

A. Israeli Supreme Court, Judgment on Power Cuts in Gaza

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Israeli Supreme Court, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, 30 January 2008, available at http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf, footnotes omitted]

HCJ 9132/07

Jaber Al-Bassiouni Ahmed and others v. 1. Prime Minister 2. Minister of Defence

The Supreme Court sitting as the High Court of Justice

(30 January 2008)

[...]

JUDGMENT

President D. Beinisch

1. The petition before us is directed against the respondents' decision to reduce or limit the supply of fuel and electricity to the Gaza Strip. In their petition for relief from this court, the petitioners mainly addressed the need for various types of fuel (gasoline and diesel) for the proper running of hospitals and water and sewage pumps, as well as for the supply of electricity, whether via power lines from Israel or by supplying industrial diesel for operating the Gaza Strip power plant.
2. The circumstances surrounding the petition are the combat activities that have been taking place in the

Gaza Strip for a long period, and the continuing campaign of terrorism directed against the citizens of Israel. The terrorist attacks have intensified and worsened since the Hamas organization took control of the Gaza Strip. These attacks include the continuous firing of rockets and mortar shells at civilian targets in the territory of the State of Israel, as well as terrorist attacks and attempted attacks that target civilians and IDF soldiers at the border crossings between the Gaza Strip and the State of Israel, along the border fence and in the territory of the State of Israel. The respondents' decision to limit the supply of fuel and electricity to the Gaza Strip was made as a part of the State of Israel's operations against the continuous terrorism. The following is the text of the decision that was adopted by the Ministerial Committee on National Security Affairs on 19 September 2007:

'The Hamas organization is a terrorist organization that has taken control of the Gaza Strip and turned it into a hostile territory. This organization carries out acts of hostility against the State of Israel and its citizens, and the responsibility for these acts lies with it. It has therefore been resolved to adopt the recommendations presented by the security establishment, including the continuation of the military and intelligence operations against the terrorist organizations. Additional restrictions will also be placed upon the Hamas regime, so 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 after considering the legal ramifications of the humanitarian situation in the Gaza Strip, in order to prevent a humanitarian crisis.'

The petition is directed against this decision.

1. [...] During the hearing, counsel for the respondents told the court that the state recognizes that it has a duty not to prevent the supply of basic humanitarian needs to the Gaza Strip, and therefore it announced that it would monitor the situation and ensure that the restrictions being made do not harm the supply of basic humanitarian needs. [...]

Reduction of the fuel supply to the Gaza Strip

1. On 29 November 2007 we held, with regard to that part of the petition addressing the reduction of the fuel supply to the Gaza Strip, that the fuel that the Palestinian Energy Authority buys from the Israeli Dor Alon company, which is distributed by private suppliers to the highest bidder irrespective of any other concerns, can be distributed in another manner. We said that the various types of fuel supplied to the Gaza Strip can be distributed according to priorities that take into account the humanitarian needs of the civilian population, as well as the functioning of the generators that operate the water pumps and electricity plants in the Gaza Strip. In our decision we gave weight to the state's position that while combat operations and missile attacks are being carried out against Israeli towns, some of the fuel that enters the Gaza Strip is de facto used for various objectives of the terrorist organizations, and in such circumstances the reduction of the fuel supply, in the controlled manner in which it is made, may damage the terrorist infrastructures and their ability to operate against the citizens of the State of Israel, considering that the amount of fuel that enters the Gaza Strip is supposed to satisfy only the humanitarian purposes that require the use of fuel. We were therefore not persuaded at that stage, on the basis of the data presented to us, that the respondents' decision to reduce the amount of fuel allowed into the Gaza Strip through the border crossings with Israel currently violates the basic

humanitarian needs of the Gaza Strip. We therefore held that there was no basis for any order nisi or interim order concerning the reduction of the fuel supply (gasoline and diesel). Our decision was mainly based on the state's undertaking, as required by Israeli and international law, to monitor the situation in the Gaza Strip and ensure that the aforesaid reduction does not prejudice the humanitarian needs of the inhabitants of the Gaza Strip. In these circumstances we concluded the hearing of the issue of the restrictions on the fuel supply to the Gaza Strip, and proceeded to examine the arguments concerning the harm to the inhabitants of the Gaza Strip that could be anticipated as a result of the restrictions on the supply of electricity.

