

Israel May Stop Supplying Water and Electricity to Gaza

A Legal Opinion

**Prof. Avi Bell, Senior Fellow
Kohelet Policy Forum**

Tammuz 5774 – July 2014



Israel May Stop Supplying Water and Electricity to Gaza

A Legal Opinion by Professor Avi Bell, Senior Fellow at Kohelet Policy Forum
(updated and expanded 24 July 2014)¹

In March, Ukraine cut off electricity to Crimea, a Russian-occupied Ukrainian peninsula now belligerently occupied by Russia. The New York Times reported that “homes and businesses went dark ... underscoring the vulnerability of the geographically isolated peninsula, which is dependent on mainland Ukraine for many vital services, including electricity and much of its water supply.”² Ukraine was retaliating against Russia for its seizure of the peninsula. Ukraine's action hurt primarily Crimean civilians. No one suggested Ukraine had broken any law.

Ukraine restored power, but soon thereafter it cut the water supply. On May 26, the Kyiv Post reported that Russian Prime Minister Dmitry Medvedev was up in arms about the Ukrainian government's decision to build a dam to cut off the North-Crimean Channel and reduce the flow of water to Crimea by up to 90%. Crimea relies on Ukraine for some 85% of its water. Medvedev labelled the Ukrainian moves an “absolutely unfriendly and politicized act.”

What Medvedev did not do was call the action a war crime or a crime against humanity. Neither did any of the self-appointed international watchdogs for human rights. So far as I can find, Human Rights Watch, Amnesty International, and even the UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (yes, there really is an official with that title) had nothing to say about it. Nor, so far as I can find, did any legal scholar opine that Ukraine had violated international law by stopping to supply water.

By contrast, it has been argued that nine years after it relinquished all control over the Gaza Strip, Israel is legally required to ensure that Israeli companies (the Israel Electric Company and Mekorot) continue to provide electricity and water to the Gaza Strip.

Israel provides approximately 120 megawatts of electricity to the Strip, which is estimated as 25-50% of the Gaza Strip's normal needs. Israel also provides approximately 5 million cubic meters of water to the Strip, of an estimated need of 185 million cubic meters. Gaza's reliance on Israeli supplies is thus much smaller than Crimea's reliance on Ukrainian supplies.

Israel relinquished control of the Gaza Strip nine years ago; Ukraine lost control of Crimea approximately four months ago. Crimean dependence on Ukraine is thus of much more recent vintage than Gazan dependence on Israel, and more clearly the result of Ukrainian decisions.

Israel has, in the past, reduced the flow of electricity and other goods to the Gaza Strip, and the case of HCJ 9132/07 Bassiouni v. Prime Minister (2008), Israel's Supreme Court approved such steps.

There is no record of any international practice according to which states are required to provide electricity and other goods to territories they do not control absent specific agreements requiring supply. Nor is there any international treaty that requires states to supply such goods absent specific agreements.

Yoram Dinstein has written that “the notion that a Belligerent Party in wartime is duty bound to supply electricity and fuel to its enemy is plainly absurd.”⁴ Dinstein has added that “it is impossible to assert ... that [there is] a general right to humanitarian assistance ... in peacetime, not even when natural disasters strike.”⁵

Nonetheless, some have argued that international law requires Israel to supply Gaza with electricity and water.

This legal opinion demonstrates that the arguments against Israel are without legal foundation in international law.

¹ This opinion both expands and clarifies a shorter version published earlier by Kohelet. This version both corrects a number of printing, translation and clerical errors, and addresses a large number of comments I received on the earlier version. I thank the many people from whom I received constructive comments.

1. Legal “Vacuum”

Some have argued that Israel must be legally bound to supply electricity to the Gaza Strip, because otherwise Gaza civilians would be left in a “black hole” or “legal vacuum” in which they would be unprotected.

This argument is in diametric opposition to the basic principles of international law.

