



Briefing: Israeli High Court Decision Authorizing Fuel and Electricity Cuts to Gaza (HCJ 9132/07, issued January 30, 2008)

By Gisha-Legal Center for Freedom of Movement
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On January 30, 2008, Israel's Supreme Court rejected a [petition](#) filed by ten Israeli and Palestinian human rights groups challenging punitive measures taken against Gaza's civilian population, especially restrictions on supply of fuel and electricity to Gaza. **An English translation of the court decision is now available by clicking [here](#).**

This is a preliminary description of the decision, designed to provide information concerning the court ruling. This briefing does not address the extremely serious concerns Gisha has about the court's factual and legal inquiry and conclusions, which we noted briefly in a Jan. 30 joint [press release](#) with Adalah, and which we will continue to address, together with our partner organizations.

This briefing contains hyperlinks to English-language documents regarding the case. An electronic version may be found at www.gisha.org.

The petition was submitted by 10 Israeli and Palestinian human rights groups, although ***the comments presented in this briefing do not necessarily represent their views.*** The organizations who petitioned the court are:

Adalah - The Legal Center for Arab Minority Rights in Israel
Gisha - Legal Center for Freedom of Movement
HaMoked: Center for the Defence of the Individual
Physicians for Human Rights-Israel
The Palestinian Centre for Human Rights
The Public Committee Against Torture in Israel
Gaza Community Mental Health Programme
B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories
Al-Haq
Mezan Center for Human Rights

Court Petition

The court petition was filed on October 28, 2007, after Israel began cutting fuel supplies to Gaza and threatened to cut electricity supplies as well, as part of a [Sept. 19, 2007 Cabinet decision](#) calling for punitive measures in response to Qassam rocket fire on civilian targets in southern Israel. Petitioners asked for a preliminary injunction against the cuts, an *order nisi* requiring the respondents, the Prime Minister and the Defense Minister, to respond to the petition by verified affidavit, and a final order preventing the respondents from interfering in any way in the supply of fuel and electricity to Gaza. The

petitioners also asked for a general remedy invalidating the punitive measures contained in the Cabinet decision.

The Cabinet decision came after the June 2007 closure of Gaza's crossings in response to the Hamas takeover of Gaza. The border closure had choked economic and human development.¹ As militants in Gaza continued to fire Qassam rockets at southern Israel, pressure mounted inside Israel to escalate its response. The fuel and electricity cuts were presented as part of that response.

Israel does not allow Gaza residents to receive fuel except via Israeli-controlled crossings, primarily the Nahal Oz crossing, through which a private Israeli company sells diesel, industrial diesel, and petrol (gasoline or benzene) to the Palestinian Ministry of Finance, pumping it into Gaza through underground pipes.

The Palestinian Authority purchases 120 megawatts of electricity for Gaza from Israel's Electric Company, while Egypt supplies 17 megawatts of electricity to Gaza. The rest is produced by Gaza's power plant.

Petitioners' Legal Arguments

The petitioners argued that cutting fuel and electricity supplies violates international law. First, they argued that the fuel cuts constitute illegal collective punishment, because they indiscriminately punish Gaza's civilian population for acts by militants. Second, they argued that the policy deliberately targets civilians (or at least primarily targets civilians), in violation of the international law principles of distinction and proportionality. Third, they argued that Israel still owes duties to Gaza residents under the law of occupation², meaning that it has a positive duty to facilitate the proper functioning of civilian institutions, including the supply of fuel and electricity. Fourth, they argued that because fuel and electricity are essential goods necessary for the civilian population, Israel, like all states, always bears an obligation under customary international law to actively facilitate their passage to civilians in Gaza, irrespective of Gaza's status. Fifth, they argued that under Israeli law, the cuts are illegal because there is no rational relationship between the violation of Gaza residents' rights and any legitimate security interest.

Respondents' Legal Arguments

Respondents repeatedly emphasized that Qassam rockets are being fired on civilian targets in southern Israel by militants in Gaza. They argued that Gaza is controlled by a terrorist group intent on destroying Israel, and that the military is responding to an existential threat. They argued that the fuel cuts are economic sanctions taken against Gaza as part of "economic warfare", which was described as a life-saving alternative to a large-scale ground operation. They argued that Gaza is no longer occupied, but that even if it were, only minimal obligations are owed to its civilian population, obligations which they characterized as the duty to avoid a humanitarian crisis or to permit the fulfillment of minimal humanitarian needs. They argued that they were permitting enough fuel and

¹ See Gisha's reports: *Commercial Closure: Deleting Gaza's Economy from the Map* (July 2007) and *Israel Undermines Higher Education – and Its Own Best Interest – in Gaza* (October 2007), available at www.gisha.org.

