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Human Rights Council

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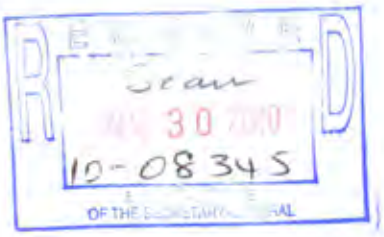
INTEROFFICE MEMORANDUM MEMORANDUM INTERIEUR



cc CdC

TO: Ms. Kyung-wha Kang
Deputy High Commissioner for Human Rights

DATE: 27 August 2010

FROM: Patricia O'Brien
Under-Secretary-General for Legal Affairs
The Legal Counsel

SUBJECT: **Human Rights Council Resolution related to the establishment of an escrow fund**

1. This is with reference to your memorandum dated 9 July 2010 seeking our advice on the legal aspects involved in the request by the Human Rights Council, set out in paragraph 8 of its resolution 13/9 of 25 March 2010, that the High Commissioner

> "… explore and determine the appropriate modalities for the establishment of an escrow fund for the provision of reparations to the Palestinians who suffered loss and damage as a result of unlawful acts attributable to the State of Israel during the military operations conducted from December 2008 to January 2009".

We understand that, pursuant to its paragraph 15, your Office is required to report to the Human Rights Council on the implementation of this resolution, including the above request, at the Council's fifteenth session, in September.

2. By way of background, we note that the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48 of 15 September 2009, the so-called Goldstone Report) recommended, among other things, that the General Assembly

> "1971 (b) … establish an escrow fund to be used to pay adequate compensation to Palestinians who have suffered loss and damage as a result of unlawful acts attributable to Israel during the December–January military operation and actions in connection with it, and that the Government of Israel should pay the required amounts into such fund. The Mission further recommends that the General Assembly should ask the Office of the United Nations High Commissioner for Human Rights to provide expert advice on the appropriate modalities to establish the escrow fund;"

3. We have taken note of the fact that your Office also sought the views of the Controller's Office and that the Controller's Office provided a number of observations in the request by memorandum of 7 June 2010. We broadly concur with these observations. Accordingly, the following decisions would need to be taken by a competent organ of the United Nations, for example, the General Assembly, if one were to follow the recommendation in the Goldstone report.

(a) A decision to establish the escrow fund to be used to pay adequate compensation to Palestinians who have suffered loss and damage as a result of unlawful acts attributable to Israel during the December-January military operation and actions in connection with it.

(i) The Secretary-General would then establish the escrow fund as a special account of the United Nations.

(ii) The escrow fund would be operated in accordance with the United Nations Financial Regulations and Rules.

(iii) As a fund of the United Nations, the monies in the fund, while held in fund, would be immune from every form of legal process and from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(b) a decision on the source or sources of funding that are to make up the fund.

(i) The Independent International Fact-Finding Mission recommended, in paragraph 1971 (b) of its report, that it was the Government of Israel that should pay the required amounts into the fund. However, the Human Rights Council, in paragraph 8 of its resolution 13/9 of 25 March 2010, did not indicate the source or sources of the monies that would make up the fund.

(c) a decision to establish a body to administer the fund, whose mandate would include:

(i) the following tasks of a functional or legal nature:
   a. receiving and considering claims to compensation
   b. deciding whether losses had indeed by sustained by the individuals on whose behalf those claims were made
   c. deciding whether those losses were caused by acts attributable to the State of Israel
   d. deciding whether those acts of the State of Israel were unlawful
   e. deciding on the extent of the compensable losses sustained by the individuals as a result of those acts and
   f. setting a figure on the compensation payable to those individuals in respect of those losses

(ii) the following tasks of a political or administrative nature:

a. administering the fund, including ensuring its financial viability and its capacity to meet awards

b. taking decisions on the allocation of monies held in the fund to the payment of particular claims

c. depending on the approach taken by the competent political organ, taking ancillary decisions on the matters described in paragraph 4 below.

i. This body would be a subsidiary organ of the organ that established it and would function under its authority.

ii. Given the very different nature of the two broad categories of tasks that it would be called upon to perform, it would probably be most appropriate that the body consist of two separate organs — a body of a legal or functional nature, which would consider and decide on the payment of individual claims, and a body of a policy or administrative nature, which would administer the fund.

iii. In order to be able to resolve claims that were disputed,* the legal or functional body would need to function in a judicial or quasi-judicial nature. Its composition and operating procedures would need to reflect this fact.

iv. The policy or administrative body would most appropriately consist of the representatives of States.

(d) a decision to what extent the body would rely on the investigations carried out by the Government of Israel and the Palestinians in order to determine the factual basis of the claims for compensation

(e) a decision to establish a secretariat for this body, which would be responsible, inter alia, for:

(i) technical administration of the escrow fund;

(ii) servicing the body, including its functional / legal organ and its policy / administrative organ;

(iii) receiving and registering claims and

(iv) disbursing payments.

