

20 July, 2014

Members of the Foreign Affairs and Defense Committee,
The Knesset
Fax No. 02-6753100

Honorable Committee Members,

Re: Legal Opinion Concerning Supply of Electricity and Water to the Gaza Strip

Recently, we have received a legal opinion drafted by our colleague Professor Avi Bell, according to which Israel can legally cut off the supply of electricity and water to the Gaza Strip (hereinafter – the Opinion). To our knowledge, the Opinion was recently discussed in front of the Committee. As the issue relates directly to our areas of expertise, we have decided to bring to the Committee our own view on this question. We do not doubt that the Opinion reflects Prof. Bell's genuine conviction, that his conclusions are supported by international law. However, with all due respect, in our view the Opinion is fundamentally wrong. It does not reflect Israel's obligations towards the Gaza Strip as these were circumscribed by the Supreme Court of Israel, and is not in conformity with contemporary international law, in which special emphasis is placed upon the humanitarian objectives of international humanitarian law (IHL) and on the protection of human rights, whether in peacetime or during active hostilities.

In short, our conclusions are as follows: first, we are of the view that Prof. Bell's opinion is erroneous in its perception of the legal relations between Israel and Gaza. Accordingly, there is no legal basis for his claim that Israel can cut off the supply of electricity and water as a lawful economic sanction, retorsion or countermeasure. In any case, we reject the view that electricity is not a basic humanitarian need, which can therefore be subject to countermeasures or retorsion. In our opinion, Israel remains in control of several aspects of life in Gaza, and these powers must be exercised in consideration of the interests of the civilian population in Gaza. This approach has also been adopted by the Supreme Court. Second, the Opinion is wrong in its argument that certain instruments of IHL do not apply in the relations between Israel and Gaza. In this context,

the Opinion reflects a substantial inconsistency: on the one hand, it treats Gaza as an independent entity when it comes to Israel's rights to impose sanctions. On the other hand, when it comes to the application of IHL, the Opinion stresses that Gaza is *not* an independent and sovereign state, and therefore some norms of IHL do not apply. The combination of these two conflicting views results in a legal vacuum concerning the rights of protected persons in Gaza. Third, we believe that cutting of the supply of electricity or water to Gaza may amount to unlawful collective punishment, even if we adopt a narrow definition of the term.

It should be emphasized, that to the best of our knowledge, the reasoning found in the Opinion also does not reflect the formal legal view of the Israeli government.

We shall now present our detailed reply to the arguments presented in the Opinion:

Cutting Supply of Electricity and Water as an Economic Sanction, Retorsion or Countermeasure

1. The Relations between Israel and Gaza is not a Relationship between Sovereign and Independent States

It seems that the point of departure in the Opinion is that Israel and Gaza are two independent entities, entitled, as such, to impose upon one another sanctions, measures of retorsion and countermeasures. However, in actuality, even after its disengagement from Gaza, Israel has retained many powers in relation to residents of Gaza – control over the supply of electricity and water being just one of them. In this context, the Supreme Court, sitting as High Court of Justice, has explicitly ruled in the *Bassiouni Case* that although Israel is not under a *general* obligation to promote the welfare of the residents of Gaza, in regards to the powers it *still* exercises, it remains under certain obligations. These obligations emanate, *inter alia* from

the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as

a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.¹

The Supreme Court is the authorized interpreter of the law in Israel, and the latter ruling is therefore binding upon all arms of the executive. It should be added, that the approach of the Supreme Court, in this context, conforms to the emerging understanding in international law regarding the residual obligations of states towards territories which are no longer under their control.²

Indeed, there is an ongoing debate regarding the legal status of the Gaza Strip after the Israeli disengagement – and specifically regarding the question whether the international law of occupation applies to Gaza in its entirety. We shall not resolve this complex issue here. Nonetheless, **it is clear that regarding the specific administrative powers that Israel retains over the Gaza Strip, these must be exercised for the benefit of the residents of Gaza, subject to security considerations.** As held by the Supreme Court over the years, when the state exercises power that affects individuals, the balance between security considerations and human rights must be maintained, *inter alia*, through a proportionality analysis.³ Therefore, Prof. Bell is wrong to conclude that Israel is permitted to cut off essential supplies to the Gaza Strip, without limitation, as if at issue are two sovereign states. Israel is indeed subjected to legal limitations in its actions towards the population of Gaza, which do not necessarily exist in the context of regular and normal relations between independent and sovereign entities.

Moreover, we wish to point out an acute incoherence in the Opinion. On the one hand, as regards the rights of Israel in its relations with Gaza, the Opinion treats Gaza as a sovereign entity, towards which Israel does not bear any special duties. On the other hand, concerning the applicability of norms of IHL protecting the welfare of civilians in Gaza – and specifically concerning the Fourth Geneva Convention – the Opinion argues that these are not applicable since Gaza is *not* a state. It is clear that these two opposing views cannot be invoked simultaneously.