² See Gisha's position paper, *Disengaged Occupiers: The Legal Status of Gaza*, January 2007, available at www.gisha.org.

electricity to provide for humanitarian needs, and that it was up to the leadership in Gaza to prioritize its distribution to give preference to humanitarian needs. They argued that they were monitoring the humanitarian situation in Gaza to make sure that basic needs were being met, and that the Defense Minister had broad discretion to wage a battle against militants in the way he saw fit.

Court's Treatment of International Law

"Minimal Humanitarian Standard"

From the beginning, the court avoided any legal discussion of the relevant international framework and implicitly selected the state's "minimal" standard. In oral presentations, the judges curtailed argument on the question of what law is applicable, pressing the petitioners to address only the factual question of whether the reduction in supply of fuel and electricity planned by the military could in fact cause a humanitarian crisis. In a [November 29, 2007 interim decision](#), the court accepted the state's position that the proposed reduction in fuel would not cause a humanitarian crisis, in part because, the court said, the fuel could be redistributed to prioritize humanitarian needs. On the other hand the court found that the state had not carried its burden of proof in respect to electricity, that it had not presented facts that created a reliable picture of the impact of electricity reduction on Palestinian civilians, and it asked that the states' lawyers present further evidence regarding the impact of electricity supply reductions on Palestinian society. The interim decision prevented the state from starting the progressive reduction of electricity supply to Gaza on December 2, as had been planned. The court did not present or analyze any legal sources in holding that the respondents could continue their program of fuel reduction. After two paragraphs noting the petitioners' factual claims and the respondents' legal argument regarding the inapplicability of the law of occupation, the judges declined to address the legal arguments raised by the parties, adopting instead, without comment, the "minimum humanitarian standard" proffered by the state:

"In light of the conclusions we have reached as outlined below, and considering the state's declaration concerning its commitment to fulfill the essential humanitarian needs in the Gaza Strip, we did not see fit, at this stage, to address the principled legal questions raised by the parties before us".

It is a conclusion devoid of law. A major point of dispute was the applicability of the "minimum humanitarian standard" offered by the state, which the petitioners claimed does not exist under the law. Rather than explicitly ruling in favor of the state's interpretation of the law, the court applied the standard it offered without comment.

The court's final ruling grounds the "minimal" humanitarian standard in the laws of armed conflict but sheds little light on the content of the standard, except to note that the laws of armed conflict do not require Israel to permit "unlimited" supplies to Gaza.

Status of Gaza

While each party submitted written argumentation concerning the legal status of Gaza, the court declined to hear oral arguments on that issue in each of the three hearings, preferring to focus on a factual inquiry into the effects of the fuel and electricity cuts. In the middle of paragraph 12 of its decision, however, the court obliquely declares an end

to Israel's effective control over Gaza, the standard for determining the applicability of the laws of occupation. The court says that the only obligations owed to Gaza residents by Israel are those arising from Israel's continued control of Gaza's crossings with Israel, Gaza's residual dependence on electricity supplied by Israel, and the laws of combat. To quote Paragraph 12 of the court decision:

"The state argued before us that it is acting in accordance with the principles of international law and is fulfilling its humanitarian obligation under the laws of armed conflict. According to the State's representative, these obligations are limited and are derived from the state of armed conflict that exists between the State of Israel and the Hamas organization which controls the Gaza Strip, and from the need to prevent harm to the civilian population that finds itself living in a combat zone. In this regard, we note that since September 2005 Israel no longer has effective control over what takes place within the territory of the Gaza Strip. The military government that previously existed in that territory was abolished by decision of the government, and Israeli soldiers are not present in that area on an ongoing basis and do not direct what goes on there. Under these circumstances, the State of Israel bears no general obligation to concern itself with the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, according to the international law of occupation. Israel also has no effective ability, in its current status, to instill order and manage civilian life in Gaza. Under the current circumstances, the primary obligations borne by the State of Israel with regards to the residents of the Gaza Strip are derived from the state of armed conflict that prevails between it and the Hamas organization which controls the Gaza Strip; its obligations also stem from the degree of control that the State of Israel has over the border crossings between it and the Gaza Strip; and also from the situation that was created between the State of Israel and the Gaza Strip territory due to years of Israeli military control in the area, as a result of which the Gaza Strip is at this time almost totally dependent on Israel for its supply of electricity".

