

17 July 2014

To: Prof. Michael Bothe

Re: Urgent Request for your expert opinion to examine Prof. Avi Bell's (Bar Ilan University, Israel) legal opinion (Heb) that approves the legality of Israel's disconnecting supply of water and electricity to the Gaza Strip

Background

On 14 July Jonathan Lis/Haaretz wrote¹ that Israel is permitted to cut off water, fuel and electricity supplies to the Gaza Strip in response to hostile actions, according to a legal opinion submitted to the Knesset Foreign Affairs and Defense Committee on 14 July 2014, in preparation for a committee hearing scheduled for the 15 July. The opinion was formulated by Prof. Avi Bell of Bar-Ilan University. Diakonia has managed to obtain a copy of the opinion and wishes to clarify through a counter expert opinion that such policy is illegal under international law. Following are highlights from the opinion.

Highlights of the legal opinion titled "Israel is allowed to stop supplying electricity and water to the Gaza Strip" of July 2014

Imposing economic sanctions on the Gaza Strip, such as refraining from the supply of water, fuel and electricity, does not involve military force and is thus a legal measure, despite the collateral effects on the Strip's residents. Using economic and non-military sanctions as punitive measure against international players is known as retorsion (*Encyclopedia of Public International Law*, 335 (1986); Oppenheim's *International Law*, 134 (H. Lauterpacht ed., 7th ed.1952). Lacking an agreement that denies such right, international law recognizes the right of every state to use this measure (Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 7 (1984).) Indeed, it is also common that states can take harsher measures with non-military countermeasures that under other circumstances would be unlawful (such as suspension of aviation agreements). Since Israel is not obliged legally to trade in fuel, electricity or any other thing with the Gaza Strip and is also not obliged to preserve a policy of open borders with it, it may avoid supplying commodities and

¹ <http://www.haaretz.com/news/diplomacy-defense/.premium-1.605139>

close its borders should it chose to do so, even if this is imposed as a “punishment” for terror activity. The only restriction is that Israel is not allowed to interfere in the supply of basic humanitarian needs (like food and medicine) by others. Israel is not obliged to supply these needs by itself.

Electricity is not considered a basic humanitarian need therefore allowing Israel to stop supplying electricity. More so, Israel is allowed to attack electricity power supply in the Gaza Strip and prevent the Strip of its independent electricity supply. Furthermore, Israel is allowed to stop water supply, but is obliged to allow such supply of water by a neutral third party if such demand will be presented. Israel is not allowed to attack water supply infrastructure with the goal of preventing civilians of water supply. In the past, Israel has limited electricity supply and other commodities to the Gaza Strip and the High Court of Justice has allowed for these steps.

It is noteworthy that Ukraine has threatened to stop water and electricity supply to the Island of Krim (already limiting supply) as a result of the Russian occupation, although Krim is totally independent of Ukraine’s supply. I have never heard until today of any person who claimed that Ukraine, should it wish to exercise its threats, will be in breach of international law.

Nevertheless, some legal arguments have been heard against such sanctions by Israel. An in-depth analysis concludes that none is valid.

1. Humanitarian needs

During wartime the parties to the conflict should not interfere with the supply of certain humanitarian products to the enemy population.

Article 23 IVGC obliges the parties in certain conflicts to allow passage in certain conditions, of specific types of products to the enemy population. But the Fourth Geneva Convention does not relate to the type of the conflict that takes place around the Gaza Strip since this conflict is not between states party to the convention and the Gaza Strip is not occupied territory (IVGC art. 2). Therefore Israel is free to disregard article 23 IVGC. Article 70 of the

First Additional Protocol of 1977 imposes a slightly broader obligation regarding the supply of food, medical supply, clothing, bedding, shelter and “other supplies essential to the survival of the civilian population” but Israel is not a party to the First Additional Protocol and is therefore is not obliged to follow Article 70.

In 2008 the High Court of Justice 9132/07 Bassiouni vs. Prime Minister the High Court has related to these articles as reflecting international law but nonetheless found that Israel has a right to decrease electricity supply. The High Court ruling, despite its rightful position to justify Israel’s actions was wrong in its approach to the above mentioned article. In order to show an obligatory international law custom one must show that states act upon this as obligatory norm. There is no practice that supports the duty to provide electricity to enemy territory and indeed no such custom was mentioned in the ruling. Ukraine’s example shows the opposite.