Reduction of the supply of electricity to the Gaza Strip

[...]

1. According to figures that are not disputed by either party, the amount of electricity needed for the Gaza Strip at peak times is slightly more than 200 megawatts. Approximately 120 megawatts are supplied by Israel, and approximately 17 megawatts are supplied by Egypt. The remainder is supplied by the Gaza Strip power plant. The electricity supplied to the Gaza Strip by the State of Israel is supplied via 10 power lines, on four of which load limiters have been installed. The respondents' intention was to reduce the supply of electricity through those four power lines gradually, by 5% of the amount of electricity transferred through each of the lines. The respondents' claim that this step would require the authority that controls the Gaza Strip to manage the load and reduce the actual consumption of electricity in the area to which the relevant line supplies electricity, to prevent the supply of electricity for terrorist purposes such as workshops where Qassam rockets are made. According to their approach, if the authorities in Gaza manage the consumption of electricity properly, the flow of electricity from Israel to the Gaza Strip will continue without interruption. But if consumption exceeds the permitted amount, the supply of electricity will cease automatically, due to the load limiters installed upon the four power lines described above. The respondents emphasized in their response that the aforesaid reduction of electricity does not affect the basic humanitarian needs of the residents of the Gaza Strip.
2. The petitioners argue that there is no physical way of reducing the supply of electricity to Gaza without causing power stoppages in hospitals and the pumping of clean water to the civilian population of Gaza, and therefore the implementation of this decision will cause certain, serious and irreversible harm to the necessary humanitarian needs of the Gaza Strip, its hospitals, the water and sewage system, and the entire civilian population. [...] [A]ccording to them even now, since the bombing of the local power plant by the Israeli Air Force in 2006, the Gaza Strip has suffered from a shortage of electricity that compels the Electricity Distribution Company in Gaza to make electricity stoppages for several hours each day. They argue that even now the frequent power stoppages affect the functioning of essential services in Gaza, such as hospitals, because the infrastructure in the Gaza Strip does not make it possible to disconnect the electrical supply to the civilian population without disconnecting essential services. Moreover, it was emphasized that stopping the supply of electricity to the homes of Gaza residents denies them the possibility of receiving clean drinking water in their homes and interrupts the functioning of the water and sewage pumps.

[...]

Deliberations

1. The question before 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 has no duty to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances where some of these products 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. The respondents are required to discharge their duties under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in order to provide the essential humanitarian needs of the civilian population.
2. The State argued before us that it conducts itself in accordance with the rules of international law and respects its humanitarian obligations under the laws of war. Counsel for the state argues that these duties are limited and are derived from the state of armed conflict that exists between the State of Israel and the Hamas organization that controls the Gaza Strip, and from the need to avoid harm to the civilian population that finds itself in the combat zone. We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. The military government that was in force in this territory in the past was ended by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. 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 under all of the laws of a belligerent occupation under international law. Neither does Israel have any effective ability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main duties 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 duties 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.
3. In this context, the respondents referred in their pleadings to various provisions of international humanitarian law that apply to this case. Inter alia, the respondents referred to art. 23 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: 'the Fourth Geneva Convention'), which requires a party to a conflict to allow the free passage of consignments intended for the civilians of the other party. They said, however, that this is a very limited obligation, since it only requires a party to a conflict to allow the unlimited passage of medical equipment, and to allow the passage of foodstuffs, clothing and medicine intended for children under the age of fifteen and expectant mothers. The respondents also referred to art. 70 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter: 'the First Protocol'), which in their opinion constitutes customary international law, and which imposes a general and broader obligation according to which parties to a conflict are required to allow the rapid and unimpeded passage of essential goods for the civilian population. Finally, the respondents also referred in their pleadings to art. 54 of the First Protocol, which prohibits the starvation of civilians as a method of warfare, as well as any attack, destruction, removal or rendering useless of installations required by the civilian population, including foodstuffs, agricultural areas and drinking water installations.

