

Cutting off electricity and water supply for the Gaza Strip
Limits under international law

Preliminary expert opinion
submitted by

Michael Bothe

Dr.iur., Professor emeritus of international Law, J.W. Goethe University, Frankfurt/Main

In the light of reports concerning possible Israeli plans to completely cut off the water and electricity supply delivered from Israel to the Gaza Strip, I have been asked to furnish a legal expert opinion on the legality or illegality of such a measure under international law. In this context, an English translation of highlights from an opinion submitted by Prof. Avi Bell has been communicated to me. That opinion holds that, at least in principle, such a measure would be lawful under international law. With due respect, I come to a different conclusion.

In the meantime, it has been reported that these measure have been executed, at least in part, and that parts of the power distribution system have been put out of function by artillery fire. If and to the extent that these reports are true, these facts may be evaluated in the light of the legal rules developed below. But it cannot be the purpose of the present opinion to express any view on the facts which are developing on the ground, and consequently, the legal reasoning may not be understood as uttering a judgment on any concrete measure taken by Israel.

1. Applicable law

The answer to the question thus posed is to be found in international humanitarian law and, to the extent applicable in armed conflict, international human rights law. As there is an armed conflict between Israel and the Palestinian side, the rules relating to countermeasures in times of peace are not relevant to the problem at stake.

As to international humanitarian law, relevant rules may be found in the Fourth Geneva Convention. From a technical point of view, its applicability may be controversial. The customary law character of the rules relevant for the question which is the object of this opinion seems, however, to be uncontroversial. As Israel is not a Party to Protocol I Additional to the Geneva Convention, its rules can only be applied as far as they reflect customary international humanitarian law.

As to countermeasures under international humanitarian law, it must be emphasized that “reprisals” against various types of protected persons are prohibited.

2. The status of the Gaza Strip under international humanitarian law

For the purpose of answering the question posed, the question whether the Gaza Strip still constitutes territory occupied by Israel is decisive. As the Israeli Supreme Court held in *Bassiouni v. the Prime Minister*, the Occupying Power has the duty to provide for the welfare of the population of the occupied territory. If the territory is no longer occupied, the duties of Israel as a party to the armed conflict, according to the Court, are limited to not preventing supplies ensuring a humanitarian minimum of essential supplies for the civilian population. The Court further held that due to the withdrawal of Israel from the Gaza Strip, it had lost the effective control of that territory and, therefore, was no longer an occupying power, and consequently no longer bound by the said duty to provide for the welfare of the population.

With due respect, it is submitted that the Court could and should reconsider that conclusion. It should be taken into account that the withdrawal was not as complete as it should have been in order to terminate Israel’s position and ensuing duties as an occupying power. Israel continued to control access to Gaza from land (except for a relatively short border line with Egypt, which however was closed pursuant to an understanding between Israel and Egypt), from the sea and from the air. Israel, thus, remained in full control of the lifelines of the Gaza Strip. It is submitted that this is at least equivalent to a *de facto* control which, according to Art. 42 of the Hague Regulations, is constitutive for an occupation.

If this line of argument is accepted, the cut of electricity and water supply would be a violation of Israel’s duty to provide for the welfare of the population. Even if relief actions are undertaken by third parties, this does not relieve the occupying power of that duty (Art. 60 GC IV).

3. The question of special post-occupation duties

In addition, it is submitted that there are at least special post-occupation duties if an occupying power withdraws from an occupied territory under conditions such as those of the Israeli withdrawal of 2005.

The law of belligerent occupation, as it is formulated in GC IV and is enshrined customary law, contains safeguards against an occupying power trying to evade its duties by changing the status of the territory Arts. 47, 54). The case expressly regulated in Art. 47 is so to say

the contrary of what happened to the Gaza Strip, namely annexation. But the underlying purpose of Articles 47 and 54 is not limited to the changes specifically mentioned in Art. 47 as not depriving the population of the protections provided by the law of occupation. A withdrawal which does not give back to the territory in question its complete powers of government which would enable the authorities of the territory to provide themselves for the welfare of the population is subject to that broad purpose defining invalid (in the sense of not affecting the protections of the population) status changes. Thus, the change in status which Israel may have tried to achieve by its withdrawal could not deprive the population of the benefits of the law of occupation.

If this line of argument is accepted, the cut of electricity and water supply would be a violation of Israel's duty to provide for the welfare of the population.

The Israeli Supreme Court, in its *Bassiouni* decision, at least seems to allude to a related argument when it stresses "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".

4. The duty to maintain certain supplies under general humanitarian law

Israel's duty to ensure a humanitarian minimum of supplies for the Gaza Strip was recognized by the Israeli Supreme Court in *Bassiouni*. The Court, however, does not really specify the legal basis of this duty. As a consequence, the opinion by Prof. Bell, mentioned above, criticizes the Court (as will be shown erroneously).