¹ H CJ 9132/07 *Bassiouni v. The Prime Minister* (Jan. 30, 2008), ¶12.

² Eyal Benvenisti, *The International Law of Occupation*, Ch. 11 (2012).

³ H CJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* (Jun. 30, 2004), ¶¶36–39 (holding that proportionality is a general principle of international law).

In light of these incoherencies, there is no basis also for the argument found in the Opinion, that it is possible to distinguish between the duty of the state to **supply** electricity, water or any other vital commodity to Gaza, and its duty to **allow** neutral third parties to do so. **This reasoning, if at all, applies to relations between sovereign states, and not to situations where one state holds administrative powers vis-à-vis another entity in regards to supply of essential commodities (while not allowing that entity to develop independent capacities in this context), and unilaterally decides to cut off the supply of these items.**

Due to the same considerations, Israel's control over this infrastructure results also in *positive* obligations. Accordingly, in the event that infrastructure providing electricity and water to Gaza is damaged during the hostilities, and this infrastructure is under Israel's effective control – the latter is under an obligation to attempt to repair them, as far as possible, in order to renew the supply of these basic needs.

2. Cutting of Electricity and Water as Lawful Retorsion or Countermeasure

According to Prof. Bell, preventing the supply of water and electricity to the Gaza Strip is an act of “retorsion” or countermeasure permissible under customary international law. As he argues, the only limitation on such actions relates to interference in the supply of basic humanitarian needs by *others* (third-party states or organizations). Moreover, according to the Opinion, electricity is not a basic humanitarian need, and can therefore be completely cut off. Water, conversely, is such a need, and thus Israel is required to allow third-parties to provide it (but can still halt its own supply).

Beyond the problematic distinction, discussed above, between the duty to provide and the duty to allow provision by third parties (in the Gaza context, where certain control is exercised), we also disagree with the view that electricity is not a basic humanitarian need (it is a precondition for fulfillment of basic needs such as food, medical treatment, education etc.)⁴ Moreover, even if electricity was not such a basic need, the customary law on countermeasures prohibits measures that affect the protection

⁴ Gisha – Legal Center for Freedom of Movement, *Electricity Shortage in Gaza: Who Turned Out the Lights* 7–8 (2010).

of fundamental human rights.⁵ Undoubtedly, immediately disconnecting Gaza from the power grid will have such adverse effects on the civilian population, while Hamas, conversely, will surely supply its own needs. Moreover, the law of countermeasures explicitly holds that such measures must be proportionate to the harm inflicted upon the victim state. It is our opinion that depriving electricity (*a fortiori* water) from more than 1 million persons does not satisfy this condition.⁶

In addition, the concept of *retorsion* (which refers to punitive actions against states not involving a breach of international obligations) is irrelevant to the situation at hand, since it assumes no breach of obligation by the retorting state. Since, as aforementioned, Israel bears international obligations towards Gaza *at least* regarding those powers it holds over the population, we are not dealing here with classic retorsion.

3. Cutting off Electricity and Water as an Economic Sanction

Prevention of electricity (or water) is not merely an “economic” sanction but rather one that directly and indirectly harms the right to life, since life at large and in Gaza specifically (especially during intense hostilities) is dependent on the flow of electricity as a precondition for access to food, medical treatment and drinkable water.

Furthermore, the claim that cutting off electricity is merely an “economic sanction” which can be imposed unlimitedly, disregards the increasing understanding, in recent decades, of the detrimental effects of uncontrolled sanctions on human rights, and especially those of the most vulnerable groups in society – such as children and the elderly. Therefore, the Committee on Economic and Social Rights (CESCR), that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (to which Israel is a party), stressed the following in its General Comment on the relation between economic sanctions and human rights:

[t] is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and

⁵ Draft Articles on State Responsibility for International Wrongful Acts (2001), Art. 50(1)(b).

⁶ *Id.* Art. 51.

the collateral infliction of suffering upon the most vulnerable groups within the targeted country.⁷

In light of the above, and in light of the increasing practice by states and international organizations to prefer “smart” or “targeted” sanctions over general or indiscriminate sanctions, The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission) held the following:

...it seems worthwhile to consider the progress that was made around the world with regard to targeted or "smart" sanctions. It seems that the Israeli government's current policy is more in line with those recommendations; in other words, there should be continued efforts to making the sanctions more focused on the Hamas itself.⁸

In sum, gone are the days in which general and indiscriminate economic sanctions were unequivocally accepted in the international system.

