



Legal Q&A: Gaza Reconstruction Mechanism

“The UN, by becoming a party to the [Gaza Reconstruction Mechanism], is itself contributing to the maintenance of the blockade and, therefore, is committing, as well as aiding and assisting, violations of international law.”ⁱ

Nigel White, Professor of Public International Law at Nottingham University – January 2015.

What is the Gaza Reconstruction Mechanism (‘GRM’) and the context in which it was prepared and published?

The GRM is an agreement made in September 2014 between the Government of Israel (‘GOI’), the Palestinian Authority (‘PA’) and the United Nations for reconstruction of the Gaza Strip following Israel’s 2014 bombardment, which caused more than 19,000 homes to be destroyed or seriously damaged, as well as lesser damage caused to over 150,000 more.ⁱⁱ Efforts at reconstructing the area take place in the context of the illegal closure of the Gaza Strip, which is discussed in our supporting [Closure of Gaza Legal Q&A](#). The closure is referred to within some of the documents discussed below as a ‘blockade’.

The full text of the GRM agreement became public in January 2016 via an article on the ‘Electronic Intifada’ website,ⁱⁱⁱ which also published an opinion on its legality commissioned by the Diakonia International Humanitarian Law Resource Center and prepared by international law expert Professor Nigel White of Nottingham University (referred to below as the ‘Legal Opinion’) in January 2015. According to the article, the Legal Opinion and its significant findings on the legality of the GRM was disseminated to diplomats and international agencies, but was not made public.

What rights and obligations does the GRM agreement create and what practical objections arise from these?

The GRM agreement starts by setting out its five overarching parameters, of which the first is ‘to satisfy Israeli security concerns related to the use of construction and dual use material’,^{iv} signalling that such concerns are prioritised over all other considerations. It then goes on to detail more specific requirements.



In relation to PA-led construction, the PA must vet all vendors, contractors, concrete-batching and brick-producing factories, and the Israeli government is granted the right to object to any of these on security grounds. Access into Gaza for construction materials such as Aggregates, Reinforcing Bars, and Cement for building factories, schools, housing projects and house reconstruction/rehabilitation is predicated on the establishment of a central IT database that registers the import and transfer of these materials. Monitoring requirements include due diligence measures by the PA and a system of spot-checks and cross checks by the UN.^v Formal and commercial works are subject to more onerous specifications, including submission of designs and Bills of Quantities (BoQs) to the Israeli government and registration of project submissions on a central IT database.^{vi} UN-run reconstruction projects contain similar requirements as well as monitoring of compliance.^{vii}

The GRM therefore ensures that control over the supply of materials into Gaza remains firmly in the hands of the Israeli government, while also potentially making private information about Palestinian households available to them via the extensive provision of information via the central IT database.^{viii} Meanwhile, the PA and UN bear the burden of ensuring sufficient resources are in place to meet the GRM's extensive monitoring requirements.^{ix} In practice, therefore, the GRM agreement places numerous obligations on the PA and the UN while giving the Israeli government a number of rights. Professor's Nigel White's Legal Opinion accordingly describes the GRM as 'an unbalanced exchange of "rights" and "duties"',^x bearing in mind the distinct absence of corresponding obligations on the part of Israel, and the lack of rights afforded to the PA including as regards to improving conditions in Gaza in the longer term. It further criticises the lack of opportunity for challenge within the GRM, since the 'high level steering team' it creates comprising representatives from each party 'only appears to be a forum for diplomacy rather than a dispute resolution mechanism', and does not amount to a means of challenging objections raised by Israel.^{xi}

Crucially, the GRM is ineffective in relation to its stated aim of reconstruction, which is noted in the Legal Opinion to have been 'extremely limited' and 'totally inadequate given the scale of devastation.'^{xii} More recent reports confirm this situation to be ongoing – for example, the UN Office for the Coordination of Humanitarian Affairs noted in April 2016 that an Israeli authorities ban on cement imports for the private sector into the Gaza Strip imposed unilaterally at the start of that month (subsequently lifted on 22 May 2016) had led organisations to put on hold assistance for over 1,370 families in respect of house repairs, and that an estimated 75,000 people remained internally displaced due to access restrictions on basic construction materials and a lack of funding.^{xiii}



By allowing construction materials to be admitted as limited exceptions to the illegal closure, which remains in place, and failing to mandate that a certain amount of materials must be allowed through to guarantee that the needs of the people of Gaza are being met, the Legal Opinion very significantly finds that the GRM 'is designed to complement the closure to ensure that a protracted humanitarian crisis in Gaza is maintained', and that it 'serves to legitimate the closure which is... illegal under international law, and, further, to occasion a number of violations of specific human rights and humanitarian law obligations'.^{xiv}

What is the legal status of the GRM?

