



Lawyers for Palestinian Human Rights' briefing on the Gaza Reconstruction Mechanism: its ineffectiveness, its incompatibility with international humanitarian and human rights law obligations, and its future



About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a lawyer-based charity in the UK that works on projects to protect and promote Palestinian human rights. We distinctly provide a legal and human rights perspective on issues affecting Palestinians. Our trustees include leading human rights lawyers, Sir Geoffrey Bindman QC and Tessa Gregory.

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Introduction

1. This briefing outlines why LPHR urges the UK government to use its influence to ensure significant improvements to the Gaza Reconstruction Mechanism (GRM) and make its future support for it conditional on such improvements. The GRM was established by an agreement made between the Government of Israel, the Palestinian Authority and the United Nations in September 2014.
2. It is a pertinent time to highlight this critical issue following the announcement on 15 February 2018 by the UN Special Coordinator for the Middle East Peace Process, Nickolay Mladenov, that the GRM is to be subject to 'a joint review by the three parties to the GRM agreement to improve its functionality, predictability and transparency'. No date, however, has been disclosed as to when this review will take place.
3. At the time of its establishment in 2014, the GRM was stated to be a 'temporary access mechanism'. However, nearly four years on, it troublingly appears to be entrenched. There is no indication that the review will include the formation of a timetable for ending the GRM.
4. We are deeply concerned that the GRM effectively perpetuates and gives tacit approval to the illegal closure imposed on Gaza by successive Israeli Governments since June 2007. We are also seriously concerned that the GRM agreement is incompatible with fundamental legal obligations under international humanitarian law, human rights law and UN law, that are relevant to meeting the humanitarian needs of the people of Gaza.
5. Our concerns are based on analysing a confidential January 2015 legal opinion ('the Legal Opinion') by Nigel White, Professor of Public International Law at Nottingham University, commissioned by Diakonia International Humanitarian Law Resource Centre, and made public in 2016. It provides a detailed legal analysis raising significant concerns about the legality of the GRM, and how it effectively consolidates the illegal closure imposed on Gaza which has created a catastrophic humanitarian cost for its population.

The GRM has largely not been effective in providing for the reconstruction of Gaza

6. Crucially, the GRM has largely not been effective in relation to its stated aim of reconstruction following the immense damage caused by Israel's 2014 military bombardment of the Gaza Strip.
7. During the Israeli military offensive between 7 July 2014 and 26 August 2014, over 19,000 family homes in Gaza were destroyed or severely damaged, meaning that reconstruction of homes became an urgent and critical post-conflict issue. However, the



UN reported in September 2017 that of the 100,000 people internally displaced at the end of the conflict, an estimated 29,000 (over 5,500 families) remained internally displaced three years on, due to access restrictions on basic construction materials and a lack of funding. Furthermore, the overall housing shortage in Gaza had increased to 120,000 housing units, from 71,000 in 2012.

8. There is also a severe water and waste-water crisis in Gaza, where 97 per cent of its water is unfit to drink. In this regard, the UN reported in July 2017 that construction of three Short Term Low Volume (STLV) desalination plants, which will produce an additional 13 Million Cubic Metres of water, as well as of sewage treatment plants in both the North, Middle and South areas of Gaza, 'have been delayed in large part due to restrictions on imports of the necessary dual-use material, and only 23% of the planned STLV interventions forecast to be completed by 2016 were achieved'. The UN reports that the completion date for the remainder is now expected in 2019 at the earliest.
9. In relation to the current electricity crisis, which causes ongoing suffering for the residents of Gaza, the UN reported in July 2017 that the functioning of Gaza's sole power plant is, in part, 'impaired by Israeli restrictions on imports of spare parts and equipment'. In its May 2018 Early Warning Indicators bulletin, the UN revealed that in both April and May 2018, Gaza received on average only 4 hours of electricity per day, and that between May 2017-May 2018, residents of Gaza have not received more than an average of 6 hours of electricity per day.