The notion that “legal vacuums” are an impossibility and that there must, therefore, be a legal duty to fill the vacuum is alien to the most basic principle of international law. Under international law, states are free to act as they see fit until and unless specific provisions of international law deny them that right. This rule was established by the famous *Lotus* case,⁶ in which a French vessel crashed into a Turkish vessel, causing the death of eight Turks. Turkey sought to bring criminal charges against a French officer in command of the French boat. The Permanent Court of International Law ruled that there was no international law granting Turkey jurisdiction, or denying Turkey jurisdiction. Given the legal vacuum, Turkey could do what it wanted and try the French officer despite French objections. Turkey could do anything it wanted until and unless a specific rule of international law instructed otherwise.

In other words, to the degree that there is a “black hole” or “legal vacuum,” Israel is entitled — like any other state — to exercise its sovereign power to implement any policy it wishes to implement.

There is little doubt that the *Lotus* principle — allowing states to do anything which is not specifically prohibited by international law — is still good law. For example, the International Court of Justice used the *Lotus* principle in 2008 to determine that Kosovo was permitted to issue a unilateral declaration of independence, because there was no specific rule of international law forbidding such a declaration.⁷

Needless to say, neither the *Lotus* decision nor any subsequent case stated that a different, more restrictive rule applies to the Jewish state.

2. Collective Punishment and Retorsion

Some have argued that discontinuing supply of electricity, water and other goods would constitute unlawful collective punishment. Collective punishment is illegal under the laws of war.⁸

However, while international law certainly bars “collective punishment,” withholding water and electricity does not constitute collective punishment. The bar on collective punishment forbids the imposition of criminal-type penalties on individuals or groups on the basis of another’s guilt, or the commission of acts that would otherwise violate the rules of war. Withholding Israeli-supplied electricity or water would not involve the imposition of criminal-type penalties or violation of the rules of war. As Professor Amichai Cohen writes “there is no support of the assumption that the prohibition on collective punishment adds obligations other than those specified in the ... [Geneva] conventions.”⁹

Indeed, there has never been a prosecution for the war crime of collective punishment on the basis of economic sanctions. It is striking that many of the critics that have called Israel’s prior actions of withdrawing of economic aid “collective punishment” have themselves called, for the imposition of economic sanctions or the withdrawal of economic aid against Israel and other countries¹⁰ or, at least, have claimed to have “no position on [the legality of] punitive economic sanctions and boycotts.”¹¹ While there have been those who have argued that international law ought to restrict the imposition of economic sanctions, they have also acknowledged that such restrictions do not currently exist in international law.¹²

In 2008, in HCJ 9132/07 *Bassiouni v. Prime Minister*, Israel’s Supreme Court ruled that reductions in electric and other supplies to Gaza did not constitute collective punishment.

Even if Israel did intend to use discontinuation of the supply of electricity and other goods as “punishment” of the political unit on which the sanctions were imposed, imposing economic sanctions on foreign territory is not considered collective punishment, and is therefore legal, despite the ancillary effects on civilians, so long as there is no specific treaty provision forbidding such economic sanctions. The use of economic and other non-military sanctions as a means of disciplining other international actors for their misbehavior is a practice known as “retorsion.”¹³ It is generally acknowledged that any country may engage in retorsion.¹⁴ Indeed, it is acknowledged that states may

even go beyond retorsion to carry out non-belligerent reprisals non-military acts that would otherwise be illegal (such as suspending flight agreements) as counter-measures.¹⁵ Since Israel is under no legal obligation to engage in trade of fuel, electricity or any other commodity or service with the Gaza Strip, or to maintain open borders with the Gaza Strip, it may withhold commercial items and seal its borders at its discretion, even if it adopts these measures as “punishment” for Palestinian terrorism.

