundamental concerns and dispenses justice at the individual level is likely to be sustainable and survive the reality check that its implementation will represent. Any other solution will not address the root cause of the problem and therefore will likely fail.

The participation of the international community in the establishment and administration of the international mechanism is required not only because the international community bears a shared responsibility, together with Israel, for the creation of the Palestinian refugee issue in the first place.⁵ It

⁵ The Mandate of Palestine was partitioned by a resolution of the United Nations General Assembly. See *supra* note 1. The International Court of Justice specifically recognized the responsibility of the international community in its Advisory Opinion on the *Legal Consequences of a Wall in the Occupied Palestinian Territory*, 9 July 2004, <http://www.icj-cij.org>, para. 49 (“[T]he Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United

is also necessary because, even if the United Nations Security Council has failed to exercise its authority in the matter, there is little doubt that the situation in the Middle East continues to constitute a threat not only to peace in the region but also to international peace and security.⁶ Thus, the responsibility of the international community for the just resolution of the Palestinian refugee issue must also be considered as engaged under Chapter VII of the United Nations Charter.

Subject to the acceptability of the eventual solution by the refugee community, the basic design and parameters of the proposed international mechanism are largely matters of legal competence and administrative and technical engineering. The applicable parameters include the requirement that the international mechanism be based and operate in accordance with international legal standards and embody and reflect the best practice of refugee repatriation and international mass claims resolution, as developed over the last twenty years.

The basic objectives of this blueprint are:

- To define the problem to be addressed by the international mechanism.
- To specify the premises and assumptions on which the proposed design of the international mechanism is based.
- To provide a conceptual framework for the design of the mechanism.
- To provide a basis for the development of a detailed design during the permanent status negotiations.

Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine”)

⁶ This was recognized by the International Court of Justice in its recent Advisory Opinion on the *Legal Consequences of a Wall in the Occupied Palestinian Territory*. *Id.* at para. 161 (“The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, *which continues to pose a threat to international peace and security*, to a speedy conclusion, thereby establishing a just and lasting peace in the region.”) (emphasis added)

- To specify the relevant administrative and technical requirements and best practices.
- To specify the applicable international legal standards.
- To identify the basic elements of the mechanism, including its structure, composition, mandate, and procedures.
- To provide basic criteria for the estimation of the aggregate value of the refugee properties and the size of the compensation fund.
- To propose an allocation of responsibility for the funding of the mechanism and the creation of the compensation fund.

CONFIDENTIAL

2. APPLICABLE ADMINISTRATIVE AND LEGAL STANDARDS

2.1 Separation of Functions

The preliminary design of the international mechanism proposed in this paper is based on the assumption that the principal aspects of the Palestinian refugee issue will be addressed and resolved in the permanent status agreement. These include:

- (1) The definition of refugee (status determination);
- (2) The scope and modalities of the right of return;
- (3) Definition of the circumstances in which property restitution is available;
- (4) The execution of successful restitution claims;
- (5) Certain public claims between Palestine and Israel, including those for compensation for damage to property caused during the occupation;
- (6) The composition, structure and function of the international mechanism, including the participation of Israel, other countries in the region, and the international community; and
- (7) Funding of the mechanism, including arrangements for financing the return process and the creation of a compensation fund to compensate claims for property losses and for refugeehood.

While some of these issues, or certain aspects of them, may be deferred for solution within the international mechanism, it is unlikely that a permanent status agreement can be concluded without reaching an agreement on the scope of the right of return and the basic parameters of the claims process, including the scope and modalities of property restitution, composition and mandate of the international mechanism, and the funding of the process. For the present purposes it is not necessary to identify the precise issues that will need to be resolved as part of the permanent status agreement and

which ones may be deferred for resolution within the mechanism. It is sufficient to assume that, by default, one of the functions of the international mechanism will be to address all policy issues not resolved in the permanent status agreement.⁷

To the extent that the permanent status agreement defers the resolution of certain policy issues to the international mechanism, and to the extent that the implementation of the permanent status agreement itself raises policy issues not foreseen during the negotiations, a proper separation of responsibilities and functions requires that the resolution of these issues is allocated to a separate policy-making body that is not directly involved in the management and operation of the return and claims processes. This policy-making body should be tasked with providing policy guidance to the return and claims processes, to exercise management and financial oversight over these two processes, and to monitor the use of the substantial amounts of funds that must be made available for financing the return process and the payment of compensation claims.⁸

Given the massive scale of the return and claims processes, these two functions should be allocated to separate organs within the mechanism. The claims process will likely deal with millions of claims,⁹ which will make it the largest international claims program ever, when measured by the number of claims to be processed.¹⁰ Similarly, although the number of refugees

⁷ If many or most of the principal policy issues are deferred to the mechanism, this may have a significant impact on its efficiency, as the resolution of these issues is likely to distract attention from the establishment and operationalization of the mechanism and thus encumber and slow down the process.

⁸ When required by the scope of the program, other large international mass claims programs have established similar policy-making bodies. Notably the UNCC, whose Governing Council provides policy guidance to the Commissioner panels and approves the recommendations made by the panels. The Governing Council also approves the Commission's budget. *See Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, S/22559 (2 May 1991) ("Report of the Secretary-General of 2 May 1991"), paras. 4 & 10. The German Foundation also has a Board of Trustees and a Board of Directors exercising similar policy-making functions. *See the German Foundation Act*, section 4 & 5.

⁹ The actual number will depend on the refugee definition to be adopted and the number of property claims, as well as on the extent to which family is used as a claimant unit.

¹⁰ To date, the largest international claims program is the UNCC, which is in the final stages of processing the approximately 2.6 million claims filed by it.

choosing to return cannot be known with precision, it is likely that it will be in the range of millions, making the management of the return program a major operational and logistical challenge. The completion of the two processes is bound to take several years, which also enhances the need for policy coordination and oversight.¹¹

The separation and allocation of the return and claims process to different organizational units is also required by their differing functions, which pose different institutional challenges and therefore require different institutional solutions.

The function of the *return process* is to deal with the repatriation, resettlement and rehabilitation of returnees. This is essentially a field operation and must be organized accordingly to ensure the efficiency and effectiveness of the process. The design of the process must take into account the logistical, administrative and practical requirements of such an operation.

The function of the *claims process* is to process claims for restitution of property and for compensation for property losses and refugeehood. This function is essentially a quasi-judicial mass claims process and must be organized accordingly. The design of the process must strike an appropriate balance between efficiency and fairness, and therefore enable extensive reliance on modern mass claims processing methods and techniques, while providing for the necessary independence of the decision-makers and for other safeguards for due process.

Apart from a proper allocation and distribution of functions, the constitution of the mechanism must reflect and embody the relevant administrative and technical requirements, applicable international legal standards, and the international best practice of international mass claims resolution.

¹¹ By way of comparison, the UNCC started its work in 1991. All smaller individual claims were processed by the end of 1999, whereas the work on the more complex government and corporate claims continues to date.

