

## CONFIDENTIAL

### Expert Opinion on the Legality of the Gaza Reconstruction Mechanism (GRM)

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#### Outline of the GRM

According to the 'Fact Sheet' of the UN's Office of the Special Coordinator (UNSCO) for the Middle East Peace Process the Gaza Reconstruction Mechanism (GRM) of September 2014 is a 'temporary agreement between the Government of Palestine ... and the Government of Israel ... brokered by the United Nations'.<sup>1</sup> However, the text of the GRM itself shows that this is an agreement between three 'parties': the Government of Israel (GoI), the Palestinian Authority (PA) and the United Nations (UN), the latter being represented by UNSCO.<sup>2</sup> Apart from the use of the term 'parties', the bulk of terminology used in the GRM to describe the various roles and responsibilities of the parties points to it being constructed so as not to constitute a binding treaty or agreement, but it will be shown that it should be construed as an agreement between three entities with international legal personality and, therefore, subject to international law. The GRM contains agreed processes for approval, purchasing, supply and monitoring of all building materials entering Gaza for the purpose of reconstruction of buildings destroyed during the conflict between Israel and Hamas in July and August 2014. The GRM aims to give the GoI security guarantees that would allow for reconstruction materials to enter into Gaza without them being used for military purposes by Hamas, for example for rebuilding infiltration tunnels or bunkers.

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<sup>1</sup> For the 'Fact Sheet' on the GRM see Annex 1.

<sup>2</sup> A copy of the GRM, which was made available to the author on a confidential basis, is found at Annex 2.

Although the GRM studiously avoids using legal language of 'rights' and 'duties', it will be shown that it does indeed constitute a binding agreement comprising an exchange of rights and duties and, furthermore, is one that is subject to international law. As a treaty or, indeed, as an international agreement subject to international law, the GRM is an unbalanced exchange of 'rights' and 'duties', with the PA and the UN having a number of duties, while the Gol has a number of very wide rights and very few obligations. Nor does the GRM give the PA any beneficial rights or responsibilities that might improve conditions in Gaza in the longer term, for example, by empowering it to control the crossing points into Gaza at least as regards building materials.

The rights and duties, of the Gol and the UN in particular, will be subject to examination in the course of this opinion in terms of their compatibility with the UN Charter, treaty law, international humanitarian and human rights law. In terms of contents, a close reading of the GRM shows that, despite the absence of terms such as 'rights' and 'duties', the detailed provisions on what each party is required or empowered to do in respect of building materials can only be understood in such terms, namely that:

- Gol has the right to approve the proposed UN Program of Works for large scale works;
- Gol has the right to have its security concerns satisfied with regard to dual use material (defined as aggregates, reinforcing bars, cement and other dual use items (ABC));
- Gol has the right, related to the control rights of an occupying power, (along with UN and PA) to access the central IT database that registers import and transfers of ABC;
- Gol reserves the right to object on security grounds to any PA vetted vendors, contractors and factories;
- For large scale-works the Gol has the duty to process project submissions and Bills of Quantities (BoQs) within a predetermined time-frame and, in any event, is dependent upon details being agreed in Annex C;
- For large-scale works, the Gol has the right to refuse delivery to contractors/vendors on security grounds;

For small scale rebuilding:

- PA has a duty to vet vendors;
- PA responsible for materials;
- PA subject to quota for materials;
- PA/UN have a duty to register eligible recipients into central IT database;
- PA/UN to decide on amount of material needed for reconstruction but subject to a maximum amount;
- PA/UN have a duty to ensure unused materials are returned to vendors and registered in central database;
- PA has a duty to monitor 'due diligence measures and obligations by vendors in terms of registration';
- PA has a duty to suspend/delist vendors in cases of violations;
- UN has a duty to carry out random cross-checks of surveyors, spot checks on end-users and vendors;

- PA/UN has a duty to log any violations in central database.

For large-scale rebuilding:

- The PA has an obligation to submit designs and BoQs to the GoI;
- PA is responsible for material supplied to the private sector;
- PA is responsible for monitoring 'due-diligence' measures/obligations by contractors';
- UN/PA have the duty to inspect;
- UN/PA have the obligation to undertake security precautions at storage facilities specified in Annex B (surveillance cameras, guards, UN spot inspections);
- UN has duty to submit BoQs to GoI;
- UN has duty to monitor contract compliance and report on database.

There are further onerous monitoring duties placed upon the UN/PA in Annex A (including the 'constant presence' of the UN at concrete mixing and brick factories). The GRM creates a high level steering team (HLST), comprised of representatives from the GoI, PA and UN, but it only appears to be a forum for diplomacy rather than a dispute resolution mechanism for there is nothing provided to challenge Israel's invocation of its GRM-based rights to object to projects, contractors and vendors on security grounds. HLST seems to be a limited forum for diplomacy and can be stymied by a 'veto' by the GoI as it does not provide for majority decision-making.

### The Legal Status of the GRM

If the GRM is not meant to be a binding agreement, then its nature and purpose is unclear, although it could arguably be seen as a non-binding Memorandum of Understanding (MoU) that regularises existing practices as regards humanitarian relief in the form of building supplies entering into Gaza. However, it is contended here that the GRM sets up a very detailed framework within which rebuilding in Gaza is permitted following the 2014 conflict, and that framework is in the form of a normative regime, indicating what the parties *should* do as opposed to what they are doing or will do. The devastation of Gaza necessitated a new regime to govern reconstruction and that regime is embodied in the GRM. Furthermore, that normative framework is a product of an agreement, albeit unsigned, between entities having international legal personality. As an agreement between international legal persons the GRM is a binding treaty, agreement or equivalent. This signifies that the customary law of treaties applies to it, and that the PA and the UN both have the capacity in international law to enter into it. The key to bindingness is the *intent* of the parties, evidenced by the closing statement in the GRM that the 'parties consider this to be a temporary access mechanism that can be adjusted to changed circumstances through the HLST and with agreement of all three parties'; in effect the need for a further 'agreement' between the parties to change the GRM is a recognition that the GRM is itself a binding agreement. In this regard it is worth noting that the UN General Assembly welcomed the GRM and, in so doing, referred to it as a 'trilateral agreement'.<sup>3</sup> There can be little doubt that the GoI would see the GRM as containing enforceable

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<sup>3</sup> UNGA Res 69/23, 'Peaceful Settlement of the Question of Palestine', 25 November 2014.

rights; and the only basis for this is that the GRM is governed by international law and is legally binding.

Following the Oslo Peace Accords of 1993, the GoI and the Palestine Liberation Organization (PLO) entered into an 'Agreement on the Gaza Strip and the Jericho Area' in 1994. This agreement contained within it a recognition that the PLO 'may conduct negotiations and sign agreements with states or international organizations for the benefit of the Palestinian Authority', but only in limited cases, including economic agreements provided for in Annex IV. Annex IV contains a Protocol on Economic Relations between the PLO and the GoI and establishes a 'contractual agreement that will govern the economic relations between the two sides' covering goods listed in the Annex, a list that includes the materials subsequently covered by the GRM.<sup>4</sup>

Thus, there is clear evidence of Israel recognizing the PLO as a party to an international agreement over areas subsequently covered by the GRM. In addition, there is plenty of evidence that the PLO, the PA and the UN are international legal persons in the sense of Article 3 of the Vienna Convention on the Law of Treaties (VCLT) 1969 and, therefore, possess the capacity to enter into agreements valid in the international legal order and subject to international law.<sup>5</sup> Leading commentators have noted that national liberation movements have the capacity to conclude treaties, which mostly consist of bilateral treaties concluded with the state against which the national liberation movement is fighting, and that Article 3 of the VCLT was intended, in part, to cover these sorts of agreement.<sup>6</sup> In any case Palestine has been accepted as a state by a large number of states and as a non-member observer state within the UN,<sup>7</sup> and while Israel does not accept the statehood of Palestine, there is plenty of evidence that Palestine is treated as having many attributes of statehood so as to cross the threshold for international legal personality and accompanying competence to enter into binding international agreements.