According to the Legal Opinion, the GRM 'should be construed as an agreement between three entities with international legal personality and, therefore, subject to international law.'^{xv} The counter argument – that the document is a non-binding Memorandum of Understanding regarding existing practices – is not tenable, since it sets out a normative regime indicating what parties *should* be doing rather than recording what they are already doing. In addition, it is agreed between parties with legal personality, having also been referred to by the UN General Assembly as a 'trilateral agreement'.^{xvi}

Is the GRM compatible with international law obligations?

Is the GRM compatible with International human rights law?

The Legal Opinion identifies the rights in jeopardy as a result of the 'severe scarcity of building supplies caused by the GRM, by reason of its severe restriction of building supplies entering into Gaza'^{xvii} as being: the right to life, to self-determination of the Palestinian people, to freedom from inhuman or degrading treatment, to liberty of movement and freedom to choose residence, to an adequate standard of living, to health and to education.

While the Israeli government is directly responsible for any such violations due to being an occupying power and/or maintaining the illegal closure of Gaza^{xviii}, the Legal Opinion finds that the UN is potentially involved with and / or complicit in them through becoming a party to the GRM agreement and assisting in implementing it.^{xix} (The implications of the illegal closure of Gaza for the human rights of Gaza residents are discussed in more detail in our supporting [Closure of Gaza Legal Q&A](#)).

Is the GRM compatible with International humanitarian law?

The Legal Opinion asserts that 'under international humanitarian law, Israel, as an occupier, has the obligation to agree to "relief schemes" if the whole or part of the population of an occupied territory is "inadequately" supplied and further, it shall facilitate such schemes 'by all the means



at its disposal'.^{xx} It then states that although international law on occupation allows for search and regulation of supplies for 'imperative reasons of security', the 'Government of Israel is in breach of its obligation to provide humanitarian relief' by allowing a level of control over access to humanitarian relief through the GRM that is so onerous that the basic requirements of alleviating suffering in Gaza cannot be met.^{xxi}

It further asserts that the GRM's prioritising of control above relief efforts means that it 'in effect, is a continuation, in a different form and in relation to specific supplies, of Israel's blockade of Gaza, which is in clear violation of international humanitarian law'.^{xxii}

Professor White concludes his opinion on the international humanitarian law implications of the GRM by stating that the Government of Israel 'appears to be using the UN in an attempt to circumvent its own obligations under international humanitarian and human rights law to allow for the full reconstruction of Gaza', and that 'although the government of Israel is not absolved of responsibility by using the UN in this way, the UN itself also bears responsibility for wrongful acts committed by it'.^{xxiii}

Is the GRM compatible with UN Law?

The Legal Opinion identifies two issues which suggests that the GRM agreement is potentially in breach of UN law.

The GRM agreement was negotiated on behalf of the UN by the Office of the United Nations Special Coordinator for the Middle East Peace Process (UNSCO). However, the Legal Opinion notes that there is nothing in UNSCO's mandate that could be interpreted as giving it the authority to negotiate a binding agreement such as a treaty on behalf of the UN, as 'this would require express or (arguably) implied delegation of treaty competence' to the UN Secretary General and then to UNSCO.^{xxiv} It therefore concludes that in purporting to bind the UN to the GRM as a party, and thus imposing further duties on it which are not delegated by the General Assembly or Security Council, UNSCO acted *ultra vires*, i.e. outside their powers, and therefore illegally.