International practice clearly shows that refusal to supply goods — from the Arab League boycott of Israel, to the OPEC oil embargo, to US sanctions on Cuba, to internationally imposed sanctions on Iran and apartheid South Africa — is widespread and is not considered collective punishment in international law. There is no treaty or international practice limiting states solely to “smart” or “targeted” sanctions.

It has been argued that since the Gaza Strip is not a state, Israel is not entitled to engage in economic sanctions or other acts of retorsion against it. However, there is nothing in international law that forbids economic sanctions against non-states. There is no treaty stating states must supply good to territories it does not control simply because they are non-states. There is no international practice indicating that states must supply goods to territories they do not control because they are non-states. There is no international practice indicating that states may not use acts of retorsion to punish international actors that violate rules of international law (such as terrorist organizations) simply because the international actors in question are non-states. The argument that the Gaza Strip has the right to block Israeli retorsion or demand goods because it is not a state finds no support whatsoever in international law.

On the contrary, economic sanctions can be and are imposed on non-state actors. Non-state actors are capable of bearing international responsibilities, and of being legally punished for violation of those responsibilities. Armed groups (such as Hamas), for example, are legally bound to follow the laws of war, and when they fail to do so, their war criminals are liable to prosecution. Economic sanctions can be imposed on terrorist organizations; indeed, international law mandates some kinds of economic sanctions against terrorist organizations. The government of the Gaza Strip, though not a government of a state, is a terrorist organization. It violates international legal obligations on an ongoing basis and obviously states may employ legal countermeasures.

The Gaza Strip has fewer, not more, grounds to complain about Israeli retorsion since it is not a state. States have the entitlement to sovereignty, and with that entitlement comes a legal right to block certain kinds of interference with their sovereignty. Since the Gaza Strip is not a sovereign state, it cannot complain of interferences with its sovereignty. Even if economic sanctions against Gaza were of the type that would be considered interfering with the sovereignty of a state, as a non-state, Gaza would have no legal grounds to complain.

3. Humanitarian Supplies

Some have argued that Israel is required to supply electricity and water to the Gaza Strip because Israel is currently involved in an armed conflict with Hamas, the terrorist organization that acts as the de facto government of Gaza.

Yoram Dinstein writes, “it is impossible to assert ... that [there is] a general right to humanitarian assistance ... in peacetime,”¹⁶ but there is a duty not to interfere with certain humanitarian goods during wartime. This duty is a limited one. There is no indication in international practice or any treaty of a duty to supply humanitarian goods to the civilian population of the enemy.

This distinction between non-interference (required) and supply (not required) has been the subject of some commentary.¹⁷ In describing the duties related to humanitarian supplies, Professor Dinstein states that a duty may be imposed upon a state to supply humanitarian assistance to civilians in territory it controls, and not to interfere with essential provisions that are already available. However, he adds, “the right to humanitarian assistance—as it exists under contemporary international law—is quite limited in scope.”¹⁸ Professor Yuval Shany writes that while there is a “duty to allow passage of humanitarian relief supplies ... [w]arring parties are not generally required by IHL to provide each other with basic supplies.”¹⁹ There is no international practice indicating a duty to supply territories out of a state's control.

Several treaties describe the duty not to interfere with the passage of humanitarian treaties.

Article 23 of the Fourth Geneva Convention requires parties to certain conflicts to permit transit of a limited number of items to enemy civilian populations under a limited set of conditions.²⁰ However, the fighting in and around the Gaza Strip is not a conflict covered by the Fourth Geneva Convention: the conflict is not one between state parties to the Convention, and Gaza is not occupied territory.²¹ Therefore, Israel is free to ignore the injunctions of Article 23, except to the extent that article 23 reflects customary law.

Article 70 of the First Protocol Additional to the Geneva Conventions of 1977 creates a slightly broader duty regarding the provision of food, medical supplies, clothing, bedding, means of shelter and “other supplies essential to the survival of the civilian population.”²² Israel, however, is not a party to the First Protocol and is therefore not bound by the provisions of Article 70, except to the extent that article 70 reflects customary law.