2.2 Administrative and Technical Requirements

The international mechanism must be designed in such a way that it will be capable of organizing, managing and implementing the return process of at least hundreds of thousands but possibly millions of refugees and processing claims by approximately five million individuals. The scale of the international mechanism and the resources available to it must reflect these requirements.

The return program is essentially a field operation. The administrative, operational and logistical requirements of such a program are those generally applicable to the implementation of large-scale international humanitarian efforts. Experience gained in these efforts, including recent efforts in the Balkans and elsewhere to organize returns of sizable refugee populations, should be taken into account, while keeping in mind the specific nature, scope and complexity of the Palestinian refugee issue.

The principal requirements applicable to the design, management and administration of the mechanism are outlined below. They apply both to the return process and the claims process, although they are relatively more important for the return process.

Effectiveness. The requirement of effectiveness means that the process produces results and achieves its goals within a reasonable period of time.

A precise goal for the completion of the *claims process* should be established once the basic parameters of the process, including the scope of the program and eligibility criteria have been agreed. Once the scope of the right of return and the prioritization criteria have been agreed, a work program should also be developed for the *return process*. Given the operational and more open-ended nature of this process, in particular the rehabilitation

stage of the process, it may be more appropriate to establish yearly targets rather than a fixed completion goal.

Efficiency. Efficiency means that the international mechanism be designed in such a way that it achieves its goals with minimum expenditure of time and resources. Consequently, the procedures of the mechanism should be designed to further this goal and adjust, as appropriate and necessary, traditional rules regarding the allocation of burden of proof and standards of evidence.¹² In order to promote efficiency, it is also important to ensure that the mechanism, including its key management positions, are staffed on the basis of professional and technical competency and experience.

Given the number of claims to be processed and the scope of the return process, it will be necessary to automate certain aspects of the process. Computerized returns and claims databases should be created and appropriate computer support should be developed for certain aspects of claims processing and the return process. Relevant existing computerized records, including those collected by the United Nations Conciliation Commission for Palestine (“UNCCP”), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) and Israeli authorities, should be made available to the mechanism in a computerized format. The creation of the return and claims databases should be coordinated to ensure compatibility of data and to facilitate global tracking and reporting.

Transparency. Transparency means that eligibility and other criteria, including the options available to the refugees, and all principal documents, including progress reports and budgets, be made public. The refugees should be advised of the options available to them in both the return process and the claims process.

¹² Many of the existing international mass claims programs have in part shifted the burden of proof to the decision-making body, which has thereby assumed a fact-finding function, and relaxed the applicable standard of proof. Often, instead of balance of probabilities, the plausibility standard is assumed.

The policy-making body should also include representatives of the parties, the international community and the countries presently hosting significant numbers of Palestinian refugees. This does not necessarily mean and should not mean that third parties would have a decisive role in the decision-making process; this role should in principle be preserved for the principal parties to the conflict.

Standard operating procedures should be developed to guide the operation of both the return process and the claims process. Rules of procedure should be adopted for the claims process that embody and reflect applicable international legal standards and the best practice of international mass claims resolution.

Accountability. The mechanism should be organized in such a manner that the applicable management and financial accountability requirements are met. This requires that the process is organized based on appropriate allocation of functions, including the separation of the policy-making and oversight functions from the operative (claims processing and return process) functions, and that appropriate reporting mechanisms are established.

A financial oversight service must be established to audit and oversee the use of funds; alternatively, these functions can be outsourced to existing public or private oversight and audit services.

2.3 Applicable Legal Standards

The applicable international legal standards and best practice requirements apply to both the claims process and the return process, although their primary role is in the organization of the claims process. The key requirements include the following.

Restitution in kind as the primary remedy. International law recognizes restitution in kind as the primary remedy in the event of an international wrong. This generally accepted standard was confirmed by the Permanent Court of International Justice in its judgment in the *Chorzów Factory (Indemnity) Case*:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”¹³

General Assembly resolution 194 (III) of 11 December 1948, which serves as the legal basis of the Palestinian case, reflects the *Chorzów Factory* standard. In paragraph 11 of resolution 194 (III), the General Assembly

“resolve[d] 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 and equity, should be made good by the Governments or authorities responsible.”¹⁴

The continuing applicability of these standards in the occupied Palestinian territories was recently confirmed by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of a Wall in the Occupied*

¹³*Chorzów Factory (Indemnity) Case* (Germany v. Poland), (1927) P.C.I.J. (ser. A), No. 17, at 47.

¹⁴ The General Assembly also instructed the United Nations Conciliation Commission for Palestine (“UNCCP”), a body established by the resolution, “to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation.” *Id.* para. 11.

Palestinian Territory. Referring to the *Chorzów Factory (Indemnity) Case*, the Court stated:

“[G]iven 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 the 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 possible, 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.”¹⁵

The *Chorzów Factory* standard also applies in case of a negotiated settlement where one of the parties agrees to provide a remedy to address the adverse consequences of its action without prejudice to the characterization of such action as an international wrong. Thus, in the circumstances of the present case, the primary remedy is the return of the refugees and the restitution of their property rights. This is also the basis on which most international mass claims programs, including those created in the aftermath of mass population displacements, have been established.¹⁶

In case of a negotiated settlement that is acceptable to the Palestinian side, the alternative remedy of compensation for property losses is also available under international law. As confirmed in the *Chorzów Factory (Indemnity) Case*, if restitution is not possible, international law provides for payment of compensation corresponding to the value of the property lost. Compensation may also be claimed for commercial losses such as loss of

¹⁵ *Legal Consequences of a Wall in the Occupied Palestinian Territory*, paras. 152-53.

¹⁶ Existing examples include the Commission for Real Property Claims of Refugees and Displaced Persons in Bosnia and Herzegovina (“CRPC”) and the Housing and Property Claims Commission in Kosovo (“HPCC”). The procedure currently administered by the Claims Resolution Tribunal for Dormant Accounts in Switzerland (“CRT-II”) is also based on the principle of restitution, i.e., return of dormant assets to their rightful owners.

income and loss of income producing property. In addition to property claims, compensation may also be provided for violations of intangible goods such as human rights, including mental suffering as a result of such violations.

Full value as the applicable standard of compensation. International claims practice since the early 1980s has established that the applicable standard of compensation for loss of property is full value. This standard applies both to takings of property (including nationalization, formal and indirect expropriation, seizure or confiscation) and to loss of or damage to property as a result of acts or omissions attributable to the liable party. In the circumstances of the Palestinian case, the full value standard applies to taking and expropriation of refugee property by Israel in connection with the events of 1948 and their aftermath, as well as the destruction of and damage to property during the period of occupation.¹⁷

The full value standard has been adopted by arbitral tribunals and claims commissions such as the Iran-United States Claims Tribunal, the United Nations Compensation Commission, the Property Claims Commission of the German Foundation “Remembrance, Responsibility and Future,” and the Claims Resolution Tribunal for Dormant Accounts in Switzerland.¹⁸ The full value standard does not prevent the tribunal or the claims commission from taking into account adjustment factors such as the subsidization of the purchase of the property by the initial owner.¹⁹

¹⁷ Israel’s obligation to make reparation for damage to property caused by the construction of the “security wall” in the occupied Palestinian territories was established in the Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 152-154. There is no doubt that the same principle applies to damage caused during the period of occupation by other acts and omissions attributable to the State of Israel under international law.

