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**FORA AVAILABLE FOR PALESTINIAN REFUGEE RESTITUTION,
COMPENSATION AND RELATED CLAIMS**

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BADIL-Briefs aim to support the Palestinian-Arab and international debate about strategies for promotion of Palestinian refugees' right of return, restitution, and compensation in the framework of a just and durable solution of the Palestinian/Arab - Israeli conflict.

Background

The lack of political support for Palestinian refugees' right to repatriation and restitution has triggered a new debate about ways in which international human rights fora could be used to promote the Palestinian cause. Restitution claims raised by numerous national and ethnic groups, as well as individuals, worldwide serve as models to be explored by Palestinians and their Arab and international supporters.

In the initial attempt at a survey presented here, Susan Akram examines international and regional fora currently available for Palestinian refugee restitution. The paper is based on the discussion in a Palestinian-European activist workshop organized by BADIL and Oxfam Solidarity in Brussels in January 2000, and aims to contribute to the current effort at exploring avenues for Palestinian restitution claims in the international human rights system.

Summary

of

Discussion

This summary focuses on where Palestinian refugees can bring individual restitution and compensation claims. It does not discuss fora where claims for realizing the right of return might be made, although such claims will be mentioned as appropriate in the context of the discussions of restitution/compensation fora. Palestinian refugees do not at present have any forum immediately available in which they can file individual claims for restitution and/or compensation for losses sustained as a result of their expulsion from their lands and homes in 1948. The forum in which such claims would ordinarily be made is the place where the property lies, i.e., Israel. Israeli law has essentially foreclosed the right of Palestinians to make such claims. However, there are possible fora in which claims can be made for establishing and furthering the principles of restitution and compensation—as well as the principle of return-- and for raising public awareness of such rights for the Palestinians. ***There are three categories of potential fora: international; domestic; and a loose category referred to here as “Negotiated Agreements or Resolutions”.*** All potential and feasible fora for such claims are summarized below.

A. International

There are three categories of international fora: 1) “supranational fora”, also known as charter-based bodies (created by UN Charter) such as the International Court of Justice (ICJ); 2) regional fora, such as the European human rights system; and 3) fora created under the auspices of international conventions, or treaty-based bodies.

1. Supranational Fora

1.1 International Court of Justice (ICJ)

Problems and Possibilities: The ICJ only exercises jurisdiction over disputes between recognized states. Technically, states are required to submit to ICJ jurisdiction under Article 94 of the UN Charter, but it is unclear whether judgments are enforceable. (The US, in the mining of Nicaraguan waters case, claimed it did not have to comply with the ICJ decision). An ICJ Advisory Opinion states that the UN has the capacity to bring an international claim against a state to obtain reparation for damage to the “interests of which it is the guardian” (ICJ Advisory Opinion on Injuries Suffered in the Service of the United Nations). Under the theory of this Advisory Opinion, the UNHCR as mandated representative of refugees, stands in the shoes of a state, and should have the right to represent refugee interests before the World Court. Although Palestinian refugees have traditionally been considered outside UNHCR’s mandate, this position is subject to serious challenge. It is theoretically possible to fashion restitution and compensation claims for presentation at the ICJ with UNHCR (or the UN Conciliation Commission on Palestine, the UNCCP) as the state-substitute for the party bringing the claim. If a Palestinian sovereign state is created and recognized by the world community as a result of Palestinian-Israeli negotiations, then the PLO (or the Palestinian Authority as the government of the state) would have standing to bring restitution/compensation claims at the ICJ. Although this is theoretically possible, it is likely that a future Israeli-Palestinian agreement will include a condition that all such claims be extinguished with the signing of an agreement.