In 2008, in HCJ 9132/07 Bassiouni v. Prime Minister, the Israel Supreme Court treated these articles as if they reflected customary international law, but still found that Israel has the right to reduce electric supplies.

There is no customary practice supporting the claim that states are obliged to supply electricity and water to enemy territories, and none was cited in the judgment. Indeed, recent examples show just the opposite: Ukraine's decision to cut off Crimea's water supply is an important recent example.

Assuming that the treaty provisions mentioned above reflect international law, Israel would still have the right to stop supplying the Gaza Strip. Article 23 of the Fourth Geneva Convention only requires a party to permit passage of food, clothing and medicines intended for children under fifteen, expectant mothers and maternity cases.²³ Were Article 23 to apply, Israel would still be under no obligation to permit the passage of electricity, fuel or any items other than food, clothing or medicine. Article 70 of the First Protocol Additional to the Geneva Conventions has a longer list of goods with which parties must not interfere; however, Article 70 does not list fuel and electricity as items for which passage must be permitted.

Moreover, under Article 23, Israel would be under no obligation to provide anything itself; Israel would only be required not to interfere with consignments of food and so forth sent by others. Likewise Article 70 does not place any duty on warring parties to supply the required items. It imposes a general duty on all states to organize “relief actions,” and on the warring parties not to interfere with the actions. Thus, under Article 70, Israel would have no obligation to provide fuel or electricity; indeed, it would not even have any particular duty to provide food and medicine. At most, Article 70 would require Israel to permit passage to others' shipments of food and medicine, which Israel already does without reference to Article 70.

There is excellent reason to believe that, unlike food and medical supplies, electricity is not even a necessary humanitarian good under the laws of war, and thus Israel does not have to allow even third parties to send electricity to the Gaza Strip. As the Supreme Court noted in Bassiouni, Article 70 of the First Additional Protocol (which forbids interference in the passage of humanitarian goods) is often read in conjunction with Article 54 of the same treaty, which forbids targeting certain humanitarian targets (foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works) if the targets are aimed at “for the specific purpose of denying them for their sustenance value to the civilian population.” Specifically, the Supreme Court indicated that the types of protected humanitarian goods whose passage is protected can be read together with the types of installations that are protected. However, there is a widespread practice of targeting electric plants during wartime²⁴ and the practice is supported by statements of the International Committee of the Red Cross. It follows that electric plants do not enjoy special protection in war, and electricity is not a specially protected humanitarian good. Indeed, it would be paradoxical to say that a state is permitted to destroy the enemy's electric plants, but is required to supply its own electricity to the enemy. As Dinstein explains, “relief consignments can include only essentials, such as food, water, medications, clothing, bedding, and means of shelter.”²⁵ Electricity and fuel are not among them.

In Bassiouni, the petitioners claimed that electricity should be seen as a necessary humanitarian good because Palestinians in the Gaza Strip need it for hospitals and the operations of water plants. Needless to say, the petitioners did not show any legal precedent for this interpretation of international law for the obvious reason that there is no such precedent. Nonetheless, the state, in response, stated that it was reducing electricity in a small amount that

would not interfere with hospitals and water facilities. On that factual background, the Court ruled that reducing electricity did not violate what it interpreted as a customary law not to interfere with humanitarian supplies. The state's position in the case hints that the state assumed — incorrectly — that Israel had some legal duty to supply a minimal level of electricity.

Water, by contrast, is a humanitarian good. If the treaty provisions apply, Israel is forbidden to interfere if third parties want to supply water to Gaza Strip civilians. Nonetheless, the treaties do not require Israel to supply the water itself. Moreover, since the treaties probably do not apply, and there is no customary practice showing that states are required to supply water to an enemy civilian population, there is no reason to believe there is any legal duty according to which Israel must supply water.