The GRM consolidates and serves to legitimise the illegal closure of Gaza

10. 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', signalling that such concerns are prioritised over all other considerations. It then goes on to detail more specific requirements.
11. The GRM crucially ensures that control over the supply of materials into Gaza remains firmly in the hands of the Israeli government. Meanwhile, the Palestinian Authority and UN bear the burden of ensuring sufficient resources are in place to meet the GRM's extensive monitoring requirements.
12. Basic construction materials such as cement and steel bars have been classified by Israel as being dual civilian and military use in specific relation to Gaza. This is an overly broad and harmful classification that is not replicated in the international standard for classification of dual-use goods, the Wassenaar Arrangement, of which the participating states include the UK, all other EU member states, the United States and Russia.



13. Israel's definition of basic civilian items such as construction materials as “dual use” is not challenged by the GRM agreement, which accordingly permits extremely onerous restrictions on the entry of such materials under the GRM, and allows for blanket bans at any point.
14. The core feature of the GRM agreement thus ensures the control over the supply of materials into Gaza remains firmly with the Israeli government, in addition to failing to mandate that a certain amount of materials must be allowed through to meet the humanitarian needs of the people of Gaza. This led the Legal Opinion to strikingly find:

'[The GRM] is designed to complement the closure to ensure that a protracted humanitarian crisis in Gaza is maintained.... [it also] 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'.

The GRM is incompatible with International human rights law

15. The Legal Opinion details that the 'severe scarcity of building supplies caused by the GRM, by reason of its severe restriction of building supplies entering into Gaza', places the following fundamental human rights in jeopardy of violation: the right to life; the right to self-determination of the Palestinian people; freedom from inhuman or degrading treatment; liberty of movement and freedom to choose residence; the right to an adequate standard of living, including food, clothing and housing; the right to health; and the right to education.
16. While the Israeli government is directly responsible for any such violations as a consequence of being an occupying power and maintaining the illegal closure of Gaza through the GRM, 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.

The GRM is incompatible with International humanitarian law

17. The Legal Opinion notes 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”'.
18. The Legal Opinion also notes that international law on occupation does allow for search and regulation of relief supplies for ‘imperative reasons of security’, and references the Government of Israel claims that building materials are 'dual use' because they may be used to build tunnels for the purpose of launching attacks on Israeli territory.



19. However, the Legal Opinion concludes that, on the assumption that this fear is well-founded, the control-over-relief provision in international humanitarian law 'would only allow it to restrict those supplies that it has "serious reason" to believe will be used in this way, and would not justify the assertion of control rights over all building supplies'.
20. The Legal Opinion accordingly concludes that the 'Government of Israel is in breach of its obligation to provide humanitarian relief' by allowing 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. It further asserts that the GRM's prioritisation of control above the need for humanitarian relief efforts means that it 'in effect, is a continuation, in a different form and in relation to specific supplies, of Israel's blockade [closure] of Gaza, which is in clear violation of international humanitarian law'.

The GRM is incompatible with UN Law

21. The Legal Opinion identifies that the UN's role under the GRM is incompatible with the UN Guiding Principles on Humanitarian Assistance, which require that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality, and in ways that are supportive of recovery and long-term development. Far from allowing for 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.
22. It also finds that in light of the numerous duties placed on the UN under the GRM that effectively serve the Israeli government, by becoming a party to the GRM agreement, the UN has agreed to undertake a partial role in violation of its own principles.

The GRM is an internationally wrongful act and the UN did not perform adequate human rights due diligence in becoming a party to the GRM

23. The Legal Opinion contends that the GRM amounts to an internationally wrongful act that entails the international responsibility of the Government of Israel, the Palestinian Authority and the UN for acting in breach of international law obligations. This is because the GRM 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. International law requires the cessation of the internationally wrongful act and the provision of remedies to those harmed by the act.