4. The state's pleadings in this regard are based upon norms that are part of the customary international law, which set out basic obligations that govern combatant parties during an armed conflict, and require them to ensure the welfare of the civilian population and respect its dignity and basic rights. It should also be noted that under the rules of customary international humanitarian law, each party to a conflict is obliged to refrain from disrupting the passage of basic humanitarian relief to populations needing it in areas under its control (J. Henckaerts & L. Doswald-Beck, Customary International Humanitarian Law (ICRC, vol. 1, 2005), at pp. 197, 199 [See ICRC, Customary International Humanitarian Law, Rule 55]). It is also stated in the commentary on art. 70 of the First Protocol that arts. 54 and 70 of the First Protocol should be read together, so that a party to a conflict should not be permitted to refuse to allow the passage of foodstuffs and basic humanitarian equipment necessary for the survival of the civilian population [...].
5. It follows from the aforesaid that the respondents do not in any way deny the existence of their humanitarian duties, which require the State of Israel to allow the passage of essential humanitarian goods to the Gaza Strip, and to refrain from intentional harm to humanitarian facilities. According to the respondents' arguments, [...] not only are the respondents allowing the transfer essential goods to the civilian population in the Gaza Strip, but they also regard this as a humanitarian obligation for which they are liable pursuant to international law and the decision of the ministerial committee. Notwithstanding, the respondents emphasized that this does not require them to allow the passage of unessential goods or amounts of goods that exceed what is required for basic humanitarian needs, and this is the heart of the disagreement between them and the petitioners.
6. In this last respect, Colonel Nir Press, the commander of the Coordination and Liaison Authority,[1] appeared before us during the final hearing and gave details of the relevant data and information upon which respondents rely. Colonel Press clarified the statements made on behalf of the state, and insisted that the amount of fuel and electricity entering the Gaza Strip is sufficient for the proper functioning of all the humanitarian services in the territory; Colonel Press further told us of contacts that he held with Palestinian representatives for the routine monitoring of the functioning of the humanitarian services in the Gaza Strip. Inter alia, he described how the State of Israel allows the safe conduct of the sick for treatment in the State of Israel, and allows the unlimited passage of food and medicine, in order to avoid harming the residents of the Gaza Strip beyond the extent necessitated by the state of armed conflict between the State of Israel and the Hamas organization. Colonel Press admitted to us that the situation of the civilian population in the Gaza Strip is indeed difficult, but he also gave examples of exaggerated descriptions published by the Hamas organization with regard to a humanitarian crisis in the territory.
7. The main issue remaining before us [...] is the amount of industrial diesel fuel required for the operation of the power plant in the Gaza Strip. As stated above, we were persuaded by the respondents' declarations that they intend to continue to allow the supply of industrial diesel fuel at the same level as prior to the implementation of the limitations, namely 2.2 million litres per week. Since it has been clarified that industrial diesel can be used, and is used de facto, solely for the power plant in the Gaza Strip, it can be assumed that the supply of industrial diesel will not fall short of this amount. Our examination of the matter revealed that the supply of industrial diesel to the Gaza Strip during the winter months last year was similar to the amount that the respondents now promise will be permitted to enter the Gaza Strip, and this fact also indicates that it is a reasonable amount that is sufficient for the basic humanitarian needs of the Gaza Strip. Admittedly, for several days the border crossings were closed and consequently the required amount of diesel was not delivered. But this, it was explained, was on

account of a temporary security need that was caused by a very severe rocket attack launched against Israeli towns from within the Gaza Strip. It need not be said that even during this period, when there was a specific security need to close the border crossings, the State of Israel continued to supply the Gaza Strip with the same amount of electricity that it usually provides.