Israel currently imposes a naval and air blockade on the Gaza Strip. In a blockade, the blockading party has a duty to permit the passage of humanitarian goods. However, this does not add anything to the duties that Israel would have under articles 23 and 70. Indeed, Dinstein notes that “although no explicit reference to blockade is made in article 23(1) [of the Fourth Geneva Convention], there is no doubt that blockade constitutes the background of this clause.”²⁶

According to article 102 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, a non-binding set of rules that are thought to reflect some provisions of customary law, it is forbidden to establish a blockade for the “sole purpose of starving the civilian population or denying it other objects essential for its survival.” Likewise, article 54(1) of the First Additional Protocol to the Geneva Conventions states that “starvation of civilians as a method of warfare is prohibited.” Israel is not a party to the Protocol, and thus is not bound by this rule as a matter of treaty law. However, it is likely that both articles reflect customary law. Thus, it would be forbidden for Israel to stop supplying electricity (or to take any other action) whose motivation was to starve the civilian population. The same actions, however, are permitted if motivated by permissible motives, such as saving Israeli resources, preventing aid to Hamas combatants, or imposing economic sanctions on the rulers of Gaza.

4. Control and Occupation

Some of have argued that Israel is required to supply the Gaza Strip because Israel allegedly maintains control over Gaza. There are two versions of this claim: one version claims that Israel belligerently occupies the Gaza Strip; the other claims that Israel “controls” the Gaza Strip for purposes of human rights treaties or “post-occupation” duties even though it neither occupies nor exercises sovereignty over the Gaza Strip.

When it controls territory through belligerent occupation, a state may have the duty supply certain goods to a civilian population if there is no other way to ensure access to the goods. Similarly, when it controls territory over which it has lawful sovereignty, a state may have the duty to supply certain goods when human rights treaties demand their provision to the civilian population.

However, Israel does not control the Gaza Strip for purposes of the law of belligerent occupation or human rights duties. Thus, Israel cannot be held to a duty to supply.

Israel clearly does not belligerently occupy the Gaza Strip. One of the most basic conditions for a belligerent occupation is that the occupying state exercise “effective control” over the occupied territory. The Naletilic decision of the International Criminal Tribunal for the Former Yugoslavia²⁷ recited several factors indicating an occupier's effective control, including that the local authorities must be incapable of functioning publicly, the occupier must have force present on the ground (or at least capable of being projected in a reasonable time to make authority felt) and the occupier must enforce directions to the civilian population. Similarly, as the Nuremberg Tribunal ruled in the case of Wilhelm List and others (the Hostages Case), “an occupation indicates the exercise of governmental authority to the exclusion of the established government,” meaning that the local “civil government [should be] eliminated.”²⁸

These factors demonstrate that Israel does not have control over Gaza. There is a local independent administration in the Gaza Strip that does not answer to Israel (and in fact, openly and repeatedly carries out belligerent attacks against Israel). Israel does not have troops regularly deployed in Gaza, and it can only deploy such troops through heavy and difficult fighting. The local civilian population does not answer to Israel. Israel has no local administration. As Yuval Shany wrote, “the territory is governed by an effective Palestinian government, not the Israeli government.”²⁹ It is simply not plausible to argue that Israel exercises effective control over the Gaza Strip.

In 2008, in HCJ 9132/07 Bassiouni v. Prime Minister, Israel's Supreme Court explicitly rejected the notion that Israel had effective control over the Gaza Strip or that it could be considered an occupier.

In an astounding bit of circular reasoning, some nevertheless argue that the fact that Israel supplies Gaza with electricity, water and other goods proves that Israel has “control” over key aspects of life in Gaza. They then argue that because Israel exercises “control” over Gaza (by providing the goods), Israel is legally bound to provide the very same goods that show that Israel controls Gaza. Needless to say, no treaty or international practice is adduced to support this circular reasoning. For instance, Singapore vitally depends on imported water from Malaysia, but no one has ever argued that Malaysia owes legal duties to Singapore as a result of this “control.” A rule that viewed exporting key goods as “control” requiring the exporting state to continue exporting the good indefinitely would also be extremely counterproductive. No state would ever want to export key goods like water to a dependent state lest it be trapped into providing the good forever.