The General Assembly resolution of 2014, on 'Assistance to the Palestinian People', also calls for the implementation of the Agreement on Movement and Access and of the Agreed Principles for the Rafah Crossing of 15 November 2005, in order to 'allow for the freedom of movement of the

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<sup>4</sup> Agreement on the Gaza Strip and Jericho Area, UN Doc A/49/180, S/1994/727, 20 June 1994, Article VI, para 2(b).

<sup>5</sup> Article 3 VCLT 1969 provides that: 'The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such subjects of international law ... shall not affect: (a) the legal force of such agreements; (b) the application to them of any such rules set forth in the present Convention to which they would be subject under international law independently of the Convention; ....'

<sup>6</sup> O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011) 73, 78; P. Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law' (1996) 7 *European Journal of International Law* 485 at 489 – the PLO 'as a partial subject of international law is not equal to a state, but that does not affect the validity of a treaty it concludes with a state'; at 492 he also concludes that such agreements are under international law. J. Quigley, 'The Israel-PLO Interim Agreements: Are they Treaties?' (1997) 30 *Cornell International Law Journal* 717 argues that Palestine is a state and that its agreements with Israel are binding treaties between states. See also International Law Commission, Yearbook of the International Law Commission (UN, 1974), UN Doc A/CN.4/SER.A/1974/Add.1; International Law Commission, Yearbook of the International Law Commission 1962 (UN, 1964), UN Doc A/CN.4/SER.A/1962/Add.1, 38-9 – on the phrase 'other subjects of international law' in Article 3 VCLT to the effect that it is designed to cover treaties concluded by international organizations, the Holy See, and insurgents (who may conclude treaties in certain circumstances)'.  
<sup>7</sup> UNGA Res 67/19, 'Status of Palestine in the United Nations', 29 November 2012.

Palestinian civilian population, as well as for imports and exports, within and into and out of the Gaza strip'.<sup>8</sup> This was an agreement between 'the parties' – the Government of Israel and the Palestinian Authority (with the EU acting as the third party) - indicating that each party treated the other as capable in terms of international legal personality of entering into an international agreement. The agreement spoke of Israel permitting the 'export' of produce from Gaza, indicating that this is not some form of internal agreement. This suggests that the agreement is of treaty-like status so as to come within the meaning of Article 3 of the VCLT, namely as an agreement between a state and another international legal person to which the customary rules on treaties apply. There is no reason why the GRM cannot be viewed in the same way. As an agreement between international legal subjects the GRM is regulated by international law raising the issue of the competence of the UN to become a party to this agreement, and of UNSCO to act on behalf of the UN. Further, issues of treaty law include the question as to whether the agreement is void as a result of it being procured by the threat or use of force or by other forms of coercion and, further, whether the agreement is void due to it being in conflict with peremptory rules of international law.

As well as issues of legality under UN and treaty law there is the question of whether, by incorporating processes that are in violation of Israel's obligations under international humanitarian and human rights law, the UN, by becoming a party to the GRM and agreeing to oversee these processes, is implicated in any wrongful acts. This includes the issue as to whether the UN has the competence to enter into an agreement that maintains an unlawful situation, namely the Gol's blockade of Gaza that violates its obligations as an occupying power, for example under Article 43 Hague Regulations 1907,<sup>9</sup> and Article 59 of the Fourth Geneva Convention 1949,<sup>10</sup> and its more broader obligations to facilitate humanitarian access as summarised by the ICRC in its analysis of the blockade ('closure') in 2010:

The whole of Gaza's civilian population is being punished for acts for which they bear no responsibility. The closure therefor constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law ... The closure is having a devastating impact on the 1.5 million people living in Gaza. That is why we are urging Israel to put an end to this closure and call upon all those who have an influence on the situation, including Hamas, to do their utmost to help Gaza's civilian population. Israel's right to deal with its legitimate security concerns must be balanced against the Palestinians' right to live normal, dignified lives ... Under international humanitarian law, Israel must ensure that the basic needs of the Gazans, including adequate health care, are met ... Furthermore, all States have an obligation to allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel.<sup>11</sup>

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<sup>8</sup> UNGA Res 68/100, 'Assistance to the Palestinian People', 13 December 2013, para 17.

<sup>9</sup> The occupant 'shall take all measures in his power to restore, and ensure, as far as possible, public order and safety ...'.

<sup>10</sup> 'If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal ...'.

<sup>11</sup> 'Gaza Closure: Not Another Year!', ICRC Press Release 10/103, 14 June 2010 (available at <https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm> accessed 22 January 2014). See also the UNHCHR's description of the blockade as a collective punishment of the people of Gaza in 2009 in breach of international humanitarian law and basic human rights such as the right to food and health: 'OPT: Address by the UN High Commissioner for Human Rights at 6<sup>th</sup> Special Session of the Human Rights Council', 23 January 2008 (available at <http://reliefweb.int/report/israel/opt-address-un-high-commissioner-human-rights-6th-special-session-human-rights-council> accessed 22 January 2015).

The opinion will now consider issues of the legality of the GRM in greater detail, under UN Law, treaty law, as well as under international humanitarian law and human rights law.

### **The Legality of the GRM under UN Law**

At the outset of this section it is worth stating that there are problems with the competence of UNSCO to negotiate and commit the UN to become a party to the GRM. These problems may be overcome by the UN approving the GRM, which it has arguably done when the UNGA referred to the GRM in a resolution.<sup>12</sup> Nonetheless, it is instructive to look at this issue briefly because it reflects on the wider issue discussed later in this section, namely the compatibility of the GRM with the purposes and principles of the UN. In order to address UNSCO's treaty-making competence it is necessary to determine the nature of the tasks delegated to UNSCO by the UN General Assembly (UNGA) and UN Secretary-General (UNSG). UNSCO was created in 1993 following the Oslo Accords. UNSCO's mandate is a result of delegated tasks given to the UNSG by the UNGA 'to ensure the coordinated work of the United Nations system for an adequate response to the needs of the Palestinian people and to mobilize financial, technical, economic or other assistance'.<sup>13</sup> Under Article 98 of the UN Charter the UNSG is empowered to undertake such 'functions as are entrusted' to him by the UNGA (or UNSC). It is accepted practice that the UNSG may further delegate these tasks to Special Representatives, Envoys, Political Missions or equivalent, otherwise it would be impossible for one person to achieve the numerous and varying mandates given to the UNSG. However, the UNSG cannot sub-delegate greater functions or powers than has been delegated to him, nor can his representatives interpret their functions in a way that gives them greater competence than the UNSG, nor can they increase the obligations of the UN by their actions.<sup>14</sup>

The most detailed description of UNSCO's functions is found in the UNGA's 'Biennial Programme Plan and Priorities for the Period 2006-2007':

The Special Coordinator, through exploration with relevant actors, will develop ways to support the peace process and provide a coordinated United Nations response to the humanitarian needs of the Palestinian people. This will include responding to requests from negotiating parties and Member States for assistance related to the diplomatic and socio-economic aspects of the peace process. The Special Coordinator will also develop and provide recommendations on diplomatic, legal, socio-economic and security issues as part of United Nations diplomatic input to the Middle East talks and related consultations ... The Special Coordinator will continue to play a leading role in both formal and informal coordination mechanisms and will provide political and humanitarian guidance and support to United Nations agencies and programmes ...<sup>15</sup>

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<sup>12</sup> UNGA Res 69/23, 'Peaceful Settlement of the Question of Palestine', 25 November 2014.