We wish to note that the example of the relations between Ukraine and Crimea, referred to in the Opinion, is not of relevance. First, we cannot accept without further factual analysis that the actions of Ukraine vis-à-vis Crimea are in their entirety in conformity with international law (we express no opinion on this matter). Second – and this is the key issue – the Crimean Peninsula was *de facto* annexed by an independent and sovereign state – Russia, which is perfectly capable of taking care of the energy and water needs of the Crimean population (of course, we say nothing about the *legality* of Russia's actions). The factual situation in Gaza is of course different.

4. “Humanitarian Needs”

In this part of our opinion we address several of the arguments presented by Prof. Bell concerning the humanitarian duties of parties during armed conflicts:

⁷ CESCR, General Comment 8, The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights (1998).

⁸ Turkel Report, Part 1, ¶94.

(a) Attack of Power Plants in Gaza: it is claimed in the Opinion that Israel is permitted to attack power plants in Gaza. It should be noted, that legitimate military objectives are only those objects that make an effective contribution to military action and whose destruction offers a definite military advantage.⁹ In addition, according to the position of the International Committee of the Red Cross (ICRC), power plants may become military objectives only if they are “mainly for military consumption.”¹⁰ Even if one rejects the ICRC’s rather narrow interpretation, it is beyond doubt that in any case, attack on a power plant is subject to the proportionality principle: meaning, the expected harm to civilians cause by the attack must not be excessive in relation to the concrete military advantage reaped from the attack.¹¹ In light of the circumstances in Gaza, it is doubtful whether such an attack could be proportional, *especially* if undertaken in conjunction with cutting off the electrical supply from Israel. Moreover, it should be noted that IHL prohibits attacks on objects indispensable to the survival of the civilian population, whatever the motive. The list of such objects is non-exhaustive and must be analyzed on a case-by-case basis. IHL also prohibits the *removal* of such objects.¹²

(b) Applicability of the Fourth Geneva Convention, Article 70 of Additional Protocol I and International Human Rights Law

It is stated in the Opinion that the Fourth Geneva Convention (GCIV) does not apply to the conflict in Gaza, since it is neither between High Contracting Parties, nor is Gaza occupied. Thus, Article 23 of GCIV, which mandates the free passage of some essential supplies, is irrelevant. First, the international community – including the International Court of Justice and the U.N. Security Council – has explicitly rejected the argument that GCIV is inapplicable in the Israeli/Palestinian context.¹³

⁹ Additional Protocol I (1977), Art. 52(2).

¹⁰ *Cited in* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (2000), ¶39.

¹¹ Additional Protocol I, Art. 51(5)(b).

¹² *Id.* Art. 54(2) (it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, **such as** food-stuffs, agricultural areas ...) (emphasis ours).

¹³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), ICJ (2004) ¶78, ¶¶90-101; S.C. Res. 446 (March 22, 1979). It should added that recently Palestine has requested to become a party to the Geneva Conventions. While Israel does not recognize Palestine’s membership, the fact that many states do will augment the already widely accepted position that GCIV applies in our context.

The Supreme Court of Israel, too, has never expressly accepted this position, and has also held the following (regarding the legal framework applicable in the territories controlled by Israel since 1967):

The powers of the military commander imbibe from the principles of international public law which apply to belligerent occupation. These principles are mostly anchored in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) ... and its Regulations, the provisions of which have the status of international customary law; **the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949, the customary provisions of which form part of the laws of the State of Israel** ... and in the Protocol Additional to the Geneva Conventions of 12 August 1949 ... It has already been found in our rulings that it is possible, at times, to supplement the humanitarian provisions from within **international human rights law**...¹⁴ [emphasis ours]

We likewise add that the Court has ruled that the Israeli-Palestinian conflict is an international armed conflict (for instance, regarding the law on targeting),¹⁵ which makes it even more implausible to argue that GCIV does not apply in the Israel/Gaza conflict. In this context, we stress again the incoherency between Prof. Bell's claim concerning the relations between Israel and Gaza for the purpose of imposing countermeasures and sanctions (implying that these relations are similar to inter-state relations), and his approach towards the applicability of IHL (which relies on the argument that these relations are *not* between states). It is our view that this approach creates a legal "black-hole," in which, *de facto*, residents of Gaza are deprived of the effective protection of international law.

¹⁴ HCJ 3969/06 *Al-Harub v. Commander of the IDF Forces in the West Bank* (Oct. 10, 2009), ¶10.

¹⁵ HCJ 769/02 *Pub. Comm. Against Torture v. The Government of Israel* (14.12.06), ¶¶16–18. In any case, even if the conflict is not a proper international armed conflict, there is growing recognition of similar customary norms of IHL that apply in *all* conflicts, so that the legal implications of this distinction are not substantial. *See, e.g.*, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (Oct. 2, 1995), ¶¶96–127.