Additionally, it should be noted that the more logical conclusion of an argument that supplying electricity and water constitutes a means of “control” over Gaza is that Israel should end its supply of electricity and water in order to complete its withdrawal from Gaza and relinquish control.

A different version of the argument that Israel “controls” the Gaza Strip acknowledges that Israel does not exercise effective control over the Gaza Strip within the meaning of the law of belligerent occupation. Nevertheless, it is argued, Israel should be seen as bearing greater duties to the Gaza Strip due to the law of “post-occupation,” according to which a state which formerly belligerently occupied a territory continues to have heightened legal duties towards it.

This argument appears to have been invented in large part against Israel alone. There is no treaty that creates such legal duties. There is no legal precedent for demanding such duties. There is no historical practice supporting the notion of a customary law of post-occupation duties. While there is considerable academic discussion about post-occupation duties, the discussion clearly relates to the question of whether such a body of law should be created, not whether it already exists.³⁰ There is no reason for Israel to assent to subjecting itself to such duties given that there is no set of legal duties post-occupation under the law as it is today.

Alternatively, some argue that Israel has a duty of supply that stem from a human rights treaty called the International Convention for Economic, Social and Cultural Rights. Among other provisions, the treaty calls for states to aim to ensure (though not to provide immediately) various material items and government services, such as social security, employment, schooling, homes and health (though not electricity or fuel). Because the treaty does not specify the territory to which it applies, it is claimed that it must apply outside of the state's control, and therefore Israel should be held responsible to provide everything demanded by the treaty.

This interpretation of the Convention is mistaken. According to a basic law of treaty interpretation, treaties apply to the “entire territory” of a state party, but not outside the state. Article 29 of the Vienna Convention on the Law of Treaties. There is some dispute about exactly how far the territory of a party extends for purposes of this clause. But there is little doubt that a place where a state has neither effective control nor legal title is outside its territory. Israel cannot exercise its jurisdiction in Gaza and cannot be held responsible for enforcing the International Convention for Economic, Social and Cultural Rights there. It should be noted if that states were responsible for providing the rights in the treaty outside their boundaries of control, states like Chile and Thailand could claim that Canada and Japan had violated their international legal rights by not providing housing for all Chileans or Thai. Israel would be required to provide Gazans with social security, education and employment. This is an obviously absurd result.

5. Bassiouni

In HCJ 9132/07 Bassiouni v. Prime Minister (2008), Israel's Supreme Court ruled that an Israeli decision to reduce its supply of electricity and fuel to the Gaza Strip did not violate Israeli administrative law or customary international law.

Nevertheless, there are those who argue that the Bassiouni decision actually proves that Israel has a legal duty to provide electricity and fuel in some amount to Gaza. In order to prove this, they quote part of the obiter dicta (the non-binding parts of the opinion) which seems to suggest such a duty.

The key paragraphs of obiter dicta they quote — paragraphs 11-12 say:

11. The question confronting us is whether the various restrictions upon the supply of fuel and electricity to the Gaza Strip harm the essential humanitarian needs of the residents of the Gaza Strip. ... [T]he State of Israel is under no obligation to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances in which some of these commodities are in practice being used by the terrorist organizations in order to attack Israeli civilians. The duty of the State of Israel derives from the essential humanitarian needs of the inhabitants of the Gaza Strip. ...

12. ...We note that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. ... In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. ... In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these obligations also derive 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.

Taken out of context, these paragraphs seem to recognize a duty under international law for Israel to supply a minimum amount of electricity to the Gaza Strip as required for humanitarian needs. Closer examination, however, undermines this conclusion.

