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Israel's Settlement of UN Claim Involving Gaza

Lucy Reed (International Council for Commercial Arbitration) · Friday, February 5th, 2010 · Freshfields Bruckhaus Deringer

International claims settlement involves a number of challenges that are relevant for the international arbitration community, including fact-finding and burden of proof, principles of State responsibility, treaty interpretation and damages under international law. One recent development of note involves Israel's recent settlement of a claim brought by the United Nations.

In July 2009, the United Nations submitted to the Ministry of Foreign Affairs of Israel a claim for reimbursement for the losses that the United Nations sustained in a number of incidents that occurred during the Gaza conflict between December 2008 to January 19, 2009. As a result of discussions that took place between the United Nations and Israel regarding that claim, last month the Government of Israel paid the United Nations \$10.5 million as reimbursement for those losses.

The settlement follows an inquiry that began on February 11, 2009, when the UN Secretary-General convened a UN Board of Inquiry to review and investigate the following incidents that occurred in the Gaza Strip between December 27, 2008 and January 19, 2009:

“(1) Injuries occurring at and damage done to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) Khan Younis Preparatory “A” Girls School on 29 December 2008 and the subsequent death of the person injured;
(2) Deaths occurring at and damage done to the UNRWA Asma Elementary School in Gaza City on 5 January 2009;
(3) Deaths and injuries occurring at and in the immediate vicinity of, and damage done to, the UNRWA Jabalia Preparatory Boys “C” School on 6 January 2009;
(4) Injuries occurring at and damage done to the UNRWA Bureij Health Centre on 6 January 2009;
(5) Small-arms fire affecting an UNRWA convoy in the Ezbet Abed Rabou area on 8 January 2009 and related damage to a United Nations vehicle;
(6) Injuries occurring at and damage done to the UNRWA Field Office compound in Gaza City on 15 January 2009;
(7) Deaths and injuries occurring at and damage done to the UNRWA Beit Lahia Elementary School on 17 January 2009;
(8) Damage done to the Gaza compound of the Office of the United Nations Special Coordinator for the Middle East Peace Process (UNSCO) on 29 December 2008;
(9) Damage done to the World Food Programme (WFP) Karni Warehouse between 27 December 2008 and 19 January 2009.”

The Board of Inquiry found Israel responsible for damage sustained in six out of the nine above-

listed incidents. The Secretary-General observed that the Board's report was strictly an internal and confidential document. He decided to release a summary of the Board's report nevertheless because he considered that the incidents that occurred in the Gaza Strip between December 27, 2008 and January 19, 2009 gave rise to considerable public interest. The summary of the report may be viewed [here](#).

In his summary, the Secretary-General emphasized that the Board of Inquiry "is not a judicial body or court of law: it does not make legal findings or consider questions of legal liability." Nevertheless, the Board of Inquiry's conclusions all had a legal basis, namely, the principle that the United Nations is endowed with privileges and immunities in order to ensure the organization's independence by protecting it from interference by governments. The 1946 General Convention on the Privileges and Immunities of the United Nations, which sets out the scope of privileges and immunities of the United Nations, provides in Article II, Section 3:

"The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action." (available [here](#)).

The privileges and immunities basis of the Board's conclusions was clear in the Secretary-General's summary. For example, in respect of incident (2), deaths occurring at and damage done to the UNRWA Asma Elementary School in Gaza City on January 5, 2009, the Board of Inquiry concluded:

"...that the IDF carried out a direct and intentional strike on United Nations premises. It considered that this amounted to an egregious breach of the inviolability of United Nations premises and a failure to accord the property and assets of the Organization immunity from any form of interference. It noted that such inviolability and immunity could not be overridden by demands of military expediency. The Board found that the Government of Israel was therefore responsible for the deaths of the three young men who were sheltering in the school and for the damage to the premises caused by its actions."

With Israel's payment, the United Nations has agreed that the financial issues relating to those incidents referred to in the terms of reference of the Board of Inquiry have been settled. While the financial issues relating to those incidents have been resolved, the publication by the Secretary-General of a summary of the Board's findings will undoubtedly lead to further discussion in the international legal community about the legal implications of its conclusions or the absence thereof, particularly in terms of international humanitarian law and possible tensions between international humanitarian law and the law of privileges and immunities law during armed conflict.

In addition, the publication of the summary raises questions about what standards of proof are applied by a UN Board of Inquiry, an investigative body that is not a judicial body. The summary indicates that the Board of Inquiry relied on reasonable inferences rather than a higher standard of proof such as clear and convincing evidence or beyond a reasonable doubt. For example, the summary indicates that the Board of Inquiry concluded that the IDF would have known that one of the schools was functioning as a shelter for civilians based on the fact that on the day of the attack the IDF dropped 300,000 warning leaflets in the area, urging civilians to move to city centers. The summary noted that several hundred Palestinians had been gathering at the Asma School seeking shelter the day prior to the incident, and would have been easily visible to aerial monitoring.

The publication, in and of itself, of the summary is also significant for questions of transparency and the public interest in international dispute settlement. The Secretary-General's decision to publish the summary is based on his view that there is a unique public interest in Israel's settlement of this claim. However, the Secretary-General also emphasized that "the Board's report is an internal document and is not for public release. It contains significant amounts of information that was shared with the Board in strict confidence." The Secretary-General did not state whether Israel objected to the publication of the settlement of the claim, but he noted that Israel had not embraced all of the summary's findings: "[t]he Government of Israel has informed me that it has significant reservations and objections to the attached summary, which has been shared with it and to which it intends to react."

The notion of a public interest is among the factors currently driving demands for greater transparency in all kinds of international dispute settlement, particularly in international arbitration. Indeed it is no longer unusual for the settlement of claims, even those that are politically sensitive, to be made available via the internet. The recent decisions by the Eritrea-Ethiopia Claims Commission (on which one of the authors served as a Commissioner) as well as the Abyei Arbitration concerning the Sudan border were all published and available via the PCA's web site (available [here](#)). In addition, there is a current movement among civil society groups seeking greater transparency in investment arbitration to claim that there is a human right to access to information triggered in all investment disputes involving governments. These developments add to the vibrant debate on how much scope remains for confidential international claims settlements by States—an issue the authors submit can only be resolved on a case-by-case basis.

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