This is a dramatic departure from the court's precedent applying the laws of occupation to Gaza and the West Bank, with no discussion of the relevant legal and factual framework presented by the parties and little discussion of the test under international law for the existence of a state of occupation. Indeed, the question of Gaza's legal status is pending before the court in a separate case, HCJ 10265/05 *Physicians for Human Rights-Israel v. Defense Minister*, in which the court requested detailed briefings from the parties. Compare the court's conclusions with Gisha's position paper, [*Disengaged Occupiers: The Legal Status of Gaza*](#).

Collective Punishment or Economic Sanctions?

The court does not address this point. Despite the extensive briefing on how the cuts to fuel and electricity should be characterized under international law, the final decision only notes minimal obligations owed to Gaza residents, namely the obligation to avoid causing a humanitarian crisis.

A Note on Targeting Civilians

The court did not address the arguments over whether fuel and electricity cuts, by their nature, target civilians, except to note the state's argument that the cuts would disrupt the "terrorist infrastructure" in Gaza, which uses fuel and electricity. The court did, however, contrast the cuts Israel imposed with attacks against Israel by militants that target Israeli civilians. The court characterized harm to civilians stemming from Israeli military actions as accidental, in contrast to harm to Israeli civilians from militant attacks:

Factual Inquiry

There were three main issues of fact in dispute:

1. Whether the power station requires more than 2.2 million liters/week of industrial diesel, the amount that the state agreed to permit it to acquire as of January 27, 2008;
2. Whether it is possible to cut electricity to Gaza without harming humanitarian needs;
3. Whether the electricity and fuel cuts were harming the health and welfare of Gaza residents (the question of humanitarian damage).

Fuel needs of the power station

Gaza's power station has been struggling to operate since a June 2006 bombing by Israeli fighter jets destroyed its transformers. On the eve of the implementation of the fuel cuts, the power plant was capable of making 55 MW of electricity and was ordering 2.2 million liters/week of industrial diesel. It had an additional 3.5 millions of liters of reserves. The Israeli fuel cuts imposed on October 28, 2007 restricted the power plant to receiving no more than 1.75 million liters/week, paid for by the European Union.

Between October 28, 2007 and January 5, 2008, the power plant used its reserves to make up for the deficit in industrial diesel supply. By December 2007, thanks to the introduction of a repaired transformer, it had the capacity to produce up to 80 MW of electricity, although it kept production to 65 MW because of the fuel shortage. On January 5, the plant's reserves hit the red line, and it [cut production](#). It continued to cut production until January 20, when it [shut down completely](#), re-opening on January 22 when another fuel shipment arrived.³

The petitioners submitted [affidavits](#) from Dr. Rafiq Maliha, Project Manager at Gaza's Power Generating Company, explaining that as of January 2008, the power plant needed 3.5 million liters industrial diesel/week plus reserves, because of the colder weather and because of the introduction of a new transformer in December, which gave the plant the capacity to make 80 MW electricity, desperately needed in light of Gaza's electricity deficit. In the state [response](#) (Hebrew only) submitted January 27, 2008, two hours before the hearing, the state said that Israeli military officials had determined that 2.2 million liters industrial diesel/week was sufficient for the needs of the power plant.

³ See Gisha press release, "[Not Spin – Israel Intentionally Turned out the Lights](#)", January 21, 2008, available at www.gisha.org.

In the oral hearing on January 27, 2008, petitioners referred to the affidavits submitted by Dr. Maliha, explaining the power plant's industrial diesel needs. The petitioners had requested permits for Dr. Maliha and an official from Gaza's Electrical Distribution Company, Nedal Touman, to attend the hearing, and the state had promised the court it would allow them to attend. But the morning of the hearing, the military kept Dr. Maliha and Mr. Touman waiting at Erez Crossing for three and half hours, saying there was no permit, so that the two arrived at the court only after the hearing had ended.

The judges asked the state attorney at the oral hearing how much fuel had been ordered by the power plant the winter before, and on the basis of that answer, determined that the quantity the military permitted Gaza's power plant to receive was "reasonable."