¹⁸ The adoption and application of the full value standard is examined in Appendix A.

¹⁹ See, e.g., section 4.4 of UNMIK/REG/2000/60 (“On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission”), which governs the compensation for property losses as a result of discrimination in Kosovo (“Any claimant found by the Commission to have a right to restitution of a socially owned apartment, but who is not awarded restitution in kind in accordance with section 4.2, shall be issued a certificate by the Directorate stating the current market value of the apartment in its current condition, minus the amount which the

In the Palestinian case there is no reason to deviate from the established and generally recognized standard of full value. In case the negotiated settlement includes compensation for property losses, the Palestinian refugees are entitled to compensation for the full value of the property lost. Compensation should also include damages for loss of profit in case of loss of business or other income-producing property as well as compensation for loss of income by those individuals who did not own property but lost their livelihood as a result of their displacement.²⁰

Compensation for Human Rights Violations. Modern international claims practice recognizes the entitlement of individual claimants to compensation for human rights violations. Compensation has been awarded, *inter alia*, for forced displacement or departure; inability to return; forced hiding; illegal detention; torture; personal injury or death; denial of entry or expulsion of refugees; detention, mistreatment and abuse of refugees; and slave and forced labor.²¹

Palestinian refugees should be compensated for their extended involuntary displacement. It should not be necessary for this purpose to make a specific judicial or quasi-judicial finding to the effect that the human rights of the Palestinian refugees have been violated as a result of their displacement.²² The suffering of the Palestinian refugees is a matter of public knowledge and

claimant would have been required to pay for the purchase of the apartment under the Law on Housing.”)

²⁰ See, e.g., the UNCC Governing Council decision No. 1, *Criteria for Expedited Processing of Claims*, S/AC.26/1991/1 (2 Aug. 1991) (“UNCC Governing Council decision No. 1”), para. 14 (providing that “payments are available with respect to ... losses of income [and] support”)

²¹ See, e.g.,; UNCC Governing Council decision No. 1; *Law on the Creation of a Foundation “Remembrance, Responsibility and Future”* (the “German Foundation Act”); Rules of Procedure of the German Foundation’s Property Claims Commission, *Property Claims Commission: Supplemental Principles and Rules of Procedure*; Annex 7 to the Dayton Peace Agreement, *The Agreement on Refugees and Displaced Persons*, and the rules of the CRT-II, *Rules Governing the Claims Resolution Process*; and the UNMIK Regulation establishing the Kosovo Property Claims Commission, UNMIK/REG/1999/23, *On the Establishment of the Housing and Property Claims Directorate and Housing and Property Claims Commission*.

²² See Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 INT’L REV. RED CROSS 529, 551 (2003). See also COMPENSATION FOR VICTIMS OF WAR: BACKGROUND REPORT (Rainer Hofmann & Frank Riemann), International Law Association Committee on Compensation for Victims of War, 17 Mar. 2004, at 6.

must be recognized and compensated for without unnecessary formalities such as the requirement of a preceding finding of violation. Moreover, given that compensation has been provided in practice for involuntary departures that occurred in the course of the 1990s,²³ it is more than reasonable that the Palestinian refugees are compensated for forced displacement that occurred more than fifty years ago. The amount of compensation provided must be commensurate to the length of the period of forced displacement.

Best Practices of International Mass Claims Resolution. Several international mass claims adjudication bodies have been established since the early 1990s to address the consequences of armed conflicts and other extraordinary incidents and to pay compensation to victims of those incidents. These bodies have developed approaches, methods and techniques that represent the best practice of international mass claims adjudication.²⁴

Given the size of the Palestinian refugee population, which is estimated to amount to seven million, any institutional solution to the Palestinian refugee issue must be characterized as an international mass claims program. Consequently, the international mechanism to be established to administer the solution must embody and reflect the existing best practice and be authorized to employ modern mass claims processing methods and techniques, including computer-aided claims processing, statistical sampling and modelling, relaxed standard of proof, and standardized verification and valuation methods.²⁵ The use of these tools should be adjusted to reflect the specific requirements of the Palestinian claims program.

²³ UNCC *Governing Council decision No. 1*, paras. 10-11 (providing that “payments are available with respect to any person who, as a result of Iraq’s unlawful invasion and occupation of Kuwait ... departed from Iraq or Kuwait during the period of 2 August 1990 to 2 March 1991”)

²⁴ Reference is made, in particular, to the practice of the UNCC, the CRPC, CRT-II, the German Foundation claims programs, and the HPCC.

²⁵ These methods and techniques are linked to the efficiency requirement discussed above in Section 2.2.

The purpose of the use of these tools is to ensure the efficiency and effectiveness of the program. It would be unfortunate if a political agreement is reached but its ineffective and inefficient implementation will result in yet another denial of the rights of the refugees.

CONFIDENTIAL

3. BASIC DESIGN OF THE INTERNATIONAL MECHANISM

3.1 The Institutional Framework

A key issue to be decided in the course of the permanent status negotiations is whether a new, free-standing organization should be established to administer the international mechanism, or whether the mechanism should be hosted and serviced by an existing international organization.

While a number of reasons counsel the latter solution, including the possibility of drawing on existing administrative resources and, in particular, the likely faster operationalization of the mechanism, no existing international organization is presently fully equipped to deal with all aspects of the process and would need time and additional resources to become fully functional.²⁶ Moreover, on balance the importance of assigning the task to an organization that is fully focused on and devoted to managing the process and whose decision-making structures, procedures and funding mechanisms are designed to serve the specific task at hand, outweighs the benefit of having a shorter lead time in establishing the process. A dedicated mechanism will also ensure that the work of the organization is not affected by extraneous motives such as the interests of the host organization's members or the promotion of the host organization's own bureaucratic interests.

Such a dedicated mechanism could be established as a special program within an existing international organization. This approach would ensure the functional independence of the organization while allowing it to make use of the support services provided by the host organization. If this approach is adopted, special care should be taken to ensure that functional

²⁶ Potential candidates for a hosting organization include the United Nations Relief Agency for Palestinian Refugees in the Near East, the Permanent Court of Arbitration, the International Organization for Migration and, possibly, the United Nations Compensation Commission. Further work is needed to assess the appropriateness and suitability of these organizations as a host organization.

independence is in fact guaranteed and that any support services that may be made available are provided efficiently and in a manner consistent with the program's functional requirements.

The establishment of a dedicated mechanism or a special program does not mean that the organization would not and should not work in cooperation with other, existing international organizations. Indeed, such cooperation will be necessary for an effective implementation of its mandate. Opportunities for such cooperation will be indicated below.