1.2 International War Crimes Tribunal

Problems and Possibilities: The International War Crimes Tribunal is available to prosecute war crimes, crimes against humanity and crimes against peace, as defined in the Genocide Convention. Israel is a signatory to the Genocide Convention (which is based on the Charter of the International Military Tribunal, on which the Nuremberg Tribunal was modeled). As a criminal court, the War Crimes Tribunal does not have jurisdiction over individual claims as such, but brings those accused of war crimes to trial for criminal sanctions. Cases must be brought before the Tribunal by special prosecutors, whose responsibility it is to investigate the evidence; identify, locate and serve with process the accused defendants; and pursue and present the case before the Tribunal judges. It is possible to draft a petition, marshal evidence and present the charges and their bases to the prosecutors to urge them to file charges in the Tribunal, but the success of such “lobbying” in the Palestinian case is questionable because of the political ramifications for the special prosecutors. Nevertheless, a campaign might be usefully designed around lobbying for prosecution of war crimes, including ethnic cleansing, against named Israeli defendants.

1.3 United Nations Human Rights Commission (UNHRC)

Problems and Possibilities: The UNHRC operates under the authority of the UN General Assembly, but is a relatively independent UN body. It has two procedures for petitions for determinations: the public procedure, known as a “1503” petition and procedure, and a confidential procedure, known as a “1235” petition and procedure. The UNHRC only has advisory and declaratory jurisdiction; it does not have the power to enforce a judgment or decision of any kind. However, petitions may be brought by individuals against states before the UNHRC, and its decisions can be brought to the General Assembly with requests for the UNGA to pass Resolutions that a state should conform to a UNHRC decision. Moreover, the UNHRC can appoint Special Rapporteurs who can investigate the petitions and issue reports that can be embarrassing for the state involved.

The practice under resolution 1235 is to appoint special Rapporteurs, special representatives, experts, working groups and other envoys to collect information on human rights violations and prepare annual reports to the Commission. The Commission may not refer to the substance of the communications since they remain confidential. 1235 does not provide a mechanism for consideration or analysis of the communications themselves.

The 1503 procedure, in contrast, is triggered by a petition charging a state of serious violations of internationally-protected human rights. Some practices are not specifically authorized under 1503 but they have become regular procedure, including: informing governments that they were the subject of a situation referred to the Sub-Committee, sending the governments documents and inviting them to submit observations; a Working Group on Situations was established to annually review and consider the disposition of situations referred to the Sub-Committee. Some practices were formalized, such as: the Chair of the Working Group is invited to participate in the sessions of the Commission on 1503 matters; giving accused governments the opportunity to reduring the confidential discussions of the Commission; the Sub-Commission and its Working Group are given access to the confidential records for the Commission's meetings on 1503 matters. In 1978 the names of governments which were the subject of 1503 deliberation were released but not the substance of the complaints. In 1984 the Commission released not only the names of the governments involved in 1503 proceedings but also whether the proceedings would continue or if they would terminate. It has been recommended that the Commission expand its repertoire of approaches: posing written questions to governments, sending a member of the Commission to make contact with the government, sending a UN staff member to make contact, keeping the case under consideration, transferring the case to public proceedings, or dismissing the case. The UNHRC may be a very useful forum for affirming principles of return, restitution and compensation in the Palestinian case. The procedures before the UNHRC, however, are cumbersome, time-consuming and not necessarily public.

2. Regional Fora

Although there are three regional human rights systems—the European, the American and the African—only one presents viable opportunities to raise such claims. This is the European system, in particular, the European Court of Human Rights (ECHR).

2.1 European Court of Human Rights (ECHR)

Problems and Possibilities: Israel is not currently a member of the European Union or the Council of Europe, so it is not subject to the jurisdiction of the ECHR. However, Israel has been negotiating cooperation/trade agreements and for a “preferential status” with the European Union. The first step to making the ECHR available as a forum for Palestinian claims is to pressure the EU to condition Israeli participation in cooperation agreements or to granting Israel preferential status on one or both of the following: Israel's submission to the ECHR's jurisdiction over, and decision in, petitions regarding Palestinian restitution/compensation claims, and Israel's implementing domestic legislation recognizing and effectuating such claims through Israeli courts. The next step entails again resolving the question of who would represent the refugees before the ECHR, but this is an easier matter than in the ICJ because the ECHR has jurisdiction over individual claims—individuals or their lawyers may present their petitions themselves at the ECHR. The ECHR actually holds great promise as a venue for such claims in the future, as it has a substantial body of jurisprudence reinforcing obligations of states towards refugees.