The Legal Opinion further notes that an apparent retroactive approval by the UN General Assembly in a 2014 resolution does not solve this fundamental problem of the GRM agreement's apparent illegality under UN law.^{xxv} This is fundamentally because the role accorded to the UN under the GRM is incompatible with the organisation's core principle of neutrality or impartiality. The UN Guiding Principles on Humanitarian Assistance require, *inter alia*, that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality, and that the ways emergency assistance is provided must be supportive of recovery and long-term development.^{xxvi}



However, far from facilitating the provision of desperately needed building materials which supports long-term recovery and development, the Legal Opinion states that the GRM effectively facilitates the continuation of the Israeli government's closure of the Gaza Strip by limiting building materials to much lower quantities than needed.^{xxvii} It further finds that the numerous duties placed on the UN under the GRM that effectively serve the Israeli government – whilst having no duties to monitor the Israeli government's compliance with the GRM – mean that by becoming a party to the GRM agreement, the UN has agreed to undertake a partial role in violation of its own principles.^{xxviii}

Is the GRM compatible with Treaty law?

In international law, a treaty/agreement is void if its conclusion has been procured by the threat or use of force in violations of principles contained in the United Nations Charter.^{xxix} Although Professor White does not consider that such violations can be conclusively established, he argues that the area is under-explored and has at least the potential to invalidate the GRM.^{xxx}

What are the implications for the UN?

Whether or not the GRM is a binding agreement under international law, the Legal Opinion contends that in any event it amounts to a wrongful act since it manifests the illegal closure of the Gaza Strip and facilitates the Israeli government's commission of wrongful acts, namely the violations of international human rights and international humanitarian law caused by inadequate availability of reconstruction materials.^{xxxi}

Accordingly, the UN is either directly responsible for such acts or is indirectly responsible for breaching its obligations to prevent international law violations, if (a) it aids or assists Israel with knowledge of the circumstances of the internationally wrongful act – which is likely if it is privy to the advice, unless there are valid reasons for disregarding it, and (b) the acts would be internationally wrongful if committed by the UN – which they would, since the provisions of customary international human rights and international humanitarian law (i.e. those that form part of generally recognised international norms) apply to the UN.^{xxxii} Consent by the PA does not change the position that an act violating a customary rule amounts to an internationally wrongful act.^{xxxiii}

The Legal Opinion therefore concludes that the UN bears responsibility for breaching negative obligations against violating the rights of Gaza residents and positive obligations to endeavour to ensure their rights are protected.^{xxxiv} While the UN would usually try to claim immunity against any court cases brought against it, Professor White advises that in line with its former conduct in Haiti, the UN should offer redress for violations by payment-in-kind, e.g. by direct assistance to the reconstruction process.^{xxxv} Beyond this, in order to fulfil its international



obligations, the UN is urged to amend the GRM such that it becomes compatible with international law or, should this prove unworkable, to withdraw from the GRM and set up a different mechanism for the delivery of building materials in which its role as an impartial organisation is regained.^{xxxvi}

How has the UN responded to the Legal Opinion?

The article notes that a direct question was sent to the UNSCO querying whether the special coordinator at the time of its publication or his successor had seen the legal advice. Rather than respond to this, UNSCO provided a 350-word statement which complained of a lack of reconstruction funding and defended the GRM, going on to state that it was a temporary agreement rather than a substitute for lifting the closure.^{xxxvii} However, retaining a commitment in principle to lifting the closure cannot justify the UN's current complicity in it resulting from its ongoing cooperation with the GRM.

What are the implications for the UK government's position on the GRM?

While the UK is not a direct party to the agreement, its duty to uphold international law is likely to be breached by its ongoing support for the GRM, which it confirmed in its own official update on Israel and the OPT for 2015.^{xxxviii}

Responding to a Parliamentary question in October 2015 about 'what recent discussions he has had with his Israeli counterpart on the Gaza Reconstruction Mechanism,' the Foreign Office minister with responsibility for the Middle East, Tobias Ellwood, stated that 'We regularly urge the Israeli Government to intensify measures to support Gaza's reconstruction and economic development... for example through better power and water supplies and facilitating exports from Gaza.'^{xxxix} Absent in the minister's answer was any reference to the compatibility of the GRM with fundamental international human rights and humanitarian law obligations.

As with the UN's position, the difficulty is that by continuing to provide backing to the GRM, any ministerial statements of support for Gaza's reconstruction are directly undermined; the intensification of reconstruction and economic development is not compatible with the GRM, and a theoretical commitment to lifting the closure on Gaza does not justify supporting the mechanism in the present. LPHR therefore considers that the government should revise its position on the GRM, withdrawing its approval unless the mechanism can be significantly modified as suggested above to provide for an adequate level of reconstruction, and redoubling its efforts to reverse the illegal closure of the Gaza Strip.