<sup>13</sup> UNGA Res 48/123, 'Assistance to the Palestinian People', 21 December 1993, para 10.

<sup>14</sup> 'Delegatus non potest delegare' – D. Sarooshi, *The United Nations and the Development of Collective Security* (Clarendon, 1999) 20-1. 'A general rule that an organ may create subsidiary organs to which it may delegate part of its functions, provided that such new organs do not increase the obligations of the organization or its members' – H.G. Schermers and N.M. Blokker, *International Institutional Law* (Martinus Nijhoff, 5<sup>th</sup> edn, 2011) 172.

<sup>15</sup> UN Doc A/59/6 Rev. 1 (2005) 24-5. See also UNGA, 'Biennial programme plan and priorities for the period 2014-2015', UN Doc A/67/6/Rev. 1 (2013) 38-39.

It is not possible to interpret this summary of UNSCO's mandate as empowering it to negotiate a treaty or binding agreement on behalf of the UN with a state (Israel) and an occupied/nascent state (Palestine). 'Formal and informal coordination mechanisms' relate to the coordinated provision of assistance by UN agencies, and only share the term 'mechanism' with the GRM. This may explain why that term was used in the GRM, but that does not somehow justify the conclusion that the GRM is within the competence of UNSCO, particularly as it is an agreement that increases the obligations of the UN.

According to UN Department of Political Affairs' website, the Office of the United Nations Special Coordinator for the Middle East Peace Process (UNSCO) is a:

Field mission of the Department of Political Affairs that supports peace negotiations and the implementation of political agreements between Israel and the Palestinians. The Special Coordinator, Robert Serry, is the focal point on the ground for UN support to peace initiatives – including the work of the Middle East Quartet. UNSCO is also responsible for coordinating the activities of more than twenty UN agencies and programmes on humanitarian and development assistance to the Palestinians.<sup>16</sup>

'Supporting' peace negotiations and the implementation of agreements do not seem to encompass becoming a party to the agreements; neither does 'supporting' peace initiatives nor 'coordinating' UN assistance. As a Field Mission of the DPA, which is a division of the UN's Secretariat, UNSCO's competence is framed by the competence of the UN Secretariat and the UNSG. Treaty making competence is something the UNSG has developed in practice in furtherance of functions delegated to him by the UNGA or UNSC under Article 98 of the Charter,<sup>17</sup> and is something that may in theory be delegated to a subsidiary body such as UNSCO.<sup>18</sup> Importantly, however, there must be an express or (arguably) implied delegation of treaty competence to the UNSG from the UNGA or the UNSC and then to UNSCO,<sup>19</sup> of which no evidence has been uncovered regarding the GRM. The UNSG's report to the UNGA of 2013 on UN Political Missions (in which UNSCO is included as an example) contains no mention of treaty/agreement making competence on behalf of the UN with other international legal persons, although it does talk broadly of political missions as 'civilian missions that are deployed for a limited duration to support Member States in good offices, conflict prevention, peacemaking and peacebuilding'.<sup>20</sup>

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<sup>16</sup> [http://www.un.org/wcm/content/site/undpa/main/activities\\_by\\_region/middle\\_east/middle\\_east\\_peace\\_process](http://www.un.org/wcm/content/site/undpa/main/activities_by_region/middle_east/middle_east_peace_process) (accessed 27 November 2014). UNSCO's own website is a little vaguer on its position within the UN system, referring to appointment of the first UN Special Coordinator following the Oslo Accords of 1993, and stating that UNSCO is a 'field office under the auspices of the' DPA, mandated to 'assist in all issues related to the humanitarian situation and development challenges facing the Palestinian people. In addition, the office supports negotiations and the implementation of political agreements' - <http://www.unsco.org/about.asp> (accessed 27 November 2014).

<sup>17</sup> Schermers and Blokker, above n.14, 1137-8.

<sup>18</sup> 'A delegation of powers in the law of international institutions can be defined as taking place whenever an organ of an international organization which possesses an express or implied power under its constituent instrument conveys the exercise of this power to some other entity' – Sarooshi, above n.14, 4-5.

<sup>19</sup> B. Conforti, *The Law and Practice of the United Nations* (Kluwer, 2000) 220. This relates to tasks delegated to him for the establishment of peacekeeping forces, which have led to the UNSG entering into agreements with host states and troop contributing states.

<sup>20</sup> 'United Nations Political Missions: Report of the Secretary-General' (UN, 2013) 2.

UNSCO only has the competence to put in place a 'mechanism' to coordinate UN assistance and activities, not to agree to the GRM which is a binding agreement with the GoI and the PA, and one that imposes further duties on the UN not delegated by the UNGA or UNSC or, indeed, the UNSG. The initial conclusion from this analysis of the competence of UNSCO is that it acted *ultra vires*, not in helping to negotiate the GRM, but in purporting to bind the UN to it as a party. Although the UNGA seems to have retroactively approved the GRM in its resolution of 2014, where the mechanism was seen as a 'positive development',<sup>21</sup> this does not cleanse the GRM of illegality under UN law, rather the actions of UNSCOM demonstrate the incompatibility of the GRM with the UN's position as a neutral and impartial provider, facilitator and coordinator of humanitarian relief and assistance.

Assuming that the UN has retroactively approved the GRM and UNSCO's actions, there is little doubt that the UN has the capacity to conclude treaties that are necessary to fulfil its functions.<sup>22</sup> However, it can only be a presumption that the GRM is such an agreement. Given that there is scope within the UN's treaty-making competence to claim that the GRM is within its functional competence, this aspect might be seen as deserving less inspection. However, one clear limit is that the presumption of *intra vires* that attaches to UN action is rebutted if the action is contrary to the purposes and principles of the UN.<sup>23</sup> A strong argument can be made that the GRM compromises the UN's neutrality or impartiality, a core principle upon which UN action for the peaceful settlement of disputes is taken.<sup>24</sup> The function the UN is aiming to fulfil in Gaza, by becoming a party to the GRM, is to facilitate the provision of humanitarian assistance in the shape of desperately needed building materials. The UN's Guiding Principles on Humanitarian Assistance of 1991, however, state that such assistance must be provided in accordance with the principles of humanity, neutrality and impartiality. Furthermore, the Guiding Principles supply greater applicable detail when stating that emergency assistance must be provided in ways that support long-term recovery and development,<sup>25</sup> when the GRM is evidently very restrictive on development in Gaza and, in effect, facilitates the GoI's continuation of an aspect of the blockade on Gaza by restricting building materials to quantities that fall a long way below what would be necessary to meet basic conditions.<sup>26</sup>

The only exception to a neutral and impartial approach is coercive measures taken by the UN Security Council (UNSC) under the regime of Chapter VII of the UN Charter, the use of which is

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<sup>21</sup> UNGA Res 69/23, 'Peaceful Settlement of the Question of Palestine', 25 November 2014.

<sup>22</sup> C.F Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2<sup>nd</sup> edn, 2005) 102-3.