Most importantly, the last sentences which talk about the sources of potential Israeli obligations do not establish a legal rule of any kind. They identify several facts from which legal duties may arise. The court does not, in fact, identify any legal rule which imposes such duties. Additionally, whatever the speculated legal rules may be, they are not adopted by the court as binding, as they are expressed in obiter dictum. The ruling of the Bassiouni case is that Israel may reduce the electricity and fuel supply under the case's facts, not that a law *requires* Israel to provide electricity and fuel.

It is not clear that the court intended to recognize any new legal rule at all. The government decision that authorized cutting electricity (and whose implementation was judged by the court in Bassiouni, stated that "... *the passage of goods to the Gaza Strip will be limited, the supply of fuel and electricity will be reduced and restrictions will be imposed upon the movement of persons to and from the Strip. The restrictions will be implemented bearing in mind the legal ramifications of the humanitarian situation in the Gaza Strip, in order to prevent a humanitarian crisis.*"³¹) Thus, the ruling of the Bassiouni case was based upon a government directive forbidding cutting the supply of electricity and fuel beyond a certain level. The court's nonbinding statement implying that Israel had a legal duty to supply such goods was not necessarily the conclusion of an examination of international law; it was just as likely a restatement of an assumption of the government that was binding for a particular decision only..

To the degree that the court did examine the law, it did not identify any source of a duty in international law to supply goods to a territory not controlled by the state or define that duty.

The result is that even Israeli commentators who wished to argue that the nonbinding statements in the decision proved Israel did have a duty to supply electricity to Gaza were unable to agree on the meaning or rationale of such a rule. They have therefore offered numerous, inconsistent readings of the court's nonbinding remarks. One jurist attributed the court's remarks to the Court "accept[ing] once again the government's position that it needs to attend to the local population's 'basic humanitarian needs.'"³² Another stated that the rationale of the Court was that it recognized "post-occupation obligations."³³ A third claimed that the Court recognized a "penumbral source of obligations or rather a heightened level of humanitarian obligation towards the Gaza Strip somewhat beyond the confines of the law of Armed Conflict."³⁴ A fourth claimed that the Court must have decided that international human rights law reaches into territory outside Israel's effective control, because a duty to supply could not be

justified under the Geneva Conventions.³⁵ A fifth wrote that “the notion that a Belligerent Party in wartime is duty bound to supply electricity and fuel to its enemy is plainly absurd [and] the sole reason for the existence of an obligation to ensure such supplies for the benefit of the civilian population — even at a minimal level — is that the occupation is not over.”³⁶

How to interpret the non-binding parts of the court's opinion is a mystery, but not one that is legally important. The binding part of the opinion clearly states that Israel has legal authority to reduce supply of electricity and fuel to the Gaza Strip. To the degree one reads the non-binding parts to say that customary international law creates a duty to supply electricity, fuel and other goods to a territory that is not controlled by the state, “the Court's opinion warrants criticism.”³⁷

