

The UN Register of Damage for the Wall

Al-Haq's Legal Analysis of the Proposal of the Secretary-General

On 9 July 2004, the International Court of Justice issued an Advisory Opinion (ICJ AO) finding Israel's construction of a Wall in the Occupied Palestinian Territory (OPT), including in and around East Jerusalem,¹ to be in violation of international law. On 2 August 2004, the UN General Assembly requested "the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion."² On 17 October 2006, the UN Secretary-General submitted a report proposing an institutional framework for the Register of Damage (hereinafter "Secretary-General's Report").³ The present brief evaluates selected points of that proposal.

Legal Bases

According to paragraph 14 of the Secretary-General's Report, "in devising the process of registration, eligibility criteria and categories of damage, the Board would be guided by the relevant findings of the advisory opinion, general principles of law and principles of due process of law." Among these legal bases, Al-Haq notes the surprising absence of international law, other than as reflected in the ICJ AO. Despite this unfortunate omission, the remainder of this legal brief will evaluate the proposed Register of Damage in light of the requirements of international law.

Cessation and Restitution Not Addressed

Based on the customary law of state responsibility, the ICJ AO found that Israel had the obligation of cessation, entailing "the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem."⁴ "Moreover," the Court continued, "Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned."⁵ The primary obligation of reparation is restitution of "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."⁶ In general, UN practice has insisted on the importance of restitution with regard to violations of Palestinian rights arising from, among other things, the construction of Israeli settlements in the OPT, confiscation of Palestinian land, exploitation of Palestinian natural resources and exile of Palestinian refugees.

The Register of Damage does not address the questions of cessation or restitution. While Al-Haq acknowledges that a Register of Damage is relevant only for compensation, it regrets that the UN has made no progress with regard to enforcing

¹ The OPT consists of the two legally unified but geographically separated areas of the West Bank, including East Jerusalem, on the one hand, and the Gaza Strip on the other. The Wall is being constructed inside the first of these areas.

² GA Res ES-10/15, 2 August 2004, para. 4.

³ Report of the Secretary-General pursuant to UN General Assembly Resolution ES-10/15, A/ES-10/361, of 17 October 2006.

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), para. 151.

⁵ *Ibid.*, para. 152.

⁶ *Ibid.*

Israel's obligations of cessation and restitution. The Register of Damage cannot replace progress in this area. Moreover, it is unfortunate that the Register of Damage precedes such progress. In the absence of cessation and restitution, the Register of Damage will continue indefinitely since, according to paragraph 19 of the Secretary-General's Report, it will "remain open for registration for the duration of the wall on Occupied Palestinian Territory."

No Evaluation of Damages or Compensation

According to paragraph 4 of the Secretary-General's Report, the Register of Damage would only "list or record" claims with no assessment of damages. Indeed, "the office of the Register of Damage would not be a compensation commission or a claims-resolution facility, nor would it be a judicial or quasi-judicial body. The act of registration of damage, as such, would not entail an evaluation or an assessment of the loss or damage claimed." Mere listing or recording of damages is insufficient. Evaluation of damages is essential for compensation and must take into consideration the fact that the damage created by the Wall is continuous in time, until the dismantling of the Wall. If no assessment of damage is carried out at this stage, it simply means that it must be done at a later stage, when it will be more difficult, more expensive and create unnecessary duplication of work.

Article 3 of the Hague Convention (IV) of 1907, which reflects customary international law, provides for a right to compensation under international humanitarian law. Article 3 provides, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."⁷

Recent and relevant international claims mechanisms have provided for compensation. For instance, the UN Security Council created the United Nations Compensation Commission (UNCC) with the explicit purpose of administering "a fund to pay compensation for claims" arising out of "Iraq's unlawful invasion and occupation of Kuwait."⁸ Similarly, the UN General Assembly has directed the Conciliation Commission for Palestine (UNCCP) to establish an office that would, "Make such arrangements as it may consider necessary for the assessment and payment of compensation" to Palestinian refugees displaced in 1948.⁹

Al-Haq fails to comprehend why the proposed Register of Damage does not provide for an evaluation of damages and for compensation. The mirage of a political settlement to the Israeli-Palestinian conflict must not impede the full and proper application of international law. In the famous *Loizidou* case, brought by a Cypriot woman who was denied the enjoyment of her property rights as a result of a foreign occupation, the European Court of Human Rights was "not persuaded by the argument that in [awarding compensation to the victim] it would undermine political discussions concerning the Cyprus problem."¹⁰

⁷ See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 91.

⁸ SC Res 687, 3 April 1991, paras. 16 and 18.

⁹ GA Resolution 394 (V), 19 December 1950, para. 2.

¹⁰ *Loizidou v. Turkey*, 15318/89 [1998] ECHR 60 (28 July 1998), para. 26.

No Remedy

A claims mechanism that does not address cessation, restitution, compensation or any other forms of reparation has no remedial value. This is contrary to the very purpose of the international law on state responsibility, as reflected in the ICJ AO. In addition, Article 2(3) of the ICCPR guarantees to every person an “effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” The proposed Register of Damage also falls short of the international legal standard of “adequate, effective and prompt reparation.”¹¹ This drastic shortcoming only increases the possibility that Palestinian victims of the Wall would choose not to cooperate with the Register of Damage out of fear that the Occupying Power would, as a consequence, deny them whatever meagre compensation it may give them for the confiscation of their land.

The Need for a Field Presence

Locating the office of the Register of Damage outside of the OPT may be the best solution given the evident hostility of the Occupying Power towards the Register of Damage and the associated possibility of negative repercussions on its functioning. However, without a field presence, the Register of Damage would be ineffective and appear distant and unreal to the Palestinians who are meant to use it. Hence, a field presence is necessary, and could take the form of cooperation between the office of the Register of Damage and various UN offices in the OPT.