<sup>23</sup> *Certain Expenses of the United Nations*, Advisory Opinion of the International Court of Justice, 1962 ICJ Rep 151 at 168 where the Court stated: 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.

<sup>24</sup> Article 2 of the UN Charter contains the general principles of the UN, which include respect for sovereign equality, the peaceful settlement of disputes and the principle of non-intervention (unless the Security Council is taking measures under Chapter VII in response to threats to the peace, breaches of the peace or acts of aggression).

<sup>25</sup> UNGA Res 46/182, 'Strengthening of the Coordination of the Humanitarian Emergency Assistance of the United Nations', 19 December 1991, Articles 2, 9 and 40.

<sup>26</sup> 'The reconstruction of Gaza after last summer's 50-day war with Israel is moving at a glacial pace with only tiny amounts of the promised rebuilding materials so far delivered' – P. Beaumont, 'Corruption Hampers Rebuilding in Gaza', *Guardian Weekly*, 2 January 2015, 11.

exceptional within the UN system of collective security. There is no evidence that Chapter VII is applicable here, particularly since UNSCO's mandate comes from the UNGA not the UNSC and, in any case, the latter's resolutions on the Middle East, starting with Resolution 242 (1967), are not based in Chapter VII. Thus there is a sound basis upon which it can be strongly contended that the UN has no clear power (express or implied) to become a party to the GRM, but this remains dependent upon the UN's role in the GRM being analysed as subservient to the GoI as opposed to it acting as an impartial broker.<sup>27</sup> The duties placed on the UN under the GRM: such as being subjected to GoI approval for any proposed program of works; as being tasked to carry out cross checks and spot checks; to submit BoQs to the GoI; and to monitor contract compliance and report via the central IT database - all clearly indicate that the UN performs a partial role given that none of its duties require it to monitor compliance by the GoI with the GRM.

Furthermore, although international humanitarian law provides that organizations involved in humanitarian relief are subject to certain measures of control by the occupying power (see discussion of the GoI's control rights below), it is arguable that the UN is immune from such control under the Convention on the Privileges and Immunities of the United Nations of 1946. This treaty provides that the UN, its property and assets, shall enjoy immunity from any form of legal process; and that its property and assets, wherever located and whosoever held, 'shall be immune from search, requisition, confiscation ... and any other form of interference'.<sup>28</sup> These obligations on member states, including Israel, to respect the UN's privileges and immunities flow from Article 105 of the UN Charter and, furthermore, prevail over Israel's rights to exercise control over relief supplies in the Fourth Geneva Convention, given that Article 103 of the UN Charter provides that UN Charter obligations prevails over inconsistent treaty obligations. This analysis reinforces the correct legal position of the UN in these circumstances, as a neutral and impartial facilitator and provider of humanitarian assistance, rather than as a party to a mechanism that aims to restrictively control the supply of humanitarian aid. By becoming a party to the GRM the UN has violated its own principles by acting partially and in disregard of its own immunities. It seems that, probably in order to gain access to Gaza, the UN has placed itself at the disposal of the GoI for the purposes of controlling humanitarian relief at least in the form of building supplies.

### **The Validity of the GRM under Treaty Law**

As well as potentially being a breach of the principles of the UN Charter, the GRM is problematic under customary rules of treaty law, which are applicable to such agreements, namely the rules

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<sup>27</sup> In practice the UN had already been engaged in such a system in practice since 2010, whereby all Gaza projects requiring importation of construction materials are subjected to COGAT (Coordinator of Government Activities in the Territories) approval through a central IT database through which design plans and BoQs were submitted. It may be that the UN agreed to such practices in 2010 in order to gain access to Gaza given that the GoI did not allow any goods into Gaza from 2007 to 2010 when such COGAT approval procedures for UN projects were put in place. See [http://www.cogat.idf.il/Sip\\_Storage/FILES/5/3495.pdf](http://www.cogat.idf.il/Sip_Storage/FILES/5/3495.pdf) (accessed 22 January 2015).

<sup>28</sup> Articles II.2 and II.3.

relating to agreements procured by the threat or use of force,<sup>29</sup> or other forms of coercion, or agreements adopted in conflict with a peremptory rule of international law.<sup>30</sup>

Although international law does not proscribe one-sided treaties or other binding international agreements per se, the one-sided nature may be evidence of an agreement that has been 'procured by the threat or use of force' and, therefore, void, on the basis that the relevant provision of the VCLT has become customary and is, therefore, applicable here.<sup>31</sup> While there is no conclusive evidence that the GRM was 'procured' by the threat or use of force, there is some circumstantial evidence given that the GRM was concluded soon after a temporary cease-fire between Israel and Hamas had been brokered by Egypt; a cease-fire that, in the words of UNSCO Robert Serry, has 'largely held since 26 August but remains worryingly fragile'. This was a statement made in a briefing to the UNSC, when UNSCO concluded: 'When I warn that Gaza could implode, or explode again, or the two State paradigm could slip irreversibly away, I do not believe I am crying wolf. This Council should not underestimate the dangers. I hope the Council will have the occasion to make its own position clear'.<sup>32</sup> Furthermore, in another presentation to the UNSC, the Assistant Secretary-General for Political Affairs spoke of the GRM, but also stated that 'those efforts notwithstanding, the reconstruction of Gaza is doomed to fail without a long-term cease-fire between Israel and the Palestinians'.<sup>33</sup>

Nonetheless, an agreement arrived at during a temporary cease-fire is not the same as an agreement 'procured by the threat or use of force', unless evidence can be produced (for example, from negotiations of the GRM) that the PA's or UN's consent was given as a result of a threat of further force. There is very limited practice or jurisprudence on treaties procured by force,<sup>34</sup> but it remains an under-explored issue and a potential source of invalidity. More general evidence of coercion is the fact that the continuing humanitarian crisis in Gaza was also a significant factor in pushing both the UN and the PA into becoming parties to the GRM, which very much puts Israel in control of building supplies. The denial, or threat of denial, of access to humanitarian assistance (i.e. reconstruction assistance) to thousands of people who do not have clean water, homes, functioning hospitals, schools roads etc., constitutes coercion, not at the level of a threat or use of force (which is normally confined to 'armed force'), but at the level of coercion of the representatives of the UN

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<sup>29</sup> Found as customary in *Fisheries Jurisdiction Case*, 1973 ICJ Rep 3, para 24.

<sup>30</sup> For discussion on its customary status see A. Cassese, *International Law* (Oxford University Press, 2<sup>nd</sup> 2005) 205.

<sup>31</sup> Article 52 VCLT 1969: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'.

<sup>32</sup> UN Press Release, 'United Nations Special Coordinator for the Middle East Peace Process, Mr. Robert Serry – Briefing to the Security Council', 16 September 2014. In a later statement from UNSCO it was stated that the GRM represented a step forward towards the objective of lifting all remaining closures in accordance with UNSC Resolution 1860 (2009); UN Press Release, 'Statement by the United Nations Special Coordinator for the Middle East Peace Process, Mr. Robert Serry, on Reconstruction in Gaza, 21 November 2014.

<sup>33</sup> UNSC S/PV.7312, 'The situation in the Middle East, including the Palestinian question', 17 November 2014.