24. The Legal Opinion also finds that the UN did not meet its human rights due diligence obligations to protect human rights and uphold international law in all its operations, by not doing enough to ensure that the GRM contained enough (indeed any) substance on human rights protection and a minimum level of compliance with humanitarian law. The UN's human rights due diligence obligations are to ensure that its involvement does not directly violate the rights of individuals affected, and also that its engagement does not enable the Government of Israel to violate rights.
25. To ensure the UN fulfils its international law obligations, to desist from internationally wrongful conduct, and further to meet its due diligence obligations that require it not to be implicated in any internationally wrongful conduct and to prevent enabling the Government of Israel from continuing its internationally wrongful conduct of its closure of Gaza, the Legal Opinion recommends that the UN should:
- Urgently seek to amend the GRM agreement to include guarantees that it meets basic human rights and humanitarian law obligations, and that Israel should not be able to block imports that are necessary to meet this objective; or,
 - Withdraw from the GRM and seek to set up a UN-led mechanism for the delivery of building materials (and humanitarian relief more broadly) in which its role as a neutral and impartial organisation is regained, and in which it is empowered to deliver humanitarian assistance free from Israeli security controls.

The GRM has created a black market which directly undermines its cited security purpose

26. The controlled shortage of construction materials allowed by the GRM, due to the Government of Israel's citing of security concerns over possible use for building tunnels, has been admitted by Israel's military as being one of the causes for the emergence of a black market for construction materials. As reported by the Israeli human rights organisation, Gisha, in 2015, Col. Grisha Yakubovich, head of the Civil Department of the Coordinator of Government Activities in the Territories told Israeli TV news:

'Because of the situation in Gaza, the same people who are found eligible to receive construction materials prefer to sell them in the black market, and now there is, unfortunately, a black market in the Gaza Strip, and all the people who aren't supposed to buy, do so from the black market'.

27. Gisha further stated in July 2015 that 'Israel's senior security officials have repeatedly claimed that allowing Gaza's reconstruction is more than just a humanitarian gesture; in fact, that it is in Israel's interest from a security perspective'.



28. Gisha's considered position on the GRM, also stated in July 2015, is that it 'should be ended and restrictions must be removed on the entrance of basic construction materials which serve no one'.

Minister Alistair Burt's evidence on the GRM before a parliamentary committee in June 2018

29. As confirmed by Minister Alistair Burt on 19 June 2018 in oral evidence before the International Development Committee's inquiry on the humanitarian situation in Gaza, the UK Government has supported the GRM since its inception and has provided £1.6m funding towards it. The Minister further stated the UK will continue to support it.
30. However, the Minister's oral evidence did not address the compatibility of the GRM with fundamental international human rights and humanitarian law obligations. We are also concerned that by continuing to provide backing to the GRM, the important ministerial statements of support that Burt provided during his oral evidence on Gaza's urgent infrastructure needs in areas such as electricity, water and sanitation are directly undermined; the intensification of reconstruction and economic development is not compatible with the UK's ongoing support for the GRM in its current form.

Three urgent actions for the UK government to consider in relation to the future of the GRM:

31. Against the context above, we make the following recommendations to the UK government in regard to the future of the GRM so as to ensure that its continued position on the GRM is consistent with its duty to uphold respect for international law:
- i) Work with all parties to urgently revise the GRM so as to: a) include guarantees that sufficient levels of humanitarian relief in the form of construction materials are expeditiously delivered to Gaza by specified time deadlines to meet basic human rights and humanitarian law obligations; b) provide flexibility in the operation of the GRM and independent expert oversight to ensure the rights and humanitarian needs of the people of Gaza are being progressively realised, c) prevent Israel from blocking imports that are necessary to meet these objectives, and d) provide a clear timeframe for ending the GRM and the ending of restrictions on the entrance of basic construction materials.
 - ii) If the above cannot be agreed, the UK should support a UN withdrawal from the GRM and the establishment of a UN-led alternative mechanism for the delivery of building materials and other humanitarian relief in which a) the UN's role as an impartial organisation is regained, and b) it is empowered to deliver humanitarian assistance free from overly broad and harmful Israeli security controls and possible prohibited involvement in international wrongful conduct.



iii) Urge Israel to bring its definition of “dual use” items in line with international standards, such as the Wassenaar Arrangement, to enable it to meet its international humanitarian and human rights law obligations owed to the people of Gaza.

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