Only Material Claims

The Secretary-General’s Report states, in paragraph 15, that, “In accordance with the advisory opinion, both natural and legal persons who claim to have sustained any form of material damage as a result of the construction of the wall are eligible for compensation.” The limitation of registration to material damage is an unfortunate and unduly restrictive interpretation of the ICJ AO. Furthermore, it does not reflect general international law.

The French, and authoritative, version of the ICJ AO states, in paragraph 152, that, “Israël a l’obligation de réparer **tous** les dommages causés à toutes les personnes physiques ou morales concernées” (emphasis added). The UN General Assembly based its request for the Secretary-General to establish a Register of Damage on paragraphs 152 and 153 of the ICJ AO. Yet, paragraph 17 of the Secretary-General’s Report, regarding the relevant kinds of damage, only mentions paragraphs 133 and 153 of the ICJ AO, thereby omitting paragraph 152. This is all the more regrettable since the reference in paragraph 152 to “tous les dommages” (all damages) refers precisely to the many non-material types of damage reviewed in paragraph 133. Indeed, operative paragraph 163 (C) of the ICJ AO states that “Israel is under an obligation to make reparation for **all** damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem” (emphasis added).

¹¹ As reflected for instance in Article 11(b) of the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” GA Res 60/147, 21 March 2006, Annex.

International law guarantees reparation not only for material but also for non-material damages. The UN General Assembly reflected general international law when it stated that:

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- a) Physical or mental harm;
- b) Lost opportunities, including employment, education and social benefits;
- c) Material damages and loss of earnings, including loss of earning potential;
- d) Moral damage;
- e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.¹²

There are numerous precedents of international claims mechanisms covering non-material damage, including the United Nations Compensation Commission, the Eritrea-Ethiopia Claims Commission, the Inter-American Court of Human Rights, the European Court of Human Rights, and reparations for victims of Nazism. Hence, in order to achieve the full and proper implementation of international law, the Register of Damage must cover non-material damage. Otherwise, a new Register will be necessary to address such damage.

Only Individual Claims

The Secretary-General's Report does not expressly mention the registration of collective, as opposed to individual, claims. Collective claims arising out of the damage caused by the Wall cover environmental destruction, use of water resources and annexation of land. The ICJ AO explicitly mentions the collective right to self-determination among the human rights violated by Israel.¹³

Reparation for collective claims is not new to international law. After the Second World War, West Germany paid reparations for Nazi crimes to the state of Israel. Similarly, the United Nations Compensation Commission has accepted claims from governments and international organisations "with respect to direct environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait."¹⁴ The United Nations Compensation Commission has recognised that awards could be given for damage to public health, loss of use of natural resources and environmental damage.¹⁵ Kuwait submitted claims under this procedure.

¹² *Ibid.*, Article 20.

¹³ See *supra* note 4, para. 122.

¹⁴ Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992, UN Doc., S/AC.26/1991/7/Rev.1, 17 March 1992, para. 35.

¹⁵ Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims, UN Doc., S/AC.26/2005/10, 30 June 2005.

In the OPT, in the absence of a Palestinian state, the Palestinian people – holding a right to self-determination under international law¹⁶ – is entitled to present collective claims. The UN General Assembly has called for “procedures to allow groups of victims to present claims for reparation and to receive reparation.”¹⁷ It has also applied this principle to the Palestinian context, for instance when reaffirming the right of “peoples whose territories are under Israeli occupation . . . to the restitution and full compensation for the exploitation, loss and depletion of, and damage to, their natural and all other resources and economic activities.”¹⁸

The Postponed Decision on Verification

According to paragraph 18 of the Secretary-General’s Report, “a decision when and if it would be appropriate for the office of the Register of Damage to engage in a process of verifying the fact and extent of the damage would be taken at a subsequent stage.” Claims verification is an indispensable step in any process whose end purpose is compensation, and has for instance been carried out for reparations for victims of Nazism and in the claims procedure before the United Nations Compensation Commission.¹⁹ Verification is best done as soon as possible after the damage is inflicted, so as to avoid disappearance or destruction of evidence. Postponing the indispensable process of verification serves neither the interests of justice nor the efficient use of UN resources.

Conclusion: a New and Improved Proposal is Necessary

The Register of Damage, if established as proposed, with all the above-mentioned weaknesses, would likely contribute to the declining faith of Palestinians in the ability of the international community and international law to uphold their rights, thereby encouraging them to seek alternative means of obtaining justice. Al-Haq fears that the respect for human rights and the maintenance of international peace and security may suffer in consequence. The UN Secretary-General concludes in his Report that, “the General Assembly may wish to consider adopting a resolution requesting me to establish the Register of Damage along the lines set forth in the present report.” Al-Haq respectfully disagrees with the Secretary-General on this point and calls upon the General Assembly to integrate the criticisms in the present legal brief into any future resolution establishing a Register of Damage.

If and when a future Register of Damage is adopted, hopefully containing the aforementioned recommendations, it is essential that the primary obligations of cessation and restitution not be forgotten. In the Palestinian context of continuous dispossession since 1948, any talk about compensation must be very clearly accompanied by an explanation that, under international law as reflected in the ICJ AO, compensation goes hand in hand with restitution and does not replace it. Otherwise, popular hostility to the Register of Damage is to be expected.

¹⁶ See *supra* note 4, para. 118.

¹⁷ See *supra* note 11, Article 13.

¹⁸ GA Res 31/186, 21 December 1976, para. 1.

¹⁹ Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, U.N. Doc. S/22559, 2 May 1991, para. 25.