<sup>34</sup> O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011) 1207-17. But see examples discussed in E. Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Status', (2003) 14 *European Journal of International Law* 999 (re Kumanovo Agreement 1999 between NATO (KFOR) and the FRY); A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> edn, 2013) 278 (re the Czechoslovakia- Germany Nationality Treaty 1938); S Hamamoto, 'Le Sort D'un Traité Imposé: La Convention de Paix Entre La France et La Thaïlande Conclue En 1941', (1998) *Revue Générale de Droit International Public* 951 (on the Tokyo Agreement 1941 between France and Thailand).

and PA, in violation of the customary prohibition of such reflected in Article 51 of the VCLT 1969, which renders their expressions of consent to be bound by the GRM of no legal effect.<sup>35</sup>

In addition, the GRM is subject to the customary treaty rule that it is void because it conflicts with peremptory rules of international law.<sup>36</sup> It will be shown in a subsequent section of this opinion that Israel's human rights obligations apply in the Occupied Territories and, although Israel rejects this, the treaty rule that an agreement is void if it conflicts with a peremptory rule is not dependent upon the human rights obligations of Israel under International Covenants, but upon the fact that core human rights norms are norms of *jus cogens*, and that the agreement is in conflict with these. There is strong evidence of the connection between the GRM and actual and potential violations of core human rights (for example, the right to housing especially in conjunction with the right to life, and the right to life in terms of potential misuse of the database by the GoI for the identification of targets), and fundamental principles of international humanitarian law (deriving from the laws of occupation and the basic principle of humanity, as well as the illegality of the on-going blockade of Gaza). These rules and violations of them caused by the GRM are reviewed in the next two sections. Core human rights – to life, to shelter – are peremptory rules of international law,<sup>37</sup> as is the broader peoples' right to self-determination.<sup>38</sup> It is possible to show that the GRM is directly in conflict with the rights to life and shelter given its design and operation is inadequate to ensure that there are sufficient building materials to meet the needs of a significant number of residents of Gaza. The complexity of the process embodied in the GRM, including the need for UN supervision, and the potential veto of GoI over all aspects of the agreement as well as its overriding security concerns, enable the GoI to prevent the reconstruction of Gaza to any significant degree.

UN and PA consent has, in effect, been given to the continuation of the blockade of Gaza in respect of construction materials by providing a means of palliative care through limited exceptions to the blockade, while leaving the illegal blockade in place. The GRM does not contain any provision that would guarantee that the needs of the people of Gaza are being met (by for, example, specifying that for the reconstruction of Gaza to be completed within a certain period, so many trucks/tonnes of materials must be allowed to cross into Gaza per day). In fact the GRM allows the GoI to place limits on any quota. The GRM is designed to complement the blockade to ensure that a protracted humanitarian crisis is maintained in Gaza. By offering a pressure valve, albeit an extremely limited one, the GRM serves to legitimate the blockade which is shown elsewhere in this opinion to be illegal under international law and, further, to occasion a number of violations of specific human rights and humanitarian law obligations. The UN, by becoming a party to the GRM, is itself

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<sup>35</sup> Article 51 VCLT 1969: 'The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts directed against him shall be without any legal effect'.

<sup>36</sup> Article 53 VCLT 1969: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ...'.

<sup>37</sup> Article 6 of the ICCPR 1996 provides that 'every human being has the inherent right to life'; while Article 4(2) does not allow from any derogation of that right in times of public emergency. The Committee on Economic, Social and Cultural Rights has identified core socio-economic rights that re attendant upon the right to life – food, water and shelter – 'The Nature of States Parties Obligations: Article 2(1) of the Covenant', General Comment 3, UN Doc E/1991/23, para 10.

<sup>38</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the International Court of Justice, 2004 ICJ Rep 136 at 171-2; *East Timor* case, 1995 ICJ Rep 90 at 102.

contributing to the maintenance of the blockade and, therefore, is committing, as well as aiding and assisting, violations of international law.

### **The Legality of the GRM under International Humanitarian Law**

There is no doubt that Israel has significant obligations in Gaza under the provisions of international humanitarian law, although the extent of those obligations is disputed. The two arguments offered in the literature and jurisprudence are that: either Israel remains an occupying power because of the control it exerts over Gaza and so Israel has the full range of duties provided for occupiers under international humanitarian law,<sup>39</sup> or that Israel has ceased to be an occupier after its troop disengagement in 2005, but it still has a number of humanitarian obligations (generally stated as an obligation to meet the essential humanitarian needs of the residents of Gaza).<sup>40</sup> The effect of the military actions of Israel in 2014, following from its action in 2009, indicate that Israel still acts as an occupying power, reasserting its military authority over Gaza when it feels it necessary, even though it might claim to be acting in self-defence under international law. Any *jus ad bellum* claim Israel might make, to be acting in self-defence, is undermined by the fact that the acts to which it is claiming to respond to in self-defence, i.e. the on-going missile attacks by Hamas, are not confined to the immediate period before Israeli military incursions, indicating that the choice of entering Gaza by force is one exercised by an occupier, deciding when to reassert authority, rather than as a state responding to existential threats against it.

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<sup>39</sup> Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc A/HRC/12/48, 25 September 2009, para 276: 'Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel'. S. Darcy and J. Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law', (2010) 15 *Journal of Conflict and Security Law* 211: 'It could be argued that since the seizure of control by Hamas in June 2007, it is they who exercise effective control on the ground in Gaza and for Israel to reassert control would require a major ground offensive involving the likelihood of numerous casualties. On the other hand, Israel continues to exercise considerable control over this relatively small geographical area, through the control of airspace, coastal waters and borders, and through the dependence of Gaza's population and economy on Israel. ... In the same vein, Article 69 of Additional Protocol I to the Geneva Conventions positively compels occupants to 'ensure the provision of clothing, bedding, means of shelter [and] other supplies essential to the survival of the civilian population of the occupied territory'; while Article 70 of the Protocol places substantially lesser requirements on non-occupying parties to an armed conflict to merely 'allow and facilitate rapid and unimpeded passage of all relief consignments'. T. Meisels, 'Economic Warfare – the Case of Gaza', (2011) 10 *Journal of Military Ethics* 94: 'Construed as a belligerent occupier, Israel would be obligated to permit all humanitarian relief so far as this is necessary to supplement inadequate supplies .... In particular, as an occupying power Israel would be obligated to facilitate the provision of all consignments of foodstuffs, medical supplies and clothing, whether by humanitarian organizations or by foreign states, to the population of Gaza at large. Crucially, if Israel were regarded unambiguously as the occupying power, and if Gaza is inadequately supplied (as the UN asserts, and Israel denies), then its obligation to accept any relief scheme on Gaza's behalf is entirely unconditional. Israel would then retain only the right to search and regulate the passage of the relief supplies'.

<sup>40</sup> *Jaber Al-Bassiouni Ahmed and others v. Prime Minister, Minister of Defence*, Supreme Court of Israel HCJ 9132/07 2008: 'The duty of the State of Israel derives from the essential humanitarian needs of the inhabitants of the Gaza Strip. The respondents are required to discharge their obligations under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in order to provide the essential humanitarian needs of the civilian population'. Also *A and B v State of Israel* [2007] Supreme Court of Israel CrimA 6659/06.

Under international humanitarian law, as an occupier, Israel 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'.<sup>41</sup> Clearly the people of Gaza are inadequately supplied and, although international humanitarian law on occupation allows for search and regulation of supplies for 'imperative reasons of security',<sup>42</sup> the GRM does not aim to achieve the regulated rebuilding of Gaza, rather, it is designed and operates to keep building supplies to below a minimum threshold that would allow for the rebuilding of Gaza.