Indeed, the ECHR has rendered a decision in the only known case in which an individual successfully claimed restitution and compensation after an agreement between the two states concerned was supposed to have concluded property claims: *Loizidou v. Turkey*. In this case, the Turkish Republic of Northern Cyprus had expropriated the “abandoned” property of Greek Cypriots who left Cyprus. The ECHR ruled on behalf of the applicant, a Greek Cypriot, finding

the expropriation laws illegal, and granting restitution of her property as well as compensation for interference with her property rights. This case is significant for a number of reasons; first, because it establishes precedent for restitution/compensation claims to be made after the conclusion of an agreement between the disputing states; second, because the ECHR took jurisdiction over the claim even though the state-respondent (Turkey) was not a member of the EU (Mrs. Loizidou was a citizen of an EU member state, Greece); third, because the ECHR's decision invalidated Turkey's expropriation laws; and fourth, because the Court not only ordered Turkey to return Mrs. Loizidou's property, it also awarded her damages for Turkey's interference with her right to full enjoyment of her property (There are three pending cases at the ECHR for similar claims as Loizidou's. These three cases will test the precedential value of the *Loizidou* case for future use in Palestinian claims).

3. Committees Created under International Conventions, or Treaty Bodies

3.1 Human Rights Committee

Problems and Possibilities: The Human Rights Committee is the body established under the International Convention on Civil and Political Rights. This is one of the most widely-ratified Conventions in existence. Israel is a signatory. The Committee operates similar to most other treaty bodies, in that it requests reports on the progress of individual state parties to the Convention concerning their compliance with Convention obligations. In addition to the reporting system, it has an inter-state complaint mechanism; its Optional Protocol permits states signatory to the Protocol to submit to an individual petition, or complaint system, before the Human Rights Committee. The inter-state complaint procedure is essentially unused, but the individual procedure under the Optional Protocol has been heavily utilized. The Committee has dealt with issues of immigration and refugees. Again, complaints before the Human Rights Committee would focus on affirming legal principles under international law to benefit future Palestinian refugee claims when they are brought in a forum having direct jurisdiction over individual claims. Israel has already been the subject of several findings from the Human Rights Committee of violations of the ICCPR in its widespread use of torture against Palestinian prisoners (Report on Israel of July, 1998). Pressure created by these negative reports helped lawyers in Israel to obtain the recent Israeli Supreme Court decision forbidding the use of torture in Israeli prisons.

3.2 Committee on Economic, Social and Cultural Rights

Problems and Possibilities: The Economic, Social and Cultural Committee, although entrusted with supervision over the International Covenant on Economic, Social and Cultural Rights, (ICESCR) is actually under the direct authority of the UN Economic and Social Council (ECOSOC). Its mandate is to assist ECOSOC to do its job, but it is also entrusted with monitoring compliance with, and affirming the provisions of the ICESCR. There are many provisions in this Covenant which are relevant to Palestinian rights to property. In fact, one Palestinian petition has already been raised and concluded in the ICESCR, concerning economic, social and housing rights. The ICESCR appointed a Special Rapporteur to investigate the claims, and the ICESCR's findings and final report were extremely favorable to the Palestinian claims. The Committee's findings were that Israel was in serious breach of a number of Articles of the Covenant for the following practices and policies against Palestinians: house demolitions; land confiscation; denial of right to return to their country of birth; denial of rights to reunify with families; denial of equal access to resources such as water and electricity; discrimination against Palestinians in all economic and social spheres, from access to employment to discriminatory land and return policies. Significantly, the Committee pointed to Zionism as the root of the discriminatory policies which violated the Covenant. Despite the lack of an enforcement mechanism in this process, its use can be effective if part of a broad-based strategy coupled with a sophisticated and sustained publicity campaign.