In any case, a detailed discussion of Article 23 of GCIV, as well as Article 70 of API (which reflects, in its essence, customary IHL and is thus binding upon Israel)¹⁶ is beyond the main point. While these provisions can be interpreted in different manners (and some might say that Prof. Bell’s interpretation is too narrow), Israel’s actions in relation to Gaza are not limited only by the basic humanitarian obligations stemming from the law on the conduct of hostilities (in the narrow sense). Rather, they are also limited in light of the special situation between Israel and Gaza, as recognized by the Supreme Court in the *Bassiouni Case* discussed above.

It should also be noted that the Opinion does not at all refer to obligations stemming from international human rights law (IHRL). These may be imposed on Israel with regard to the powers it exercises over Gaza –*in addition* to its IHL obligations.¹⁷ We cannot exhaust this issue here, but it would be unreasonable to argue that IHRL does not affect, to a certain extent, Israel’s power to cut off the supply of essential commodities – even if Israel is not in complete control over the territory of Gaza.¹⁸

5. Collective Punishment

It is claimed in the Opinion that prevention of electricity or water does not amount to collective punishment prohibited under international law. As the Opinion holds, unlawful collective punishment includes only penal punishments inflicted upon innocent persons in relation to actions of others, or other acts contrary to “the laws of war regarding **distinction or proportionality**” [emphasis ours]. In our view, this definition of collective punishment is too narrow. In general, it is possible to identify two approaches in the literature and practice concerning the definition of the term: a broad approach and a narrow one. According to the broad approach, prohibited collective punishment includes every act meant to exact a substantial toll on the civilian population because of the actions of individuals. For instance, the commentary on Additional Protocol I states the

¹⁶ ICRC Study on Customary IHL, Rule 55. It should be noted that Prof. Bell’s rigid approach to the development of customary international law does not reflect the reality of contemporary practice, in which customary norms are recognized in a more flexible manner. This is particularly true in the context of IHL. An example is the ICRC’s study on Customary IHL.

¹⁷ Wall Opinion, ¶¶105–106, 109–112.

¹⁸ Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 *Law & Ethics of Human Rights* 47 (2013).

following:

The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.¹⁹

The narrow approach, conversely, posits that the concept of prohibited collective punishment encompasses only actions which deprive protected persons of **rights** entrenched in IHL treaties (and even according to this approach, these rights are wider than those relating to distinction and proportionality, as opposed to the view presented in the Opinion).²⁰ We do not need to resolve the differences between these two approaches here. This is because even according to the narrow position, cutting off electricity and water could amount to collective punishment, since in our view, Israel remains bound by specific provisions of IHL, when exercising the powers it still holds vis-à-vis Gaza. It should be emphasized, that even if one adopts the position that cutting off such services does not amount to collective punishment, our conclusion still remains that such action is unlawful, in accordance with the reasoning detailed above.²¹

Last, as opposed to the claim in the Opinion, nothing can be concluded from the fact that no person was yet indicted in international criminal tribunals for the imposition of “economic sanctions” as a type of collective punishment. As is well known, the international criminal system is in constant development and has yet to address all possible issues. Moreover, even if actions of this sort do not amount to an international crime (and we do not take any position on this question), they can still constitute an international wrongful act in the context of state responsibility.

6. **In sum**, the Opinion is a far cry from the acceptable discourse in contemporary international law, both generally and specifically in the context of Israel and Gaza. As such, it is highly improbable international body of import will view it favorably. Israel

¹⁹ Commentary on Additional Protocol I ¶3055. See also ICRC Study on Customary IHL, Rule 103.

²⁰ Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles* 42 Isr. L Rev. 117, 131–132 (2009).

²¹ It should be noted that the Turkel Report also seems to support this conclusion, by holding that even actions that do not amount to collective punishment *stricto sensu* can be prohibited, if the cause disproportionate harm to innocent third parties. Turkel Report, ¶105.

and Gaza are not equal sovereign entities. Israel has controlled Gaza for decades, which resulted in significant dependence on Israeli infrastructure. Even after the disengagement, it still holds certain powers over the population in Gaza – including by its control over essential infrastructure. Since Israel does not allow, *de facto*, the development of independent infrastructure in Gaza, it cannot completely deny the responsibility to provide these essential supplies. Therefore, the interpretation suggested in the Opinion does not reflect a proper balance between the different objectives of IHL – even when considering the special challenges of asymmetric warfare. Chiefly, this is because it results in a legal “black hole” which deprives the civilian population of the effective protection of international law.

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