The possibility of "redistributing" electricity to avoid harming humanitarian needs

A central issue in dispute was whether it is possible to reduce electricity supply without harming humanitarian needs. Petitioners argued that Gaza was already suffering a deficit of 20% in electricity, primarily due to the bombing of its power plant by Israel in June 2006, and that already, the deficit forced Gaza's Electricity Distribution Company (GEDCO) to institute rolling blackouts across Gaza, which affected everyone, hospitals, water wells, and ordinary buildings, without differentiation. Petitioners submitted a [November 27, 2007 affidavit](#) from Nedal Touman of GEDCO explaining that technically, the electricity system in Gaza was not capable of distinguishing among users in coping with the electricity deficit and for that reason, GEDCO was forced to respond to the electricity deficit by cutting electricity along main lines that affected hospitals and other humanitarian institutions.

In its [submission of December 27, 2007](#), the state argued that the amount of electricity being supplied to Gaza was enough for humanitarian needs, and that it was up to officials in Gaza to decide how to use the electricity. The state informed the court that Israeli military officials had met with unnamed Palestinian energy officials to inform them of the plan to cut electricity supplies. According to the state, the Palestinian officials said that they had the ability to redistribute electricity to avoid harming humanitarian needs. The state assured the court that, "for example, the Palestinians confirmed their capacity to reduce consumption on one line in order to enable proper functioning of a hospital." (para. 6a of Dec. 27, 2007 state submission).

In response, on January 24, 2007, the petitioners submitted another [affidavit](#) from Nedal Touman of GEDCO responding in detail to the state's claim that it was possible to redistribute electricity to avoid humanitarian damage. Petitioners also emphasized this at the oral argument on January 27, 2008. Mr. Touman, however, did not attend the hearing, because he was delayed at Erez Crossing.

On the basis of the state's assertion that "the Palestinians" told Israeli military officials that electricity could be redistributed to avoid humanitarian damage, and despite detailed affidavits to the contrary from the Palestinian officials in charge of electricity distribution in Gaza, the court approved the electricity cuts.

The state's [plan](#) to cut the electricity sold directly to Gaza by Israel is due to go into effect on February 7, and it will gradually reduce supply by 1.5 MW on three of ten lines. However, the military is already "cutting" 25 MW of electricity to Gaza, by preventing

the power plant from receiving enough industrial diesel to operate at its capacity. The power plant is currently producing 55 MW of electricity, rather than the 80 MW it could produce with more fuel.

Humanitarian Damage

Petitioners claimed that the fuel and electricity cuts were crippling the functioning of [hospitals](#) and clinics, disrupting access to [clean water](#) and [sewage treatment](#), preventing Gaza residents from lighting and heating their homes, and interfering with health and sanitation services. They claimed that the state had no way to monitor and mitigate the humanitarian damage being caused, as an inevitable result of the fuel and electricity cuts.

In response, Colonel Nir Peres, the military official in charge of Erez Crossing, asked to address the court orally at the January 27, 2008 hearing. Petitioners objected, noting that Colonel Peres had not submitted an affidavit in the case⁴, but the court overruled the objection.

Colonel Peres talked extensively about the security threats facing Israel and assured the court that the military was being responsive to the humanitarian needs of Gaza residents. He said that the Palestinian media and Hamas leadership were distorting the facts in order to create an impression of crisis. He claimed that Israel was taking risks in order to allow medical patients from Gaza to enter Israel for treatment, and that militants were taking advantage of the opening of Gaza's crossings to smuggle explosives into the Strip. He assured the court that the military was in regular contact with Palestinian officials and international organizations to maintain humanitarian needs in Gaza.

Petitioners referred the court to reports and press releases issued by international organizations and submitted to the court, warning that the fuel and electricity cuts were harming vital humanitarian services in Gaza. They noted that the state had not claimed that any of the evidence submitted in the case was false, but rather made general claims about the Palestinian media and Hamas leadership, not parties to the case. Petitioners also referred the court to documentation submitted concerning the humanitarian damage caused.

The court accepted the state's argument. Its decision quoted Colonel Peres's oral presentation, noting the state's assurance that it was monitoring the humanitarian situation in Gaza. The court suggested that the petitioners address any specific concerns to the military officials in charge of monitoring the humanitarian situation in Gaza.

For more information, please contact Tania Hary, Director of International Relations, tania@gisha.org (03-6244120, extension 106) or visit us at www.gisha.org.

Gisha is an Israeli not-for-profit organization, founded in 2005, whose goal is to protect the freedom of movement of Palestinians, especially Gaza residents. Gisha promotes rights guaranteed by international and Israeli law.

⁴ High Court of Justice hearings are not designed for oral testimony, but the court commonly agrees to hear oral comments from individuals who have submitted affidavits.