3.1 Composition

3.1.1 *Policy-Making Body*

The policy-making body of the international mechanism should represent the parties to the conflict as well as the principal stakeholders of the Middle East peace process. These include the international community and those countries in the region that host significant numbers of refugees. Representatives of the international community should include all or certain of the permanent Members of the United Nations Security Council²⁷ and relevant international organizations, including the United Nations and the World Bank. The precise composition and number of members remain subject to negotiation and agreement between the parties to the conflict.²⁸

Several reasons counsel the establishment of the policy-making organ on a stakeholder basis, i.e., on the basis that all parties that have a direct stake in the success and effective implementation of the agreed solution

²⁷ In order to avoid that the body becomes too unwieldy, those permanent members of the Security Council that are also members of the European Union could also be jointly represented.

²⁸ While for a number of reasons all key players should be represented on the policy-making body, the body risks becoming unwieldy and ineffective if too many parties are represented. The composition of the policy-making body thus is an issue that should be considered early on the peace process.

participate in the process.²⁹ Other factors to be considered in defining the principal stakeholders include the following:

- (1) Recognition by the international community of its shared responsibility for the creation of the Palestinian refugee issue;
- (2) Providing an international guarantee for the implementation of the agreed solution and facilitating the resolution of any problems that may arise in the course of its implementation;
- (3) The dispersal of the refugees in a number of countries in and outside the region; and
- (4) Ensuring sufficient funding of the return process and the compensation payments.

The policy-making body should be organized as a collegial organ that generally takes its decisions on the basis of consensus or, if necessary, by majority voting.³⁰ A critical issue for the negotiations is whether the decision-making process should be organized in such a way that the principal parties, in particular Palestine, would have a right of veto over certain decisions. Israel's role in the policy-making body should also be carefully considered, taking into account the Palestinian ownership of the refugee issue and Israel's interest in participating in decisions involving returns to Israel. Similarly, the role of other countries in the region should be clearly defined. While these countries have an interest in participating in decisions involving refugees currently in their territory, they do not necessarily have any legitimate interest in participating in decisions involving the settlement and rehabilitation of refugees in Israel or Palestine.

²⁹ *Cf.* the United Nations Compensation Commission's Governing Council, the composition of which reflects that of the UN Security Council at any given time.

³⁰ *Cf.* the UNCC Governing Council. While the composition of the Council reflects that of the UN Security Council, the right of veto does not apply. Except for decisions concerning the method of ensuring that payments are made to the Compensation Fund, which are to be made by consensus, decisions are taken by majority of at least nine members. To date, the Commission has taken all its decisions by consensus.

One possibility to balance these various considerations is to create a policy-making body that takes decisions in different compositions depending on the type of decision to be taken. Procedures should also be established in the permanent status agreement for the resolution of disagreements, in order to pre-empt the possibility that these disagreements stall the whole process.

In view of its function, the policy-making body should meet regularly, but its members need not serve on a full-time basis. Members of the body should serve as representatives of the government or the international organization that appointed them. In view of the representational nature of their function, the members need not be compensated for their services.

The basic design of the international mechanism is shown in *Appendix A. [to be appended]*

3.1.2 Return Process

The return process should be organized in a manner that meets the basic requirements of effectiveness, transparency, efficiency and accountability. Given the operational and logistical nature of the process, it should be organized as an administrative process that is staffed by professional managers and technical, administrative, financial and legal experts that have the necessary expertise and experience in this type of operation. Recruitment should be based exclusively on professional and technical expertise and experience, while ensuring that the staff has the necessary language skills and the experience in dealing with refugees in the region.

Certain functions of the process could be delegated to, or implemented in coordination with, other international organizations having experience with refugee repatriation. Potential partners include the United Nations High Commissioner for Refugees (“UNHCR”), the International Committee of the Red Cross (“ICRC”), United Nations Development Program (“UNDP”) and the International Organization for Migration (“IOM”). The roles and

responsibilities of these organizations should be indicated (although not necessarily precisely defined) in the permanent status agreement.³¹

The operationalization and implementation of the return process should be coordinated with the winding down of UNRWA. Suitably qualified and experienced UNRWA staff should be transferred to the return mechanism, in particular to staff functions related to interfacing with the refugees. Refugee data, documentation and other resources of UNRWA should be made available to the return mechanism to facilitate and expedite the operationalization of the process.

The internal organization of the return process should reflect the various functions of the process, including refugee liaison, repatriation, resettlement and rehabilitation. Separate departments under the direction and supervision of a program director should be created to administer these functions, which should be supported by the necessary administrative, technical, financial and legal support services.

The basic design of the return process is illustrated in *Appendix B [to be appended]*.

3.1.3 Claims Process

The claims process is essentially a quasi-judicial function and should be organized accordingly, taking into account its nature as a mass claims

³¹ Cf. Article III of the Dayton Peace Accords (“1. The Parties note with satisfaction the leading humanitarian role of UNHCR, which has been entrusted by the Secretary-General of the United Nations with the role of coordinating among all agencies assisting with the repatriation and relief of refugees and displaced persons. 2. The Parties shall give full and unrestricted access by UNHCR, the International Committee of the Red Cross (‘ICRC’), the United Nations Development Program (‘UNDP’), and other relevant international, domestic and nongovernmental organizations to all refugees and displaced persons, with a view to facilitating the work of those organizations in tracing persons, the provision of medical assistance, food distribution, reintegration assistance, the provision of temporary and permanent housing, and other activities vital to the discharge of their mandates and operational responsibilities without administrative impediments. These activities shall include traditional protection functions and the monitoring of basic human rights and humanitarian conditions, as well as the implementation of the provisions of this Chapter. 3. The Parties shall provide for the security of all personnel of such organizations.”)

facility. Subject to more specific guidance in the permanent status agreement, the process design should incorporate the applicable legal standards and the best practice of international mass claims resolution. The principal function of these standards and practices is to ensure that the minimum requirements of due process are respected while ensuring that the process is executed in an efficient and effective manner and without undue delay.

The principal units of the claims process are the secretariat and the claims commission. Responsibility for the resolution of the claims should be vested with panels of commissioners. Given the different types of expertise required, it is advisable to create two panels, one dealing with claims for compensation for refugeehood and the other for property claims (restitution and compensation claims). The members of the panels should be appointed by the policy-making body on the basis of a nomination by an appointing authority designated in the permanent status agreement.³² One member of each of the two panels should be appointed to serve as Chairman of the Panel, and one of these as Chairman of the full Commission.

In line with the independent, professional nature of their function, the members of the panels should serve in their personal capacity and not as representatives of their governments. The plenary of the two panels, sitting as the claims commission, should be authorized to adopt the Commission's rules of procedure or, alternatively, draft these rules and submit them for approval by the policy-making body.³³

³² The appointing authority could be, e.g. the Secretary General of the United Nations, the President of the International Court of Justice, or the Secretary-General of the Permanent Court of Arbitration. *Cf. Report of the Secretary-General of 2 May 1991*, para. 5 ("The commissioners will be experts in fields such as finance, law, accountancy, insurance and environmental damage assessment, who will act in their personal capacity. They will be nominated by the Secretary-General and appointed by the Governing Council for specific tasks and terms. In nominating the commissioners, the Secretary-General will pay due regard to the need for geographical representation, professional qualifications, experience and integrity. The Secretary-General will establish a register of experts which might be drawn upon when commissioners are to be appointed.")