3.3 Committee Against Torture

Problems and Possibilities: This Committee monitors compliance with the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture, or CAT). This Committee has both reporting authority and the power to investigate cases on its own. The Committee has rapidly developed a substantial body of cases in refugee and refugee-related situations, affirming broad protections towards individuals when it finds “well-founded indications that torture is being systematically practised in the territory of a State party.” Again, this forum is extremely useful for developing principles, but does not have power to issue judgments in compensation or restitution cases.

3.4 Committee on the Rights of the Child

Problems and Possibilities: This is most recent of the treaty committees, and was established to implement the provisions of the 1989 Convention on the Rights of the Child. The Committee functions in a similar way to the other convention committees discussed above. The Convention has a particular provision regarding refugee children. The Convention has been ratified by over 170 states, including Israel. There is not yet a body of opinions concerning refugee cases from this Committee.

3.5 Committee on the Elimination of Racial Discrimination

Problems and Possibilities: This Committee operates to implement the Convention on the Elimination of Racial Discrimination (CERD). It has reporting functions in the same way as the other treaty bodies. This Committee has also issued a report (March, 1998) finding Israel in violation of the Convention for discrimination against Arab Israelis as well as Palestinians under occupation in a wide array of practices. This Committee, like the Committee on the Rights of the Child, also presents additional possibilities for Palestinian claims on substantive violations proscribed by the Conventions that may help establish useful principles for individual claims on return, restitution and compensation.

B. DOMESTIC

By “domestic” fora, I mean venues available within a particular state under that state’s domestic legislation. Because Palestinians are in diaspora all over the world, a number of potential fora may be viable possibilities for exercising rights of restitution and compensation. I have limited knowledge of what fora might be available in states other than the United States, but can generally identify the types of legislation or possible avenues for pursuing such claims in domestic courts.

1. Israel

Problems and Possibilities: I know almost nothing about the Israeli court system and procedures available for property claims by Palestinians, and don’t know too much more about the expropriation laws and mechanisms. However, my understanding is that Israeli law essentially forecloses any possibility of restitution and compensation claims by Palestinians for property taken in and after 1948. Still, these need to be exhaustively researched; research also needs to be done on attacking Israeli discriminatory laws that effectuate expropriation without compensation, or “unlawful takings” under other provisions of Israeli *federal* laws. This is especially important in light of Israeli “privatization” of land holdings, as this process may open up new avenues for challenge that were unavailable when the land was held exclusively by the Custodian of Absentee Property and the Land Authority. One must be extraordinarily cautious in any decision about filing a claim under Israeli law, as an adverse precedent will eviscerate the claims of thousands (or millions) of others. Several avenues of campaign work are possible, however. One avenue would be to pressure European governments to insist as

a condition of participating in any post-agreement funding package to Israel and Palestine that Israel implement legislation permitting the filing and making good on restitution and compensation claims by Palestinians. A second avenue would be to pressure European governments to insist on such conditions as a prerequisite to membership in the EU; or to insist on such conditions in each trade/cooperation agreement concluded between a European state and Israel.

2. United States

Problems and Possibilities: There are two different avenues of pursuing restitution/compensation claims in the United States: through direct claims in the courts, or through pressure on the United States government to take up with Israel the claims of Palestinians who are US residents or citizens. In terms of direct court claims, filing a case fashioned to claim restitution or compensation based on US domestic law is extremely problematic because of both substantive and procedural barriers to suing the Israeli state in US courts. Doctrines such as sovereign immunity, subject matter jurisdiction, personal jurisdiction and statutes of limitation will most likely bar such suits. However, there are two pieces of legislation that may be utilized to make restitution/compensation claims if they are fashioned as torts (civil wrongs) or crimes under international law: the Alien Tort Claims Act, and the Torture Victims Protection Act. These laws permit suit against foreign defendants, or parties, in US federal courts to defend claims against them for gross violations of international law. The laws also allow the US courts to order attachment of the assets of the defending parties found in the US to satisfy the judgments. Significant jurisprudence is developing under both these laws. There are still procedural and substantive barriers to using these laws in Palestinian refugee claims, but such barriers can probably be overcome. It is much more difficult to assess whether such claims by Palestinians would survive the kind of legal battle that will be brought against them, and whether any judgment on behalf of the Palestinian claims would be enforceable.