Even if Israel is not viewed as an occupier, the conflict in Gaza in 2014 was either an international armed conflict or a non-international armed conflict. In relation to international armed conflicts, international humanitarian law grants the GoI certain 'control' rights over relief if it is satisfied that it has serious reason to fear that the consignments will be diverted from their destination, that control might not be effective or that a definite advantage may accrue to the military efforts or economy of the enemy.<sup>43</sup> The GoI claims that building materials are 'dual use' and may be used to rebuild the 'terror' tunnels from Gaza into Israel but, assuming that fear to be well-founded, it would only allow it to restrict those supplies that it has 'serious reason' to believe will be used in this way,<sup>44</sup> and would not justify the assertion of control rights over all building supplies. In non-international armed conflicts, international humanitarian law provides that 'if the civilian population is suffering undue hardship owing to the lack of supplies essential for its survival ... relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned'.<sup>45</sup> According to the ICRC's study of customary rules, the 'parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.<sup>46</sup> The GoI's consent to, and control over, relief supplies cannot impede access of the population to humanitarian relief. While the GRM is a mechanism that allows for some relief to enter Gaza, it is regulated and controlled to the extent that it cannot meet the basic requirement of addressing the undue hardships being suffered by the people of Gaza as a result of the 2014 conflict. Furthermore, the GRM is set up so that much of the control over the distribution of supplies (as opposed to the control of crossings which remain in the hands of the GoI) is under the auspices of the UN, making it complicit in the treatment of the people of Gaza.

Given its obligations under international humanitarian law, the GoI appears to be using the UN in an attempt to circumvent its own obligations under international humanitarian and human rights law (see below) to allow for the full reconstruction of Gaza, although this does not absolve the GoI of responsibility for breaches of such obligations. Article 61 of the Articles on the Responsibility of International Organizations (ARIO) 2011 declares that a state incurs responsibility if it circumvents an obligation 'by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation'. As has been shown the GoI is in breach of its obligation to

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<sup>41</sup> Article 59 Geneva Convention IV 1949.

<sup>42</sup> Article 62 Geneva Convention IV 1949.

<sup>43</sup> Article 23 Geneva Convention IV 1949.

<sup>44</sup> ICRC Commentary on Article 23 Geneva Convention IV 1949.

<sup>45</sup> Article 18(2) Additional Protocol II 1977.

<sup>46</sup> J.M.Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), Rule 55 at 193.

provide humanitarian relief. The passage of relief can be subject to control, but the GRM clearly places the importance of control above the need for relief, certainly at the level necessary for the reconstruction of Gaza. The GRM, 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. The requirement of causation in Article 61 seems to be met in the case of the GRM for as the Commentary to ARIO states: there must be a 'significant link between the conduct of the circumventing' state and 'that of the international organization'.<sup>47</sup> That link between the stifling control Israel has exercised over Gaza and the control exercised by the GoI and the UN over building supplies is, in effect, detailed in the GRM itself. Although the GoI is not absolved of responsibility by involving the UN in this way, the UN itself also bears responsibility for wrongful acts committed by it.

### **The Legality of the GRM under International Human Rights Law**

Israel, as a party to the two International Covenants on Human Rights, on Civil and Political (ICCPR), and on Economic, Social and Cultural Rights (ICESCR), is bound to respect and protect those rights in the Palestinian territories. This was confirmed by the International Court of Justice in 2004.<sup>48</sup> The dispute over whether Israel remains an occupying power in Gaza after its troop withdrawal has been discussed above and the conclusion drawn is that it remains an occupying power, thus the position stated by the International Court in 2003 remains unchanged. Even if this were not to be the case, the blockade maintained by Israel against Gaza is in itself violative of human rights law, as well as humanitarian law. In 2014 the Human Rights Committee concluded its observations on Israel's compliance with the ICCPR with the following remarks on the blockade:

The Committee is concerned at the long-standing blockade of the Gaza strip imposed by the State party. It notes with concern that the blockade continues to hamper the freedom of movement with only limited categories of persons able to leave Gaza, such as medical referrals; to negatively impact on Palestinians' access to all basic and life-saving services such as food, health, electricity, water and sanitation; and to delay reconstruction efforts in the Gaza Strip (arts. 1, 6, 7 and 12). The State party should, in line with the Committee's previous recommendation (CCPR/C/ISR/CO/3, para. 8): (a) Lift its blockade of the Gaza Strip, insofar as it adversely affects the civilian population and provide unrestricted access for the provision of urgent humanitarian assistance and construction materials needed for civilian reconstruction efforts; (b) Ensure that any measures restricting the freedom of movement of civilians and the transfer of goods from, into and within Gaza are consistent with its obligations under the Covenant.<sup>49</sup>

The rights in jeopardy as a result of the severe scarcity of building supplies caused by the GRM, by reason of its severe restriction on building supplies entering into Gaza, are:

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<sup>47</sup> ILC Report, UN Doc A/66/10, 163.

<sup>48</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the International Court of Justice, 2004 ICJ Rep 136 at 181-2.

<sup>49</sup> Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Israel', UN Doc CCPR/C/ISR/CO/4, 21 November 2014, 12; see also the 'Concluding Observations' of the Committee on Economic, Social and Cultural Rights on Israel, UN Doc E/C.12/ISR/CO/3, 16 December 2011, paras 29 and 32, finding a denial of the right of individuals in Gaza to health facilities, goods and services under Article 12 and the right to sufficient and safe drinking water and sanitation systems under Article 11.

- The right to life:<sup>50</sup> put in jeopardy by inadequate and insanitary conditions in Gaza resulting from the destruction caused by Israel's military operations against Gaza in 2014; conditions that have not been alleviated by the GRM, indeed the GRM has served the purpose of maintaining these conditions.
- The right to self-determination of the Palestinian people:<sup>51</sup> the destruction caused by Israel and unalleviated by the GRM prevents the people of Gaza from pursuing their economic, social and cultural development.
- Freedom from inhuman and degrading treatment:<sup>52</sup> caused by the continuing conditions in Gaza following the 2014 conflict and destruction caused thereby.
- Liberty of movement and freedom to choose residence:<sup>53</sup> caused by individuals being unable to rebuild their residences.
- The right to an adequate standard of living, including food, clothing and housing, and to the continuous improvement of living conditions.<sup>54</sup>
- The right to the highest attainable standard of physical and mental health:<sup>55</sup> caused by lack of shelter, medical facilities and infrastructure.
- The right to education:<sup>56</sup> caused by the lack of adequate school buildings.

The Gol is in violation of these rights but there is also the issue of the UN's involvement and/or complicity in these unlawful acts by it becoming a party to the GRM and in assisting in its implementation.

### **The Legal Responsibilities of the UN Arising from the GRM**

As an agreement that places obligations on the UN, the GRM is also a potential source of liability for the organization if that agreement or those obligations are themselves wrongful acts under international law, or if they facilitate the commission of wrongful acts by the Gol. Indeed, if the GRM does not qualify as a binding agreement under international law, it still amounts to a wrongful act in itself, by being a manifestation of the illegal blockade of Gaza by Israel, as well as facilitating the commission of wrongful acts by the Gol, giving rise to responsibility on behalf of both the Gol and UN. The following are the principal issues of UN responsibility under the secondary rules of international law, embodied in the ILC's Articles on Responsibility of International Organizations (ARIO 2011). It will be shown that the UN is either directly responsible for internationally wrongful acts, or is indirectly responsible for breach of its due diligence obligations to prevent violations of international law.