³³ Precedents exist for both types of adoption; in the UNCC, the policy-making body (the Governing Council) adopted the Commission's Rules of Procedure, whereas the HPCC drafted its own Rules of Procedure, which were then submitted for approval by the Special

The decisions of the panels of Commissioners should be final and not subject to review by the policy-making body.³⁴ The extent to which appeals from the decisions of the panels will be allowed should be carefully considered, in view of the number of claims to be processed and the mass nature of the process. It may be efficient and more in line with the nature of the process to use other procedures, including audits, to monitor the accuracy of the decisions.³⁵ If appeals are allowed, they should be limited to certain specific grounds, e.g., rejection of a claim for failure to establish refugee status. Appeals should be resolved by a special appeals chamber composed of the Chairman of the Commission, the Chairman of the other Panel and a member appointed by the Chairman of the Commission. Alternatively, appeals could be submitted to, and resolved by, the panel that took the initial decision on the claim, on the basis of a request for reconsideration.³⁶

The claims panels should be supported by a secretariat headed by an Executive Secretary. The support services provided by the secretariat should include, in particular, legal support in processing the claims, technical

Representative of the Secretary-General. The German Foundation's Property Claims Commission also was allowed to develop its own "Supplemental Principles and Rules of Procedure."

³⁴ Cf. the UNCC, which reserved the final decision-making authority with the Governing Council. While there were no serious abuses of this authority, the arrangement is arguably in principle inconsistent with a proper separation of policy-making and quasi-judicial functions.

³⁵ Audits have been conducted, e.g., in the UNCC and the German Foundation's claims programs. Their use must be consistent with the quasi-judicial nature of the function of the claims panels.

³⁶ Cf. Section 25 ("Reconsideration of Decisions") of the Rules of Procedure of the Housing and Property Claims Commission in Kosovo, "On Residential Property Rights and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission," UNMIK/REG/2000/60 ("25.1 Following the establishment of two or more Panels of the Commission, any reconsideration of a matter shall be conducted by a different Panel than the one that decided the claim, unless the Chairperson of the Panel appointed to conduct the reconsideration, in consultation with the Chairperson of the Commission, determines that it should be conducted in plenary session. 25.2 In the reconsideration of a decision, the Commission or a Panel established by it shall consider all evidence and representations submitted with respect to the original claim and any new evidence and representations with respect to the reconsideration request. The Commission or Panel concerned shall either reject the reconsideration request, or issue a new decision on the claim.") In practice, the same Panel that decided the original claim has resolved all reconsideration requests, since so far only one Panel has been established.

support (both information technology and property valuation), administrative and financial support, including claims payment services, as well as a claims registry. Information technology support should include the development of a claims database and claims processing and payment status tracking functions. The claims registry should have representation at the refugee liaison posts, which should be responsible for distribution of claim forms, providing advice to claimants on filling out the claim form and presenting appropriate documentary and other evidence, and receiving and registering claims.

The proposed basic design of the claims process is illustrated in *Appendix C [to be appended]*.

CONFIDENTIAL

3.2 Function and Mandate

3.2.1 *Policy-Making Body*

The principal mandate of the policy-making body is to provide policy guidance to the return program and the claims commission and to exercise management and financial oversight over the international mechanism as a whole. The forms in which the policy guidance is provided and the respective jurisdictions of the policy-making body and the two substantive programs should be clearly defined so as to avoid overlap of functions, jurisdictional conflicts and administrative inefficiencies. Principal functional areas requiring clarifications are the role of the policy-making body in the possible approval of decisions taken by the substantive programs and in the approval of their rules and standard operating procedures.

While it can be expected that the permanent status agreement will establish basic criteria for refugee status and eligibility, it is likely that further policy-making decisions are required to operationalize these criteria and the two processes as a whole. Accordingly, the functions of the policy-making body should include:

- (a) Development and adoption of a work program for the two processes;
- (b) Development of detailed policies and criteria for the return process, including those relating to the prioritization of work and sequencing of the process;
- (c) Establishing deadlines for the submission of requests for return and for the filing of claims;
- (d) Adoption of rules of procedure for the claims process (if not reserved for the claims commission);
- (e) Appointment of members of the claims commission;

- (f) Appointment of the program director of the return process and the executive secretary of the secretariat of the claims commission;
- (g) Approval of the budget of the international mechanism; and
- (h) Development and establishment of financial oversight and audit mechanisms for the two processes and the international fund.

3.2.2 Return Process

The principal function of the return process is to organize and manage the return of the Palestinian refugees to Israel and Palestine and possibly to third countries. Its functions in Israel should also cover the implementation of the Claims Commission's decisions on the restitution of properties. Some of the refugees may choose to settle in their current countries of residence, subject to the modalities established in the permanent status agreement and any other subsequent arrangements to be made between the Palestinian State and the countries concerned. The return process should liaise with the authorities of these countries in order to ensure an effective implementation of the process.

One of the issues to be considered during the permanent status negotiations is the presence of the return process in countries outside Palestine. Such presence will be required at least for purposes of outreach, registration of requests for return and claims intake.

More specifically, the return process involves:

- (a) The identification of refugees who wish to return and their chosen destination;
- (b) The organization, management and operation of the repatriation process;
- (c) The resettlement of refugees at their chosen destination;

- (d) The rehabilitation of the returnees by way of humanitarian and medical assistance and other types of support, including housing, education and professional training; and
- (e) Reporting to the policy-making body on the status of the return process.

In assessing refugee status, the return process should defer to decisions taken by the claims commission. The decision-making of the two programs should be coordinated to ensure that the claims commission prioritizes claims made by refugees who are given priority in the return process.

The location and identification of refugees who wish to return should be coordinated with the collection of their claims. The coordination of the return effort and the claims process will not only facilitate and expedite the overall process, but will also make it more rational and user friendly from the point of view of the refugees. Instead of having to deal with two separate agencies, refugees will be able to address all of their questions and queries to one common focal point.

Refugee liaison and claims intake posts should be set up in all locations where significant numbers of refugees reside. The function of these posts should include advising refugees about their rights, including right of return and the right to restitution and compensation, and assistance in filling out claims forms and providing evidence in support of the claims. After completion of claims intake, the posts should continue to operate for purposes of refugee liaison and provide information to refugees about the status of their claims and the progress of the return process.

The repatriation program should be coordinated with the rehabilitation program to ensure that sufficient housing, educational, medical and other facilities are available for the returnees at their chosen destination once the repatriation process begins. Given the scope and magnitude of the task, policies should be developed for prioritization and sequencing of the process

and allocation of funds, to ensure that the most needy and vulnerable groups are targeted first. Establishing basic criteria for the prioritization should be the task of the policy-making body of the organization. Any decision on prioritization should be based on a comprehensive and thorough assessment of the needs of the refugee population, their socio-economic situation and their chosen destination. Those living in most dire socio-economic situations should be given priority in the return process.