(f) a decision as to the headquarters of the body.

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* A claim might be disputed on any of the following points: whether losses had indeed been sustained by the individuals on whose behalf the claims were made; if so, whether those losses had been caused by acts that were attributable to the State of Israel; if so, whether those acts were unlawful; if so, what was the extent of the losses sustained by the individuals concerned as a result of those acts; and what wasan appropriate figure to set as compensation for those losses. Disputes might also arise on other issues.

(g) a decision as to the source of funding for the body.

4. A series of ancillary decisions would also need to be taken, supplementary to the decisions listed above. These might be taken directly by the competent political organ that establishes the fund and the body described above. Alternatively, that competent political organ might decide to delegate the power and responsibility to take these decisions to that body. These decisions would need to include decisions on the following matters, amongst others:

(a) the persons who are eligible to receive compensation from the fund

(i) The Independent International Fact-Finding Mission refers, in paragraph 1971 (b) of its report, to "Palestinians". A decision would need to be taken whether this would encompass individuals only or whether it would extend also to corporations and public authorities. It would also need to be decided whether to include only residents of the Gaza Strip or, more widely, of the Occupied Palestinian Territory or whether Palestinians resident elsewhere might be eligible to receive compensation from the fund. Decisions would also need to be taken regarding the eligibility of Palestinians who bear the nationality of a State and, conceivably, of persons who are not Palestinians, but who were present in the Gaza Strip at the time of the December-January military operation.

(b) the particular types of loss for which compensation might be paid from the fund.

(i) The Independent International Fact-Finding Mission refers, in paragraph 1971 (b) of its report, simply to "loss and damage". It might be recalled that the Governing Council of the United Nations Compensation Commission adopted a number of decisions regarding the types or heads of losses for which compensation was payable from the Compensation Fund.

(c) whether interest is to be payable and, if so, the dates between which it is to be payable and the rate and method that is to be used to calculate it

(d) the process for the submission of claims to compensation

(i) In the case of the United Nations Compensation Commission, it might be recalled that the Commission's Governing Council decided that claims were to be submitted by Governments on behalf of their nationals or residents; but, in the case of persons who were not in a position to have their claims submitted by a Government, an appropriate person, authority or body appointed by the Governing Council might submit claims on their behalf. In the case of Palestinians, the Governing Council decided that claims might be submitted on their behalf by the State in which they were resident or by UNHCR, UNRWA or the ICRC. Subsequently, the Governing Council decided that certain claims might be submitted by the Palestinian Authority.

(e) the procedures that are to be followed by the body that is to decide on the payment of claims — for example, whether proceedings are to be written only or written and oral and who is to have the right to make written or oral submissions.

(f) the procedure for the distribution of payments to individuals whose claims are successful

(i) It might be recalled that awards made by the United Nations Compensation Commission were distributed to claimants through the Government, organization or entity which had submitted claims on their behalf.

(ii) In reaching a decision on this matter, it would have to be borne in mind that, once monies leave accounts of the United Nations, they cease to be considered assets of the United Nations and so to benefit from the immunities accorded by the Charter and the General Convention on the Privileges and Immunities of the United Nations. They may therefore become subject to seizure, freezing or other measures of constraint as a result of legal proceedings in the national jurisdictions through which they pass.

(g) a time-table for the submission of claims and a target date for the completion of processing of those claims.

5. To the extent that the body administering the escrow fund would be involved in the resolution of claims that were disputed in relation to the legal responsibility of Israel, the cooperation of Israel with the establishment of the body would appear to be necessary. This has also been recognized by the Independent International Fact-Finding Mission itself, in as much as it supposed, in paragraph 1971 (b) of its report, that the Government of Israel would need to cooperate with the operation of the escrow fund to be established by the General Assembly, by agreeing to pay into the fund the amounts required for the fund to operate.

cc: Mr. V. Nambiar
Mr. L. Pascoe
Mr. Y. Yamazaki

Memorandum from Ms. Patricia O'Brien, USG/OLA, The Legal Counsel

Mae Arkoncel to: Kyung-wha Kang 30/08/2010 04:57 PM

Cc: Vijay Nambiar, B. Lynn Pascoe, Jun Yamazaki, Janice Willingston, SGCentral, Joan Felli, Manel Perera, Stephen Mathias, ANDREAS VAAGT, Dorothee Joseph

Dear Ms. Kang,

Please find attached a copy of Ms. O'Brien's memo to you on "Human Rights Council Resolution related to the establishment of an escrow fund", the original of which is being sent by diplomatic pouch.

Many thanks,

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