The GRM obliges the UN to play a central role in enforcing aspects of the illegal blockade imposed by Israel on Gaza in violation of a number of specific human rights and humanitarian law obligations outlined above. Evidence regarding implementation of the GRM shows that extremely limited

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<sup>50</sup> Article 6 ICCPR 1966.

<sup>51</sup> Article 1 ICCPR 1966; Article 1 ICESCR 1966.

<sup>52</sup> Article 7 ICCPR 1966.

<sup>53</sup> Article 12 ICCPR 1966.

<sup>54</sup> Article 11 ICESCR 1966.

<sup>55</sup> Article 12 ICESCR 1966.

<sup>56</sup> Article 13 ICESCR 1966.

reconstruction is occurring in Gaza, but also that this is totally inadequate given the scale of devastation caused by Israel and the limitation the Gol has placed on humanitarian relief schemes including through the GRM.<sup>57</sup> This raises problems of the UN's direct and indirect responsibility (for the commission of wrongful acts and for the failure to stop them), requiring analysis of the GRM and the UN's part in enforcing it in terms of its legal responsibilities.

By becoming a party to the GRM the UN, in effect, has involved itself in an aspect of the on-going Israeli blockade of Gaza, conduct which the ICRC has clearly indicated violates international humanitarian law.<sup>58</sup> The GRM itself, by being a part of the continuing blockade, is an internationally wrongful act that violates the UN's own obligations under international humanitarian law, and remains so even if UNSCO acted *ultra vires* in agreeing to the GRM.<sup>59</sup> In addition to the GRM being an internationally wrongful act itself, the UN is aiding and assisting the Gol in the commission of internationally wrongful acts in the form of violations of human rights and international humanitarian law that are caused by the dearth of reconstruction materials arising from the application of the GRM.<sup>60</sup> In terms of aiding and assisting the Gol, the UN is internationally responsible if two conditions are met. First, that the organization aids or assists Israel 'with knowledge of the circumstances of the internationally wrongful act'; and second, that the 'act would be internationally wrongful if committed by that organization'. The latter condition is met given that the provisions of customary international human rights and humanitarian law are applicable to the UN as an international legal person with rights and duties under international law.

It is noteworthy that the ILC, in its commentary on aiding and assisting the commission of internationally wrongful acts, cites an internal UN document from the UN's Legal Counsel relating to the UN's force in the Congo regarding its involvement alongside DR Congolese government forces (FARDC), members of which were violating international humanitarian, human rights and refugee law:

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<sup>57</sup> According to a UN Press Release, 'Middle East: UN-backed reconstruction efforts continue in Gaza amid 'dire' conditions, 11 December 2014, available at <http://www.un.org/apps/news/story.asp?NewsId=49586#> (accessed 15 December 2014): 'Reconstruction efforts in Gaza are continuing as thousands of people will soon have access to building materials for urgent repairs to their homes following last summer's conflict in the war-ravaged enclave, the United Nations special envoy in the region has announced'. In a statement released earlier today, the UN Special Coordinator for the Middle East Peace Process, Robert Serry, noted that more than 20,000 homeowners are expected to be able to procure construction material by the end of December for critical repairs ahead of an expectedly cold winter. "This can only be the beginning of an effective process to rebuild Gaza," read Mr. Serry's statement which also stressed, however, that "much more needs to be done." ... According to a recent UN assessment, as it stands now, over 100,000 homes were damaged or destroyed, affecting more than 600,000 people. Many people still lack access to the municipal water network. Blackouts of up to 18 hours per day are common. ....'

<sup>58</sup> Above n.11.

<sup>59</sup> Article 8 ARIO 2011: 'The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'.

<sup>60</sup> Article 14 ARIO 2011: 'An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization'.

If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. [...] MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. [...] This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.<sup>61</sup>

This type of legal analysis, by the UN itself, is of relevance to the UN's support for the GoI in enforcing the GRM with knowledge that such enforcement violates the human rights of the people of Gaza and subjects them to violations of international humanitarian law.

There is also the question of whether the consent of the PA to the GRM is a 'circumstance precluding wrongfulness' under ARIO;<sup>62</sup> but such consent cannot preclude the wrongfulness of an act that violates a peremptory rule.<sup>63</sup> It is also the case that the PA is equally able to commit or facilitate violations of international law by becoming a party to the GRM, and that it has no standing to waive the individual or collective rights of the people of Gaza, or the Palestinians as a whole, particularly bearing in mind the international recognition of the 'Palestinian' right to self-determination. It is the Palestinian people who are recognised as the right holder in the case of self-determination, and individuals as rights holders in respect of other human rights.

### **Due Diligence Obligations of the UN in Relation to the GRM**

According to Darrow and Arbour,<sup>64</sup> the duties of the UN include, but are greater than, the duty to promote human rights, as stated in the UN Charter.<sup>65</sup> They posit, as a general principle of international law that 'the minimum obligation owed by any subject of international law is a "duty of due diligence" to ensure that the subject's own policies, actions, or possible neglect do not undermine the human rights obligations of other subjects of international law (including states' human rights obligations)'. To put it slightly differently, 'this duty can be seen as an aspect of the obligation to "respect" the human rights commitments undertaken by other subjects of international law, an iteration of the "do no harm" ethic commonplace in humanitarian law and practice'.<sup>66</sup>

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<sup>61</sup> Above n.47 at 37.

<sup>62</sup> Article 20 ARIO 2011: 'Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent'.

<sup>63</sup> Article 26 ARIO 2011: 'Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law'.

<sup>64</sup> M. Darrow and Louise Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', (2009) 103 *American Journal of International Law* 446.

<sup>65</sup> Article 55(c) UN Charter 1945.

<sup>66</sup> Above n.64.

In fact the principle of due diligence is broader than stated by Darrow and Arbour and this has been partly recognised by the UN itself in the publication of its own Human Rights Due Diligence Policy (HRDDP) of 2011 which, although confined to UN peacekeeping forces when operating alongside non-UN security forces,<sup>67</sup> in principle at least, is a broader recognition that the UN has a duty to ensure that its conduct does not violate, or lead to the violation by other actors (whether states or private actors), of the human rights of individuals in areas in which the UN is operating or, moreover of applicable humanitarian law obligations. This is recognition that the UN has its own human rights and humanitarian law obligations as a subject of international law under customary international law and is not simply under a duty not to undermine the obligations of other subjects of international law. There is clearly an overlap here between the due diligence obligations of the UN and the UN's responsibility for aiding and assisting a state in the breach of its human rights or humanitarian law obligations (discussed above), but the distinction is found in the fact that due diligence relates to the UN's obligations to prevent the violation of human rights or humanitarian law by other actors (irrespective of their obligations). As an obligation of conduct, rather than of result, due diligence obligations are not necessarily breached when human rights violations have occurred, but are breached when the UN has not done enough to try and prevent them. In the case of the GRM, the UN has not done enough to ensure that the GRM contains enough (indeed any) human rights protection, or minimum level of compliance with humanitarian law, to ensure that the population is adequately supplied with humanitarian relief in terms of construction materials; for instance by insisting upon a clause in the GRM that would have incorporated minimum expectations in terms of human rights and humanitarian law – that the GRM, as a minimum, should have ensured that the population of Gaza would be able to achieve, in a relatively short period of time, a level of existence that meets the minimal human rights thresholds of life, water and shelter, and that Israel should not be able to block imports that are clearly necessary to achieve such support.

The UNSG's 2012 report on the work of the UN contained some hints of recognition that due diligence might apply more broadly than as stated under the 2011 HRDDP.