8. As for the revised plan presented to us, which concerns a five per cent reduction of the supply of electricity through three of the ten power lines supplying electricity to the Gaza Strip, to a level of 13.5 megawatts in two of the lines and 12.5 megawatts in the third, we have been persuaded that this reduction does not breach the State of Israel's humanitarian duties within the context of the armed conflict taking place between it and the Hamas organization that controls the Gaza Strip. This conclusion is based, inter alia, upon the fact that the respondents' affidavit shows that the relevant Palestinian authorities have said that they have the ability to carry out load reductions if limits are placed on the power lines, and they have made actual use of this ability in the past.
9. It should be emphasized that during the hearing of the petition the state reiterated its undertaking to monitor the humanitarian situation in the Gaza Strip, and in this context we were informed [...] that this commitment is being discharged very responsibly and seriously, and that the security establishment carries out a weekly assessment of the position in this regard, which is based, inter alia, upon contacts with Palestinian authorities in the fields of electricity and health, and on contacts with international organizations. [...]
10. We have said, on more than one occasion, that we do not intervene in the question of the effectiveness or the wisdom of the security measures adopted by those responsible for security, but only in the question of their legality. Our role is limited to judicial review of compliance with the rules of Israeli and international law that bind the State of Israel, which the respondents declared before us are being scrupulously observed by the state. In this regard it has been said in the past that in times of war legal norms continue to apply, and the laws of war should be observed. [...]

[...]

1. In conclusion, we reiterate that the Gaza Strip is controlled by a murderous terrorist organization, which acts unceasingly to strike at the State of Israel and its inhabitants, violating every possible rule of international law in its violent acts, which are directed indiscriminately toward civilians – men, women and children. Notwithstanding, as we said above, the State of Israel is committed to acting against the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from intentional harm to the civilian population in the Gaza Strip. In view of all of the information presented to us with regard to the supply of electricity to the Gaza Strip, we are of the opinion that the amount of industrial diesel that the State said it intends to supply, as well as the electricity that is continually supplied through the power lines from Israel, are capable of satisfying the essential humanitarian needs of the Gaza Strip at the present.

Therefore, for the reasons set out above, the petition is denied.

Justice E. Hayut

I agree.

Justice J. Elon

I agree.

Petition denied. [...] 30 January 2008.

[1] The Coordination and Liaison Authority in Gaza is an organ of the Coordinator of Government Activities in the Territories (COGAT), created by the Israeli Ministry of Defence, and whose task is to coordinate civilian issues between Israel and the Occupied Territories. In Gaza, the Coordination and Liaison Authority deals with questions regarding access to and from Gaza, including the passage of humanitarian goods. (Note of the authors)

B. International Committee of the Red Cross, Report

[Source: International Committee of the Red Cross, "Gaza is running out of fuel", 29 April 2008, available at <http://www.icrc.org/eng>]

Gaza is running out of fuel

The current fuel crisis is causing increasing hardship for the people of the Gaza Strip. The ICRC warns that the long-term consequences may be severe if sufficient supplies are not made available to ordinary people and for facilities like public transport, hospitals and water pumping stations.

Ten per cent of nurses, doctors and other hospital staff are unable to get to work due to lack of transport. As a result, patients are having to wait for operations. Several have simply given up trying to reach hospital. Schools and universities are only functioning partially, with some 15-20 per cent of children, students and teachers absent. There are few cars on the usually crowded streets. Even in Gaza City, donkeys have become the usual means of transportation.

Daily life affected

"This is affecting every aspect of daily life. Farmers cannot harvest their crops, fishermen cannot go to sea and workers have difficulties getting around," said Antoine Grand, head of the ICRC sub-delegation in Gaza.