Even if these articles do apply to Israel as customary international law, Israel still has the legal right to stop supply to the Gaza Strip. Article 23 IVGC obliges only to permit passage of food, clothing and medicine for children below the age of 15 and pregnant women and women who gave birth (article 92 IVGC). Even if and when article 23 is valid, Israel is not obliged to permit passage of electricity, fuel or anything which is not food, clothing or medicine. Also, article 2 does not demand that Israel provides anything by itself. Israel is only obliged not to interfere consignments of food etc. sent by others to children, mothers, pregnant, nursing and women who gave birth. Article 70 of the First Additional Protocol specifies an extended list of commodities whose supply should not be interrupted and protects supply to the entire population. However, article 70 does not relate to fuel and electricity as items whose passage should be permitted. Also, article 70 does not impose any duty on the warring parties to provide the items on the list by themselves. It sets a general obligation on all states to facilitate “aid activities” and on the warring parties not to interrupt these actions. Thus, according to article 70 Israel has no obligation to provide fuel or electricity and does not have the duty to provide medication and food. At most, article 70

obliges Israel to enable transfer of medicine and food sent by others, as already done by Israel, regardless of article 70.

There is good reason to believe that unlike food and medicine, electricity is not considered a humanitarian need according to the laws of war and Israel is thus not even obliged to allow third party to provide electricity. As the High Court in the Bassiouni case noted, article 70 of the First Additional Protocol is also read in conjunction with article 54 of the same document, which prohibits the targeting of humanitarian goals if the purpose of the attack is “for the specific purpose of denying them for their sustenance value to the civilian population”. Specifically the High Court has pointed to the possible reading of items mentioned in article 70 as including those protected in article 54. However, electricity power plants are not mentioned in article 54 and thus it may be deduced that electricity is not protected item by article 70. And indeed there is a wide practice of damaging electricity power plants during wartime (see for example J.W. Crawford, III, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 Fletcher Forum of World Affairs 101 (1997), “the aerial bombardment of national electric power systems has long been considered indispensable to an effective wartime campaign”). This practice is supported by statements of the ICRC which clarify that power plants do not enjoy legal protection during wartime. It will be paradoxical to argue that a state may destroy enemy power plants but at the same time is obliged to supply with the enemy electricity of its own produce.

In the case of HCJ Bassiouni the petitioners the petitioners claimed that electricity should be regarded as basic humanitarian need since it is needed in the Gaza Strip for hospitals and operation of water systems. They have not presented any legal precedent to support their claim since no such precedent exists. However, the state in its action has clarified that it reduces electricity supply in limited manner as not to obstruct the operation of the above. Therefore, the Court has ruled that reducing the electricity does not violate what it considered a common custom not to interrupt humanitarian supply. The state’s position may hint to the wrongful assumption that the state must provide electricity by itself. These

hints were criticized by numerous legal scholars from all ideological positions, who claimed that there is no obligation to supply in the laws of war outside the laws of occupation (Yuval Shany, *the law Applicable to Non-Occupied Gaza: A Comment on Bassiouni vs. the Prime Minister of Israel*, 42 *Isr. L. Rev.* 101 (2009)).

The High Court did not relate to the question whether the law prohibits Israel from totally stopping electricity supply. But the analysis above shows that there is nothing that obliges Israel to continue such supply.

To the contrary, water is a humanitarian need. If the Convention applies, therefore Israel cannot interrupt any third party if it wishes to do so, to supply water to the Gaza Strip. Nonetheless, the Convention does not require of Israel to supply the water by itself. Additionally, since the Convention is probably not valid, and there is no common practice that shows that states should provide water to the enemy civilian population, there is no reason to believe that there is a legal duty on Israel to supply water.

2. Collective punishment

Although International law prohibits “collective punishment” (article 33 IVGC reflects customary international law) preventing water and electricity is not considered so. The prohibition on collective punishment relates to setting punishments from the criminal field upon individuals or groups based on the accusation of other persons or taking measures that will violate the laws of war of distinction or proportionality. None of Israel’s actions include setting criminal punishments or violating these rules. There has never been a legal lawful for war crimes based on economic sanctions arguing that they form collective punishment. It is interesting to note that many critics who describe “preventing economic aid” as “collective punishment” called for economic sanctions and preventing economic aid to Israel and other states (See for example Amnesty’s paper “Sudan: Joint letter to the UN Security Council” of 2006 and re Nepal) or at least claimed that they do not have an opinion re the legality of punitive steps such as sanctions and boycotts (Amnesty’s publication of 31.5.2000 “Sierra Leone: Cutting the Link Between Diamonds and Guns”).

We would mention also that in 2008 in HCJ of Bassouni case the High Court ruled that decreasing electricity supply and other needs to the Strip is not considered collective punishment.