The return process will be a major management, operational and logistical exercise, take years to complete and require substantial funds, particularly at the rehabilitation stage. The process can and should begin as soon as the permanent status agreement is concluded and sufficient funds are available to begin the repatriation process. An annual work program should be developed by the mechanism based on the prioritization approved by the policy-making body of the mechanism. The scope and the terms of the return mechanism should remain subject to adjustment as the work progresses. The decision on any such adjustments should be made by the policy-making body, taking into account the rate of progress in the return, resettlement and rehabilitation process, the available funding, and the preparedness and capacity of the Palestinian State to take over the management of the program.

The organization of the return mechanism should reflect the various tasks it is designed to deal with – refugee liaison, repatriation, resettlement and rehabilitation. As the process moves ahead, some aspects of the process (e.g., repatriation) can be phased out. It should be explored whether the mechanism could be established on the foundations of UNRWA, which already has presence in the field and has substantial experience and expertise in refugee assistance. At certain point in time the management of the process should be transferred to the Palestinian State and made part of the country's general socio-economic development programs.³⁷

³⁷ Cf. UNMIK/REG/1999/23 (*“On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission”*), which foresees the transfer of the

3.2.3 Claims Process

Subject to the permanent status agreement, the claims commission should be designed to deal with three different types of claims:

- (a) Claims for compensation for refugeehood;
- (b) Claims for compensation for loss of or damage to property; and
- (c) Claims for restitution of property.

As claims for compensation for refugeehood are intended to provide compensation for human suffering as a result of long-standing displacement, only individuals are eligible to claim compensation for refugeehood. Eligibility requirements should be simple and transparent, and they should be applied in a manner that ensures that each refugee that meets the refugee definition adopted in the permanent status agreement is entitled to compensation.³⁸ There should be no need for a prior finding of a human rights violation in each individual case.

Both individuals and legal entities should be eligible to claim compensation for property losses and restitution of property rights. As discussed above, the scope and modalities of property restitution should be defined in the permanent status agreement; to the extent that restitution is not available or not chosen by the claimant as the primary remedy, claimants should be able

functions of the two international bodies entrusted with the management of property rights and the resolution of property disputes in Kosovo, the Housing and Property Directorate and the Housing and Property Claims Commission, to local institutions.

According to section 1.1 of the Regulation, “[t]he Housing and Property Directorate ... shall provide overall direction on property rights in Kosovo *until the Special Representative of the Secretary-General determines that local governmental institutions are able to carry out the functions entrusted to the Directorate.*” See also section 2.1, which provides that “[t]he Housing and Property Claims Commission ... is an independent organ of the Directorate which shall settle private non-commercial disputes concerning residential property referred to it by the Directorate *until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission.*” (emphasis added)

³⁸ It should be explored whether claims for compensation for refugeehood should be made by and paid to families rather than individuals. Assuming “family” is an easily identifiable and traceable unit, this would likely facilitate and expedite the process.

to claim for compensation for loss of property. Claims of the Palestinian State for compensation for or return of public and religious property should be addressed in the permanent status negotiations and at least some aspects of these issues will ideally be resolved in the permanent status agreement.

The collection of claims should be coordinated with the location and identification of returnees wishing to return. While it is necessary to separate the return process and the claims process for functional reasons upon the completion of claims intake, there are obvious advantages in maintaining a common interface vis-à-vis the program's clients even when the claims process is underway. Claimants will be able to address their queries to one common focal point, whether they relate to the return process or the claims process, and will be provided with assistance and advice in filling out their claim forms. Experience shows that the need to contact the claimants and the number of such contacts after the filing of claims to obtain additional information is reduced and the quality of claims is significantly improved if such assistance is available.³⁹

As discussed above, given the different type of legal and technical expertise required to deal with refugee claims and property claims, it is advisable to create two different claims panels to deal with each of the two types of claims. The separation of the two functions also allows for the development of fast-track procedures for refugee claims, whose number is likely to significantly exceed that of property claims. The development of fast-track procedures is greatly facilitated if awards are for a fixed sum, as this eliminates the need for individualized valuation. While the valuation of property claims can also be standardized, the process is bound to remain more complex, and the panel is likely to need external expertise to assist in the valuation of the properties and in the development of standardized valuation methodologies.⁴⁰

³⁹ Thus, *e.g.*, the work of the UNCC was hampered by the poor quality of a great bulk of the individual claims.

⁴⁰ Standardized valuation methodologies for property losses are used, *e.g.*, by the UNCC and the IOM. For discussion of the UNCC process see, *e.g.*, Ramanand Mundkur, Michael J.

Given the total number of claims to be brought under the three categories of claims, which will be in the range of millions, an adequately staffed and resourced secretariat must be established to provide the necessary administrative, legal and technical support to the claims panels. The role of information technology support, in particular, will be mission-critical. International mass claims programs are unlikely to be successful without appropriate computerization of claims data and certain aspects of the process itself.⁴¹ The secretariat should report to the policy-making body on progress made in the claims resolution process.

An effective claims payment and administration system must be established as part of the secretariat to make payments, to monitor the payment process and to report on payments made. In case of cash payments, refugee liaison posts could be used as one of the avenues for distribution of payments to successful claimants.

The refugee claims panel of the commission should have the powers:

- (1) to receive and rule on claims for compensation for refugeehood;
- (2) decide any legal and factual issues necessary to resolve the claims; and
- (3) have access to appropriate governmental and intergovernmental records.

The property claims panel of the commission should have the powers:

Mucchetti & D. Craig Christensen, *The Intersection of International Accounting Practices and International Law: The Review of Kuwaiti Corporate Claims at the United Nations Compensation Commission*, 16 AM. U. INT'L L. REV. 1196 (2001). For the IOM see *Property Claims Commission: Supplemental Principles and Rules of Procedure*, section 20 (providing that the IOM shall submit the claims received to the Commission in instalments and that, to the extent possible, claims raising similar factual and legal issues should be processed together).

⁴¹ See Veijo Heiskanen, *Virtue out of Necessity: International Mass Claims and New Uses of Information Technology*, PERMANENT COURT OF ARBITRATION (ED.), REDRESSING INJUSTICES THROUGH MSS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES (2006).

- (1) to receive and rule on claims for compensation for property restitution or for compensation for loss of or damage to property;
- (2) to decide any legal and factual issues necessary to resolve the claims; and
- (3) to hold hearings, order site visits and production of documents as necessary for the processing of the claims.

The claims commission should also have the authority to settle disputes between the Palestinian side and the State of Israel regarding the interpretation and application of the permanent status agreement.⁴² The most appropriate forum for handling these disputes is the plenary of the two panels of the claims commission.

⁴² Establishing such a dispute settlement mechanism may be necessary in particular if these two parties may exercise the right of veto over certain decisions of the policy-making body; *see supra* Section 3.1.1. Cf. Article II(3) of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 Jan. 1981; Annex V (“Agreement on Arbitration”) of the Dayton Peace Agreement.

3.3 Procedures

3.3.1 Policy-Making Body

The policy-making body should organize itself in an appropriate manner taking into account its functions and the collegial nature of its decision-making procedures. It should adopt guidelines for its decision-making, voting, quorum rules, timing of its sessions and the exercise of its budgetary powers.