If the fuel crisis is not resolved soon, it will have a serious effect on food, health and education in Gaza. Hospitals and sewage pumping stations are on the verge of running out of fuel for their backup generators. When the fuel is gone, these facilities will be totally dependent on mains electricity, making them highly vulnerable to power cuts.

Onions and garlic may rot in the fields

"The lack of fuel will also severely damage the agricultural sector and the fishing industry. The sardine season is approaching, and the onion and garlic harvest is supposed to take place over the coming days and

weeks. If there is no fuel available for the harvest and for irrigation, the crops will rot in the fields,” adds Grand.

UN forced to abandon assistance

Humanitarian organizations are also affected by the crisis. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA) ran out of fuel on 24 April, forcing it to stop distributing food. Médecins Sans Frontières has been forced to scale back its work and neither UNWRA nor the World Food Programme, who together feed over one million Gazans, will be able to start distributing food again until they receive diesel for their trucks.

As Grand points out, “Suspension of this assistance will have catastrophic consequences”.

The ICRC has already called for political solutions to the ongoing conflict on a number of occasions, pointing out that solving the problems is far beyond the ability of humanitarian organizations. Currently, aid workers are finding it difficult to operate in Gaza at all.

Fuel running out

The amount of fuel available to the people of Gaza has been falling since October 2007. By March 2008, the amount of petrol available had fallen by an estimated 80%, while quantities of diesel had fallen by half. On 7 April, fuel distributors in Gaza went on strike in protest against the lack of fuel. Following the killing of two Israeli workers by Palestinian militants at a fuel station in Nahal Oz near Gaza, Israel has further restricted the amount of fuel entering the Strip.

Antoine Grand: “We urge all parties to allow the civilian population of Gaza to live normal, decent lives.”

Discussion

1. a. (*High Court of Justice (HCJ), paras 12, 18*) How would you qualify the situation prevailing in Gaza? How does the Court qualify it? Do you agree that this is a situation of armed conflict between the Hamas organization and the State of Israel? Is this conflict of an international character or not? Does it matter in this case? How could one argue that the IHL of international armed conflicts applies to the Israeli measures even if the conflict between Israel and Hamas is not of an international character?
- b. (*HCJ, para. 12*) Do you agree with the HCJ that the occupation in Gaza ended in September 2005 with the withdrawal of the Israeli troops? Even though “the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel”? Although Israel retains full control over who and what may enter Gaza? Did all the obligations of occupying powers cease to apply to Israel after September 2005?
2. a. Do you agree with the Court that the restrictions on fuel and electricity supplies were lawful? What are Israel’s obligations regarding the provision of fuel and electricity? Does it make a difference if one still considers Israel as the occupying power in Gaza? (HR, Art. 43; GC IV, Arts 23 and 59; P I,

Arts 54(1), 69 and 70; CIHL, Rule 54)

- b. Are Israel's obligations towards Gaza limited to meeting only the "basic humanitarian needs" of the inhabitants of the Gaza Strip (*HCJ, paras 15, 17*)? Even though Israeli officials themselves admit that the "situation of the civilian population in the Gaza Strip is indeed difficult" (*HCJ, para. 16*)? Considering the ICRC Report, can it be said that the basic humanitarian needs of the inhabitants of Gaza are being met? Does your answer depend on whether IHL on belligerent occupation still applies?
3. May Israel adopt measures in response to the attacks launched from Gaza? Even if they affect the entire population of Gaza? When do such measures amount to collective punishments? To reprisals? (GC IV, Art. 33; P I, Arts 20, 51(6), 52(1), 54(4), 75(2)(d); CIHL, Rule 103)
4. (*HCJ, para. 17*) Do you agree with the HCJ that security needs may allow for the restriction of relief consignments? Does IHL support this claim? Does it make a difference whether or not Gaza is still occupied? (GC IV, Arts 23 and 59; PI, Arts 54(1), 69 and 70; CIHL, Rule 54)

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