The strong link between United Nations peace operations and human rights was further strengthened by the endorsement of a policy on human rights in United Nations peace operations and political missions. The policy provides operational guidance and will contribute to the effective delivery of mandates and more coherent approaches across operations. In July 2011, the Organization adopted the human rights due diligence policy, which sets out the principles and measures to mainstream human rights in the work of all United Nations actors supporting non-United Nations security entities.<sup>68</sup>

While this can be read as something less than a clear commitment to a due diligence obligation when the UN is operating outside the strict confines of the HRDDP of 2011, the UN's acceptance of due diligence in one aspect of its work without equally applying it to other aspects, including political missions, is not defensible. As a subject of international law it has due diligence obligations to protect human rights and to uphold humanitarian law in all its operations.

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<sup>67</sup> 'Human right due diligence policy on United Nations support to non-United Nations Forces', first issued in 2011, reported in UN Doc A/67/775-S/2013/110.

<sup>68</sup> Report of the Secretary-General on the Work of the Organization', UN Doc A/67/1 (2012) para 58.

Although the HRDDP of 2011 is stated to be a policy, it is clear that the UN accepts that it is based on the furtherance of its obligations under human rights *law*. In a different report of 2012 the UNSG commented thus on the HRDDP:

In accordance with the policy, such [UN] support may not be provided where there are substantial grounds for believing that there is a real risk of the receiving forces committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take corrective measures. Adherence to the human rights due diligence policy is critical for preventing such violations and thus for maintaining the legitimacy and credibility of the United Nations as a promoter and defender of human rights and ensuring compliance with the Organization's international law obligations.<sup>69</sup>

Notice that the obligations of the UN are not simply those found under customary human rights law, but also customary humanitarian law, both of which are violated by the GRM. When the UN engages with a state to carry out certain tasks that impact on a civilian population, as under the GRM, it owes due diligence obligations to ensure that its involvement does not directly violate the rights of individuals affected (its negative obligation to respect human rights and humanitarian law), but also that its engagement does not enable the GoI to violate rights (the UN's positive obligation to protect human rights and humanitarian law).

### **The UN's Immunity Arising out of the GRM**

Having established that the primary rules of human rights and humanitarian law have been breached by the UN becoming a party to, and implementing, the GRM, and that responsibility for those wrongful acts can be attributed to the UN both for breach of its negative obligations not to violate the rights of the people of Gaza, and of its positive obligations to try to ensure that such rights are protected, there is the issue of accountability of the UN and the steps it should take to ensure that it ceases to act unlawfully.

Normally, in these circumstances, if the UN is subjected to claims against it by affected individuals in Gaza, it will claim immunity from the jurisdiction of local courts and it has done this recently despite severe criticism of its position. Following well-founded allegations that its peacekeepers were the source of a cholera outbreak in Haiti in 2010, in February 2013 the UN rejected claims to compensation by victims, stating that claims for damages totalling millions of dollars was 'not receivable' pursuant to s.29 of the Convention on the Privileges and Immunities of the United Nations 1946.<sup>70</sup> Section 29 provides, in part, that the UN 'shall make provisions for appropriate modes of settlement of ... disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'. The UN has not addressed the claims of the victims and their families per se as required by s.29, rather it has pledged to eliminate cholera and to help

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<sup>69</sup> Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/2012/376, para 27.

<sup>70</sup> 'UN Rejects Haiti Cholera Compensation Claims', BBC News, 21 February 2013 available at [www.bbc.co.uk/news/world-latin-america-21542842](http://www.bbc.co.uk/news/world-latin-america-21542842) (accessed 7 November 2014).

provide infrastructure to ensure clean water supplies in Haiti.<sup>71</sup> Whether this form of payment-in-kind can be viewed as settling the issue is unclear, although relevant laws on responsibility indicate that the UN is under an 'obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation'.<sup>72</sup> It follows that the UN should make redress in Gaza for on-going violations of human rights and humanitarian law caused by the GRM by payment-in-kind; for example, by directly coordinating and helping with the reconstruction effort in contrast with the Israeli controlled process to which it has become party.

### **Conclusions and Recommendations**

This opinion has demonstrated that the GRM is in itself, and by its very nature, an agreement that is in violation of international law as a binding agreement, and as conduct, that facilitates the continuation of the illegal blockade against Gaza in the respect of materials essential for the reconstruction of properties, businesses and infrastructure destroyed by Israel's assault on Gaza in July and August 2014. The GRM has also been revealed to be as a binding agreement, and as conduct, the consequences of which violate the Gol's and the UN's obligations under international humanitarian law and human rights law. The UN, by becoming a party to this agreement, has adopted a wrongful act (the blockade) as well as aiding and facilitating the Gol in the commission of internationally wrongful acts, both in terms of not providing adequate relief under international humanitarian law, and by breaching the fundamental human rights of the inhabitants of Gaza - to life, shelter, health, education, an adequate standard of living, self-determination and freedom from inhuman treatment.

If the UN persists in aiding and assisting in the implementation of the GRM it will be jointly (with the Gol) responsible for the injuries and losses caused to the people of Gaza and will be under a clear duty to provide remedies to those suffering loss. An alternative to individual remedies would be for the UN to help significantly in ensuring the reconstruction of Gaza. It is recommended that the UN urgently seek to amend the GRM to include guarantees, in accordance with its due diligence obligations, that levels of relief in the form of construction materials, essential to meet basic human rights and humanitarian law obligations, are delivered to Gaza over specified periods of time; and that those levels can be increased if, in the expert opinion of the UNHCHR, the rights of the people of Gaza are not being progressively realised. If such guarantees are not agreed by the parties to the GRM then the UN should withdraw from the mechanism. Only by amending the GRM to make it compatible with international law or, if that proves impossible, withdrawing from the GRM, can the UN ensure that it fulfils its responsibilities to perform its international obligations and to desist from internationally wrongful conduct.<sup>73</sup> In terms of justification for doing this the UN can rightfully claim

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<sup>71</sup> See 'Collective Efforts in Haiti will be Overwhelmed without Massive, Immediate Response, Secretary-General Warns in Remarks to the General Assembly', 3 December 2010, available at <http://www.un.org/press/en/2010/sgsm13294.doc.htm> (accessed 11 November 2014).

<sup>72</sup> Article 37 ARIO 2011.

<sup>73</sup> Article 29 ARIO 2011: 'The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached'. Article 30 ARIO 2011: 'The international organization responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require'.

that its due diligence obligations require it not to be implicated in any wrongful conduct and, indeed, to do all in its power to prevent wrongful conduct by the GoI by reason of the continued enforcement of the blockade. Furthermore, the UN can point to the fact that the GRM is void as it was procured by coercion, by threat of further force, and that it is in conflict with peremptory norms of international law.

If it decides to withdraw from the GRM, or has no choice but to withdraw, it is recommended that the UN should then seek to establish an alternative mechanism for delivery of building materials (and humanitarian relief more broadly) by asserting its role as a neutral and impartial organization - one that is empowered to deliver humanitarian assistance free from Israeli security controls, by reason of its status and by means of its immunities. This has been shown to be within the existing competence of UNSCO as delegated to it by the UNSG and as mandated by the UNGA. By taking charge of the delivery of construction materials, and by asserting its impartiality between the PA and the GoI, the UN will be able to offer guarantees that building materials will not be used for purposes that threaten Israel's security as well as ensuring that the supplies meet the needs of the people of Gaza in accordance with basic principles of international humanitarian and human rights law.