A first point of Prof. Bell's critique is derived from an analysis of the provisions of GC IV and AP I on relief. As the ICRC has shown in its Customary Law Study, Art. 70 AP I constitutes customary law. Bell argues that even if the supplies in questions constituted relief goods the passage of which had to be allowed under Art. 23 GC IV and the customary law rules corresponding to Art. 70 AP I, these rules only applied to third parties undertaking relief operations, but not to direct supplies furnished by a party to the conflict. Consequently, Bell argues, the said rules do not constitute a basis for an obligation of Israel not to cut supplies. That line of reasoning is flawed as being excessively formalistic. The situation of the Gaza Strip is special. At least on the basis of a first search, there are indeed no cases concerning a duty of a party to a conflict to provide electricity and water to the other side. In such a case, the argument that everything is permitted in the absence of a specific practice is incorrect. The solution has to be found in applying general principles which form part of customary law. The principle underlying the customary law rules concerning relief is to ensure that the basic needs of a population continue to be met under the conditions of an armed conflict.

The supply cuts discussed here would (subject to the discussion of the specific commodities below) infringe that basic principle.

The same conclusion can be derived from applying a general principle of law. According to Bell's argument, Israel would have to allow the passage if a third party were to furnish those supplies (if that was a practical possibility). Applying the general principle (derived from Roman law) "nemo petit quod statim redditurus est"¹, Israel is prevented from barring supplies it would have to allow under a slightly different organizational setup.

A second argument used by Bell is that electricity generating installations generally are military objectives which can lawfully be destroyed by an adversary. Therefore, the argument continues, it would be illogical if Israel had to provide the supplies it could cut off by destroying the power plant. That argument is flawed by the fact that it disregards a basic condition of the legality of the destruction of dual use military objectives, such as vital infrastructure. Such destruction is subject to the prohibition of causing disproportionate collateral damage. That limitation has been made clear in many analyses of bombings of big cities which put the power grid out of operation (for example the bombing of Baghdad in 1991) which resulted in the inability of hospitals to continue their services thereby causing suffering and death of civilians, in particular the most vulnerable ones. In the situation of Gaza, in view of the malfunctioning of the one and only power plant due to damage or lack of fuel, supply by Israel is the only means to avoid the effects which the prohibition of disproportionate collateral damage is meant to exclude.

As a result of the principle underlying the provisions of humanitarian law relating to relief, it has to be concluded that Israel is prohibited to execute any cuts in supplies which would prevent heeding basic needs of the population of the Gaza Strip. A violation of this obligation cannot be justified as reprisals. As is shown by the ICRC in its Customary Law Study, reprisals against persons protected by the Geneva Conventions are prohibited. The ICRC concludes that there is at least a trend to the effect that this prohibition includes civilians.

A similar conclusion may be drawn from international human rights law. The basis of its application is the doctrine of extraterritorial application, as it has been developed by courts and international human rights bodies. It not only applies where the beneficiaries are subject to the jurisdiction of a state in a formal sense (detention, occupation), but also where the beneficiary is subject to a decisive influence of the power of a state. This concept would, arguably, make the inhabitants of the Gaza Strip the beneficiaries of human rights norms binding Israel. It is beyond the scope of the present opinion to develop this line of argument in greater detail.

5. The commodities in question: water and electricity

¹ Nobody may claim anything which he or she must immediately return.

It is submitted that the definition of relief supplies found in Art. 69 and 70 AP I constitutes customary law. It corresponds to a concept of relief which is required by the circumstances of current living conditions in the world. The key term is "other supplies essential to the survival of the civilian population".

It cannot be controversial that water constitutes a supply in this sense. It is closely related to food, but also to medical supplies as access to clean water is an essential condition for the health of the population.

As to electricity, the decisive point is that living conditions in modern agglomerations depend on the availability of electricity. Gaza is a densely populated area where the energy needed for survival cannot be produced by means other than electricity. This is in particular true for the operation of hospitals and other medical establishments. Thus, sufficient electricity is essential for the survival of the population. Inter alia, the water supply depends on the availability of electricity for pumping stations and other facilities of the water distribution system. Electricity is, thus, a relief commodity the passage of which into a territory in need of it may not be prevented.

6. Conclusion

Under international humanitarian law, Israel is obliged, in the current conditions of armed conflict, to maintain water supplies from Israel to the Gaza strip at current level and of an electricity supply sufficient to meet the basic needs of the civilian population.

Frankfurt, July 18, 2014



Prof. Dr. Michael Bothe