The second avenue, that of pressuring the US government to take up Palestinian-American claims, has theoretical precedent of several kinds. The most important is the little-known unit within the US Department of Justice which was formed in response to pressure from the Cuban community in the US to assert the claims of Cuban exiles directly against Cuba. The work of this unit has not been publicized, but my understanding is that it represented the claims of Cuban Americans, Cuban residents, and even Cubans residing in the US without formal legal status, to restitution of property and compensation from the Cuban government. The US-Iran Claims Tribunal is another example of the result of pressure on the US government by American groups to recover property from Iran. Once again, it is questionable whether the US government would respond to such pressure when it is for the benefit of Palestinians.

3. Other Countries

Problems and Possibilities: Similar issues to those arising in the US are likely to arise in the context of the domestic laws and policies of other states, with one exception: the political atmosphere is unlikely to be as anti-Palestinian in other countries as it is in the US. Laws and policies in European countries, particularly those with a significant Palestinian population, should be explored for the feasibility of raising these claims.

C. NEGOTIATED AGREEMENTS OR RESOLUTIONS

The Palestinian-Israeli negotiation process presents additional possibilities and problems for Palestinian restitution and compensation claims. Compensation and other claims to damages for rights in real property are severed from other substantive rights—such as the right of return—in negotiated settlements, so only the restitution/compensation claims will be addressed in this context. There are two ways to approach using the negotiation process: either working within the process itself—i.e., the refugees demanding a separate voice at the negotiation table; or working outside the process to put pressure on the negotiators to come to a resolution of the restitution/compensation issues in a way acceptable to the refugees. Either way, it is important to emphasize the importance of ensuring that a provision is included in the final agreement that leaves open the possibility of raising individual claims. Since the decision whether to work within the current negotiation framework or outside of it to represent refugees' restitution/compensation claims is primarily a strategic and not a legal one, I will not address that further here.

There are two different types of models of the way restitution/compensation claims are made in inter-state disputes: through negotiated settlements, or through UN Resolutions creating claims commissions or tribunals. Generally, the questions that must be answered with regard to these options are: 1) Who, or which entity, can legitimately represent the refugees in pressing claims either within the negotiation process or without? 2) What categories of claimants should be recognized as requiring separate representation, or at least representation recognizing distinct interests? 3) On what basis will claims be assessed, that is, what valuation methods or principles are to be used? 4) Will the refugees be better compensated or satisfied through a lump sum agreement, or a claims commission/tribunal?

1. Lump Sum Agreements

Problems and Possibilities: The current negotiation discussions appear to be heading towards an agreement for a specified lump sum to be paid to each Palestinian refugee (\$20,000 per refugee family has been suggested). Clearly, this is the preferred solution for Israel, along with a treaty provision that extinguishes any future claims. Examining some of the recent precedents for lump sum agreements reflects that for the most part they fail to satisfy the expectations of the claimants. The longstanding US-Iran assets dispute reflects the unsatisfactory result of the first lump sum agreement between the two countries in 1990. Thereafter, the Iran-US Claims Tribunal was established, which administered a combination model of lump sum and individual claims. One advantage to a lump sum model is, of course, that it is relatively easy to administer and does not need lengthy proceedings to pay out all claims.