As discussed above, it should be considered whether the composition of the policy-making body should vary depending on the subject matter of the decision to be taken. A mechanism should be established for the resolution of disputes between the Palestinian side and the State of Israel, in particular if these two are provided with a right of veto over certain types of decisions. As noted above, the most appropriate body for the exercise of this function would be the claims commission, sitting as a plenary.

The guidelines should also regulate the possibility of any third parties not members of the mechanism to attend its meeting and address the mechanism. The policy-making body should be authorized to create sub-committees as necessary to prepare decisions and directions for the various areas of its work.

3.3.2 Return Process

The return process is an operational field program and accordingly its operations should be flexible and not constrained by unnecessary formalities and detailed regulations.

The principal features of the operations of the return process should be regulated by standard operating procedures adopted by the program

director.⁴³ These procedures should define the functions of the various parts of the program, their interaction and communication with third parties. The procedures should be promulgated to promote transparency.

The implementation of successful property restitution claims should be handled by the return process in coordination with the claims process. This coordination function should also be regulated by standard operating procedures.

The return process should operate in close cooperation with the authorities of the Palestinian State in the practical implementation of the repatriation, resettlement and rehabilitation process.

3.3.3 Claims Process

Basic criteria for the compensability of claims should be developed by the policy-making body, to the extent that these are not defined in the permanent status agreement. The claims commission should be authorized to draft its own Rules of Procedure, possibly subject to the approval of the policy-making body. The Rules should regulate matters such as the collection and registration of claims, processing of claims, evidentiary standards and verification procedures, the decision-making process and appeals.

Claimants should be requested to produce any evidence and information they may have in their possession. However, the Commission should not be considered bound by the evidence brought by the claimants, but should be authorized to engage in fact-finding functions of its own.⁴⁴ For this purpose,

⁴³ Other large claims programs, including the United Nations Compensation Commission, have adopted similar standard operating procedures.

⁴⁴ The UNCCP has collected a considerable amount of documentation of Palestinian property inside the borders of Israel. It is understood that the UNCCP database contains some 453,000 records documenting around 1.5 million individual holdings and is archived at the United Nations. There are likely to be other sources of relevant documentation that the claims mechanism could access, *e.g.*, the records of the Israeli Custodian of Absentees' property.

the Commission should have access to and authorized to obtain data from third party sources, including data and information held by Israel and international organizations. The secretariat should be mandated to create a computerized verification database containing such data for use in the verification of claims.

The rules should provide for the expedited processing of claims for refugeehood and authorize the claims commission to employ modern mass claims processing techniques such as statistical sampling and modeling and computerized matching and other computer-aided mass claims processing tools, develop standardized claims valuation methodologies, and take decisions on claims on the basis of common legal and factual issues rather than on a case-by-case basis.⁴⁵ Given the lapse of time between the date the claims arose and the date the decisions will be taken as well as the circumstances prevailing at the time of the displacement, relaxed standards of proof should be applied.⁴⁶ The commission should be authorized to seek expert advice as necessary to exercise its functions.

⁴⁵ One or more of these methods are used by all major international mass claims programs. See, e.g., Arts. 37 (a) and (b) and 38 (a) and (b) of the *Provisional Rules for Claims Procedure of the United Nations Compensation Commission*, available at <http://www.uncc.ch>; Art. 5, paragraph 10 of the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, available at <http://www.pca-cpa.org>; Art. 19 of the Rules Governing the Claims Resolution Process of the Claims Resolution Tribunal for Dormant Accounts in Switzerland, available at <http://www.crt-ii.org>; and section 20 of the *Supplemental Principles and Rules of Procedure* of the IOM Property Claims Commission.

⁴⁶ Other international mass claims programs have adopted relaxed standards of proof for similar reasons. See, e.g., Section 11, paragraph (2) of the German Foundation Act, available at <http://www.stiftung-evz.de> (“Eligibility shall be demonstrated by the applicant by submission of documentation. The partner organization shall bring in relevant evidence. If no relevant evidence is available, the claimant’s eligibility can be made credible in some other way.”); Art. 17 of the *Rules Governing the Claims Resolution Process* of the CRT-II, available at <http://www.crt-ii.org> (“Each Claimant shall demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Account. The CRT shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long period of time that has elapsed since the opening of the Accounts.”); and Section 22 (“Evidentiary Standard”) of the *Supplemental Principles and Rules of Procedure* of the IOM Property Claims Commission (“The Commission’s decisions on compensability shall be based on relaxed standards of proof taking into account the lapse of time between the date the loss occurred and the date the claim was made; the circumstances in which the specific loss or types of losses occurred; the information available from other cases; and the background information available to the Commission regarding the circumstances prevailing during the National Socialist era and the Second World War and the participation of German enterprises in the

The secretariat of the claims commission should develop its own standard operating procedures that define the functions and relationships between the secretariat and the claims panels and between various administrative units of the secretariat, as well as the interaction of the members of the secretariat with third parties. In order to promote transparency, the standard operating procedures should be published.

The standard operating procedures should also cover the claims payment function as well as the coordination of the execution of successful property restitution claims with the return process.

commitment of National Socialist Wrongs. ... A fact shall be established if it has been credibly demonstrated. A claim cannot be rejected on the sole ground that it is not supported by official documentary evidence.”)

4. FUNDING

4.1 Participation and Contributions

Securing appropriate funding for the international mechanism is one of the key issues in the permanent status negotiations. Its importance only increases to the extent that compensation for property losses is preferred over property restitution. Consequently, the contributions of the State of Israel to the compensation fund, including both for purposes of compensation for refugeehood and property losses, as well as for the return process, should be clearly defined in the permanent status agreement.

As the expropriation of the refugee properties was illegal, and as Israel has benefited from the properties left behind by the refugees, it should bear the responsibility for funding the awards made in the property claims process in full. The quantification of Israel's contribution must be based on the best professional assessment of the present value of the refugee properties left behind by the refugees in 1947-48.

Israel also shares a responsibility not only for the creation of the Palestinian refugee issue but also for the long-standing displacement and suffering of the refugees. Consequently, it must also be expected to make a substantial contribution to funding compensation awards for refugeehood. The size of this contribution remains a matter of negotiations between the parties; however, in conducting these negotiations it must be kept in mind that, assuming a claimant population of seven million eligible claimants, tens of billions of dollars may be required to finance the compensation awards, the precise amount depending on the definition of refugee to be adopted in the permanent status agreement and the amount to be fixed for individual awards, as well as on whether awards will be made to family units or to individual refugees.

The international community must also recognize its responsibility for the creation of the Palestinian refugee issue and for its inability to resolve the problem over a period of sixty years. This delay has contributed to the suffering of the Palestinian population and justifies the demand by the Palestinian side for the participation of the international community in the funding of both compensation awards for refugeehood and the return process. The participation of the international community must also be seen as an investment in international peace and security and thus justified on the basis of Chapter VII of the Charter of the United Nations.

In addition to the international community, Israel should also be required to contribute to the funding of the return process. The principles and criteria to be used to quantify this contribution must be agreed in the permanent status negotiations.