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Professor Nigel White, EXPERT OPINION ON THE LEGALITY OF THE GAZA RECONSTRUCTION MECHANISM (GRM) 11–12 (2015), Downloaded from <https://electronicintifada.net/blogs/ali-abunimah/un-database-gaza-aid-may-give-israel-targets-attack-secret-memo> (last visited Aug 9, 2016).

ⁱⁱUN Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, RECONSTRUCTION OF OVER ONE QUARTER OF TOTALLY-DESTROYED HOMES ONGOING OR ABOUT TO START | GAZA ONE YEAR ON (2015), <http://gaza.ochaopt.org/2015/11/reconstruction-of-over-one-quarter-of-totally-destroyed-homes-ongoing-or-about-to-start/> (last visited Aug 9, 2016).

ⁱⁱⁱ Ali Abunimah, UN DATABASE FOR GAZA AID MAY GIVE ISRAEL TARGETS TO ATTACK -- SECRET MEMO THE ELECTRONIC INTIFADA (2016), <https://electronicintifada.net/blogs/ali-abunimah/un-database-gaza-aid-may-give-israel-targets-attack-secret-memo> (last visited Aug 9, 2016).

^{iv} Gaza Reconstruction Mechanism, 1 (Undated), Downloaded from <https://electronicintifada.net/blogs/ali-abunimah/un-database-gaza-aid-may-give-israel-targets-attack-secret-memo> (last visited Aug 9, 2016).

^v *Id.* at 2–4.

^{vi} *Id.* at 4.

^{vii} *Id.* at 5–6.

^{viii} Abunimah, *supra* note 3.

^{ix} Gaza Reconstruction Mechanism, *supra* note 4 at 7.

^x Professor White, *supra* note 1 at 2.

^{xi} *Id.* at 3.

^{xii} *Id.* at 15–16.

^{xiii} UN OCHA: Ban on the import of cement into Gaza for the private sector results in scarcity and price increases. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/CF19DC630075284185257FA3004ADAD4>

^{xiv} Professor White, *supra* note 1 at 11.

^{xv} *Id.* at 1.

^{xvi} *Id.* at 3.

^{xvii} Professor White, *supra* note 1 at 14.

^{xviii} The Israeli government’s view that its IHRL obligations under international covenants do not apply in the OPT is not tenable, having for example been definitively rejected by the International Court of Justice in 2004

- xix *Id.* at 14–15.
- xx Professor White, *supra* note 1 at 13.
- xxi *Id.* at 14.
- xxii Professor White, *supra* note 1 at 14.
- xxiii Professor White, *supra* note 1 at 14.
- xxiv *Id.* at 7.
- xxv *Id.* at 8.
- xxvi UN GENERAL ASSEMBLY, RESOLUTION 46/182, “STRENGTHENING OF THE COORDINATION OF THE HUMANITARIAN EMERGENCY ASSISTANCE OF THE UNITED NATIONS” (1991) Paragraphs 2 and 40.
- xxvii Professor White, *supra* note 1 at 8.
- xxviii *Id.* at 9.
- xxix Article 52 VIENNA CONVENTION ON THE LAW OF TREATIES, (1969).
- xxx Professor White, *supra* note 1 at 10.
- xxxi *Id.* at 15–16.
- xxxii *Id.* at 15–16.
- xxxiii *Id.* at 17.
- xxxiv *Id.* at 19.
- xxxv *Id.* at 19–20.
- xxxvi *Id.* at 20–21.
- xxxvii Abunimah, *supra* note 3.
- xxxviii Israel and the Occupied Palestinian Territories (OPTs) - in-year update December 2015, www.gov.uk (2016), <https://www.gov.uk/government/publications/israel-and-the-occupied-palestinian-territories-opts-in-year-update-december-2015/israel-and-the-occupied-palestinian-territories-opts-in-year-update-december-2015> (last visited Aug 9, 2016).
- xxxix Gaza: Reconstruction:Written question - 11441, UK PARLIAMENT, <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-12/11441/> (last visited Aug 9, 2016).