-
- 2 <http://www.nytimes.com/2014/03/25/world/europe/ukraine-pulls-all-its-forces-out-of-crimea.html>.
 - 3 <http://www.kyivpost.com/content/ukraine/medvedev-slams-ukraine-for-cutting-off-water-supply-to-crimea-349485.html>.
 - 4 Yoram Dinstein, *The Law of Belligerent Occupation* 279 (Cambridge University Press, 2009).
 - 5 Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 *Naval College Review* 77 (2000).
 - 6 S.S. “*Lotus*”, *France v Turkey*, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927, Permanent Court of International Justice
 - 7 *Accordance with International Law of the Unilateral eclaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 404 (July 22).
 - 8 Article 33 of the Fourth Geneva Convention. The prohibition on collective punishment appears in several other treaties, such as Protocol I Additional to the Geneva Conventions of 12 August 1949 (to which Israel is not a party) and the Third Geneva Convention (to which Israel is a party). In any event, the prohibition on collective punishment is considered to reflect customary international law. See Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 21 (2005).
 - 9 Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 *Israel Law Review* 117 (2009).
 - 10 See, for example, “*Sudan: Joint Letter to UN Security Council*”, <http://www.amnesty.org/en/library/asset/AFR54/025/2006/en/dom-AFR540252006en.html> (calling for “targeted” and “personal” economic sanctions against Sudan) and “*Nepal: Heads of Three Human Rights Organizations Call For Targeted Sanctions*”, April 18, 2006, <http://www.amnesty.org/en/library/asset/ASA31/019/2006/en/dom-ASA310192006en.html> (calling for “targeted” and “personal” economic sanctions against Nepal). See also “*Cuba: Questions and Answers on the Work of Amnesty International*”, Amnesty International, <http://www.amnesty.org/en/library/asset/AMR25/003/2002/en/dom-AMR250032002en.html> (claiming disingenuously that “Amnesty International takes no general position on the legitimacy of economic sanctions against governments or armed groups anywhere in the world”).
 - 11 “*Sierra Leone: Cutting the Link Between Diamonds and Guns*”, May 31, 2000, <http://www.amnesty.org/en/library/asset/AFR51/027/2000/en/dom-AFR510272000en.html>.
 - 12 Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 *Israel Law Review* 117 (2009).
 - 13 *Encyclopedia of Public International Law*, 335 (1986); *Oppenheim’s International Law*, 134 (H. Lauterpacht ed., 7th ed. 1952).
 - 14 Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 7 (1984).
 - 15 See generally Lori Fisher Damrosch, “*Retaliation or Arbitration — or Both? The 1978 U.S.–France Aviation Dispute*”, 74 *Am. J. Int’l L.* 785 (1980).
 - 16 Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 *Naval College Review* 77 (2000).
 - 17 Some have argued that the distinction between non-interference and supply only applies between states. There is no evidence in any treaty, international practice or scholarly writing for such a claim.
 - 18 Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 *Naval College Review* 77 (2000).
 - 19 Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel*, 42 *Isr. L. Rev.* 101 (2009).
 - 20 Geneva Convention IV, article 23.
 - 21 Geneva Convention IV, article 2.
 - 22 Article 70 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.
 - 23 Geneva Convention IV, article 92.
 - 24 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.”)
 - 25 Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 *Naval College Review* 77 (2000).
 - 26 Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 *Naval College Review* 77 (2000).
 - 27 ICTY, TC, *Prosecutor v. Mladen Naletilić and Vinko Martinović* (Judgement), IT-98-34-T (31 March 2003)
 - 28 *United States of America v. Wilhelm List et al.*, 8 *Law Reports of Trials of Major War Criminals* 38, 55-56 (United Nations War Crimes Mission 1949).
 - 29 Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel*, 42 *Isr. L. Rev.* 101 (2009).
 - 30 See, for example, Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel*, 42 *Isr. L. Rev.* 101 (2009) referring to claims of post-occupation duties as an “innovative theory.”
 - 31 Paragraph 2
 - 32 Michael Karayanni, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* 52 (Oxford University Press, 2014).
 - 33 Eyal Benvenisti, *The International Law of Occupation* 89 (Oxford University Press, 2d ed., 2012).
 - 34 Galit Raganu, *Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel’s Supreme Court*, in 13 *Yearbook of International Humanitarian Law* 61 (2010).
 - 35 Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel*, 42 *Isr. L. Rev.* 101 (2009).
 - 36 Yoram Dinstein, *The Law of Belligerent Occupation* 279 (Cambridge University Press, 2009).
 - 37 Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel*, 42 *Isr. L. Rev.* 101 (2009).
-

Prof. Avi Bell

Senior Fellow, Kohelet Policy Forum

Avi Bell is an expert in international law and the law of war. He is a member of the faculties of law at both Bar-Ilan University and the University of San Diego.