The funding of the repatriation, resettlement and rehabilitation of refugees in third countries, including their current countries of residence, should be agreed during the permanent status negotiations.

4.2 Administration of the Compensation Fund

The funds made available by Israel, the international community and third countries should be paid into a compensation fund administered by the international mechanism. For a number of reasons, the funding of the two processes should be accounted for separately and consequently the funds related to these activities should be kept on separate accounts.

Separation of the two accounts is required not only for reasons of proper accounting of the expenses of the two activities, but also for legal reasons. A refugee's right to restitution and compensation, once confirmed in the permanent status agreement, is a matter of legal right. The purpose of the claims process is to verify this right and, if not fixed in the permanent status agreement, to quantify it; once quantified, it should not be possible, as a

matter of principle, to adjust the amount awarded on political or other discretionary grounds.

However, the funding of the return process is a more discretionary exercise. While the right of return, once recognized in the permanent status agreement, should be viewed as a legal right, the implementation of this right may be driven by considerations such as the need to prioritize the returns of those most in need of assistance. The level of assistance provided for purposes of resettlement and rehabilitation is similarly a matter of policy rather than legal principle. This does not mean that the level of assistance should be the minimum necessary to achieve the goals of resettlement and rehabilitation; it simply means that the baseline level to be achieved is discretionary and subject to various policy considerations, including the availability of funding.

Thus several reasons, including functional, transparency and accountability requirements, counsel the creation of one common fund consisting of two separate operational accounts. While the implementation of the repatriation, resettlement and rehabilitation programs can be made subject to the availability of funding, and the needs of the various groups of refugees can be prioritized, the right to compensation, once created, is not discretionary but a matter of legal right and thus should not be made subject to contingencies such as the availability of funding. Although there must also be sufficient and credible initial funding available to launch the repatriation, resettlement and rehabilitation programs, there is no quantifiable “full” funding for the repatriation program, particularly for the rehabilitation process. Given the scope and complexity of the return process, the arrangement can and must be more flexible, allowing for prioritization and sequencing of the process based on the needs of the various refugee groups. Thus, the development account should be created as an account that is subject to replenishment over time. It should also be possible to provide funding “in kind,” i.e., in the form of goods and services.

The compensation fund should be provided with the necessary international privileges and immunities.⁴⁷

CONFIDENTIAL

⁴⁷ This is necessary to protect the fund against possible domestic litigation. Cf. the system established to protect the UNCC Compensation Fund, *Report of the Secretary-General of 2 May 1991*, para. 3 (“The Fund created by paragraph 18 of Security Council resolution 687 (1991) will be established by the Secretary-General as a special account of the United Nations. The Fund will be known as the United Nations Compensation Fund The Fund will be operated in accordance with the United Nations Financial Regulations and Rules. As a special account of the United Nations, the Fund, therefore, will enjoy, in accordance with Article 105 of the Charter and the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, the status, facilities, privileges and immunities accorded to the United Nations.”) (footnote omitted)

5. SUMMARY

The mandate of the international mechanism should be comprehensive and cover the two principal aspects of the Palestinian refugee issue, the right of return and claims for restitution and compensation. The exercise of these two functions should be properly coordinated and a separate policy-making and oversight body (or bodies) should be established to exercise the necessary policy guidance, coordination and oversight functions.

The two substantive functions, the return process and the claims process, should be allocated to two different sub-units of the mechanism and organized accordingly. The return process should be organized as an operational administrative process with the necessary discretionary powers, subject to the policy guidance and oversight of the policy-making body. The claims process should be organized as a quasi-judicial body that will make final determination on claims for property restitution and compensation for property losses and human suffering as a result of long-standing displacement. The process should be designed as an international mass claims program.

An international compensation and development fund should be created to provide compensation to successful claimants and to finance the return, resettlement and rehabilitation process. The two functions should be separately accounted for. Israel should in principle be required to provide full financing for payment of claims for property losses and for damage to restored property. It should also contribute to funding the refugeehood claims, with the remainder coming from the international community. Israel should also make a contribution to the return process account.

A summary of the principal recommendations of this study is provided below.

- (1) The scope and complexity of the Palestinian refugee issue requires the creation of a comprehensive and well-funded international mechanism to deal effectively with the various aspects of the problem. While the experiences of other similar programs should be taken into account, the mechanism should be based on a thorough analysis of the specific problem at hand and tailored to address that particular problem;
- (2) Certain aspects of the Palestinian refugee issue, in particular status determination (refugee definition), the modalities of implementation of property restitution and funding, are most appropriately resolved in the permanent status agreement;
- (3) The return and claims processes should be unified at the policy-making and oversight level, but separated at the operational level. The claims process should deal with claims for compensation for refugeehood, property loss and property restitution, whereas the return process should be responsible for the repatriation, resettlement and rehabilitation of returnees;
- (4) The role and participation of third countries in the resettlement and rehabilitation of refugees who wish to remain in their present countries of residence or move to another third country (as may be agreed) should be taken into account in designing the international mechanism; and
- (5) An international compensation and development fund consisting of two separate accounts should be created as part of the permanent status agreement. It is particularly important that sufficient funds are made available up front to the claims mechanism, to establish the credibility of the process. Given its nature and scope, the return program needs adequate and but not “full” funding up front. An effort should be made to involve a wide range of international and non-governmental organizations in the implementation of the process both as donors and participants.

Annex: Composition of the Policy-Making Body

In order to ensure its effectiveness and efficiency, the policy-making body should operate on two levels: (1) an executive three-member Governing Board, consisting of the Executive Director of the Secretariat of the Claims Process and the Director of the Return Process, and a full-time Chairman; and (2) a Consultative Commission consisting of representatives of the international community and the relevant regional powers.

The principal task of the Governing Board is the day-to-day oversight and coordination of the claims process and the return process, subject to consultation with the Consultative Commission. The main function of the latter process would be to oversee the implementation of the refugee-related provisions of the Permanent Status Agreement and, given that the implementation of the process will affect a number of other countries and involve a number of important players of the international community, to incorporate the participation of international community into the process.

The composition of the Consultative Commission is obviously a key policy issue, as one of the functions of the Policy-Making Body would be to serve as an international guarantor of the implementation of the permanent status agreement on refugee-related issues. This should be reflected in its composition, which should include representatives of the Quartet (the United States, the European Union, Russia and the United Nations), as well as likely important donors. International organizations such as the World Bank and other organizations participating in the implementation of the refugee provisions of the Permanent Status Agreement likely also should be represented.

Of the regional powers, principal candidates would be those countries that presently host significant numbers of Palestinian refugees, i.e., Lebanon,

Jordan and Syria in particular. While the participation of these parties is required to ensure effective implementation of the return process, it should be carefully considered whether they should be given the right to participate in all aspects of decision-making, or only to address those issues which affect them most directly (i.e., return, resettlement and rehabilitation of refugees based in their territory).

As a party to the Permanent Status Agreement and as the main financier of the process, Israel would also have an interest in participating in the process and probably should be represented.

Diagram of the Policy-Making Body