2. Claims Commissions/Tribunals

Problems and Possibilities: Claims commissions or tribunals can be established as a result of a negotiated agreement, or through UN Resolutions passed through pressure by the state representing the aggrieved claimants. Recent examples are the Iran-United States Claims Tribunal created by the Algiers Accords; the United Nations Compensation Commission on claims by Kuwait and other countries against Iraq, created by UN Security Council Resolution; and the Commission for Real Property Claims in Bosnia-Herzegovina, created by the Dayton Peace Agreement. Claims commissions or tribunals that administer individual claims on the basis of proof of specific losses may perhaps provide more satisfaction to individual claimants, but have proved to be slow and cumbersome, as well as frustrating for claimants because the full value of loss may be difficult to prove. Moreover, as the Bosnia situation has shown, donors lose interest over time as claims processes are drawn out, and funding becomes scarce. However, these models and recent precedents need to be carefully examined in the Palestinian case, to decide which is both optimal and feasible in light of all the factors which have to be taken into account.

D. RECOMMENDATIONS FOR ACTION

1. *European Court of Human Rights*: An initial campaign with a high likelihood of success, that could be launched with relatively few resources and with a focus on “testing the waters” in Europe, should aim at the EU conditioning trade agreements with Israel on the latter’s submission to the ECHR (and/or on passage of legislation in Israel to permit restitution and compensation claims for Palestinians). Another campaign suggested by the recent cases which appear to be strong precedent for Palestinian restitution and compensation claims—*Loizidou* and its progeny—could examine the possibility of bringing claims directly to the ECHR. Palestinian residents or citizens of an EU state are prospective petitioners in such actions. Such a petition would have to be extremely well-researched, and would require a coalition of European lawyers with experience in cases before the ECHR, as well as a broad-based coalition for campaigning, to focus attention and publicity on the case/s.
2. *Treaty Committees*: A second level of campaign could focus on bringing petitions before several of the treaty bodies at the same time. This would require substantial resources, close coordination, and also sophisticated and sustained publicity. Since the treaty committee procedures are lengthy and it is difficult to maintain interest in them, it would be critical to plan such a campaign around several coordinated petitions before different committees. Simply filing petitions--such as the ones before the Economic, Social and Cultural Committee, the Human Rights Committee or the Committee on Racial Discrimination—without a coordinated campaign of publicity and public action, are unlikely to have the impact or create sufficient pressure to force necessary governmental response.
3. *Domestic Claims/Pressure*: Outside the US, this arena also holds great possibility for an activist-based, rather than a legal-based campaign. The Scandinavian countries, other European countries besides Germany and France, and possibly some Latin American countries in which there are large diaspora Palestinian communities are very good candidates for pressuring governments to make claims against Israel. If there are sufficient legal resources, of course, research should be done in countries with sizable resident Palestinian populations to determine whether claims could be filed directly in the courts of those states.
4. *International War Crimes Tribunal*: This option needs to be carefully evaluated. On the one hand, it could be extremely sensational in terms of the publicity that might be generated around compilation of evidence that reflects Israeli war crimes against Palestinians; on the other, if the political atmosphere is such that the special prosecutors refuse to prosecute against Israeli defendants, the entire effort could be a useless waste of precious resources. This option would require a substantial team of dedicated lawyers to prepare the evidence in such a way that the prosecutors would have a hard time refusing to file charges. It would also require significant financial resources to pay for the legal research and evidence-gathering, as well as for a broad-based and multi-faceted media campaign.
5. *Israeli Legislation/Court Claims*: This appears to be the least favorable option given the apparent lack of standing of Palestinian claimants to make claims for restitution or compensation for property in Israeli courts. Nevertheless, the research should be done—and as quickly as possible—to determine precisely what Israeli law is in this regard, and whether there are indirect avenues to raise such claims that have not been adequately considered. This information could, moreover, be useful in the campaigns to pressure the EU to require Israel to implement appropriate legislation, as well as in the campaigns to use other states’ domestic legislation to raise such claims.