

EXPERT OPINION

REGARDING THE THREATENED DESTRUCTION OF SOLAR PANELS IN THE VILLAGE OF IMNEIZEL (HEREINAFTER “IMNEIZEL”) THAT ARE ESSENTIAL TO THE SURVIVAL OF THE PROTECTED CIVILIAN POPULATION

by Professor Jules Lobel*

I, the undersigned, was asked by the Rabbis for Human Rights to submit this Expert Opinion as to the legality under International Law of the Israeli government’s threatened destruction of the Solar Panels which have been installed and are operating to provide electricity to the village of Imneizel in the Occupied Territories. I am the Bessie McKee Walthour Endowed Chair Professor of Law at the University of Pittsburgh Law School. I teach courses in Constitutional Law, Human Rights and International Law.

LEGAL FRAMEWORK

Israel has the status of Occupying Power in the West Bank pursuant to Article 42 of the 1907 Hague Regulations and Article 2 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Israel’s status as Occupying Power has been explicitly recognized by the International Court of Justice,¹ and is accepted by the Israeli Supreme Court, sitting as a High Court of Justice.² Moreover, every international organization that has opined on

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¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports ¶ 78, 2004 [hereinafter *Legal Consequences*].

² See, e.g., the *Elon Moreh* case, HCJ 390/79, *Azar Muhamad Mustafa Dweikat et al. v. Government of Israel*, 34:1 Piske Din (1980). The Israeli Supreme Court has consistently accepted Israel’s status as an Occupying Power and both the Israeli Government and the Court agree that the humanitarian provisions of the Geneva Convention apply “de facto” to the West Bank. Yoram Dinstein, *The International Law of Belligerent Occupation* 23-24 (Cambridge Univ. 2009). See also HCJ 2150/07 *Abu-Safiya v. Israel* [2008] IsrSC 34(1) (law that applies is “anchored” in the Fourth Geneva Convention).

the issue, including the United Nations Security Council,³ the International Committee of the Red Cross,⁴ and the United Nations Commission on Human Rights⁵ state that the Geneva Conventions and customary international Humanitarian law norms are applicable de jure to the Occupied Palestinian Territories.⁶

Furthermore, the International Court of Justice, the practice of States, and the United Nations all recognize that international human rights law also binds an occupying power with respect to the population of an occupied territory.⁷

³ S.C. Res. 446 (Mar. 22, 1979), 452 (July 20, 1979), 465 (Mar. 1, 1980), 468 (May 8, 1980), 469 (May 20, 1980), 471 (June 5, 1980), 476 (June 30, 1980), 478 (Aug. 20, 1980), 484 (Dec. 19, 1980), 497 (Dec. 17, 1981), 592 (Dec. 8, 1986), 605 (Dec. 22, 1987), 607 (Jan. 5, 1988), 636 (July 6, 1989), 641 (Aug. 30, 1989), 672 (Oct. 12, 1990), 681 (Dec. 20, 1990), 694 (May 24, 1991), 726 (Jan. 6, 1992), 799 (Dec. 18, 1992), and 904 (Mar. 18, 1994), *available at* http://www.un.org/docs/sc/unsc_resolutions.html.

⁴ The International Committee of the Red Cross, *Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of multilateral process (1997-2001)*, International Review of the Red Cross, No. 847 (Sept. 30, 2002), *available at* <http://www.icrc.org/eng/resources/documents/misc/5fldpj.htm>.

⁵ Commission on Human Rights Res.: 1993/2 (19 Feb. 1993), 1996/3 (11 Apr. 1996), 1997/1 (26 Mar. 1997), 1997/3 (26 Mar. 1997), 1998/1 (27 Mar. 1998), 1998/3 (27 Mar. 1998), 1999/5 (23 Apr. 1999), 1999/7 (23 Apr. 1999), 2000/8 (17 Apr. 2000), 2000/7 (17 Apr. 2000), S-5/1 (19 Oct. 2000), 2001/7 (18 Apr. 2001), 2001/8 (18 Apr. 2001), 2001/6 (18 Apr. 2001), 2002/7 (12 Apr. 2002), 2002/8 (15 Apr. 2002), 2002/90 (26 Apr. 2002), 2003/6 (15 Apr. 2003), 2003/7 (15 Apr. 2003); *see also* Sub-commission on Human Rights Res. 1996/6 (20 Aug. 1996), 1995/9 (18 Aug. 1995), and 1993/15 (20 Aug. 1993), *available at* <http://www.un.org/Depts/dhl/resguide/spechr.htm>.

⁶ Review of the Applicability of International Human Law to the Occupied Palestinian Territory, Harvard Program on Humanitarian Policy and Conflict Research (HPCR) 6 (July 2004), *available at* <http://www.stanford.edu/group/scai/images/harvardreview.pdf>.

⁷ *Legal Consequences*, *supra* note 1, at ¶¶ 107-12; *see also* UN General Assembly, *Situation of human rights in Kuwait under Iraqi occupation: resolution/adopted by the General Assembly*, ¶¶ 5C-59, 17 Dec. 1991, A/RES/46/135, *available at* <http://www.unhcr.org/refworld/docid/3b00efdb38.html>; *Concluding Observations of the Human Rights Committee: Israel*, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998); *Loizidou v. Turkey*, [1996] ¶ 56, Series VI ECHR 2216, 2235-36 (Judgment: Merits); *Cyprus v. Turkey*, ¶¶ 69-77 [2001]; UN Human Rights Committee, General Comment No. 31, ¶ 10, 21 Apr. 2004, CCPR/C/74/CRP.4/Rev. 6; U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* ¶ 11.19 (2004); Dinstein, *supra* note 2, at 69-71.

While this opinion addresses the specific question of whether the destruction of an occupied community's sole source of electric power violates international humanitarian and human rights law, it is important to note that the issue arises against the backdrop of a planning regime imposed by the Occupying Power with respect to Area C which is unlawful and illegitimate under international law. As other experts have pointed out, the current planning regime imposed on Area C is contrary to the Occupying Power's obligations under international law because it radically transforms the prior existing local Jordanian law in an unjustified manner and fails to meet the needs of the Palestinian residents of that area. See Expert Opinion of Dr. Theo Betruche and Professor Marco Sassoli annexed to this Opinion as Exhibit A. The Israel government's threatened deprivation of electricity to the village of Imneizel must be placed in the broader context that the planning authority exercised by Israeli over Area C is illegitimate and that such planning authority must be transferred back to the protected, local Palestinian population of the area.

In addition, even were the exercise of planning authority in Area C by Israel legitimate, Israel has exercised that general authority in a manner to destroy structures that are essential to the survival of the civilian population due to the local residents lack of proper permits. See Expert Opinion of Professor Eyal Benvenisti Annexed to this Opinion as Exhibit B. Such exercise of planning authority violates Protocol I to the Geneva Conventions and customary Humanitarian Law for the reasons Professor Benvenisti sets forth.

This opinion focuses on the question of whether electric power installations can be demolished for lack of a permit, and will not repeat the broader arguments made in the Expert Opinions that are annexed hereto. I attach those opinions to reference those arguments for the Court's convenience.

I. International Humanitarian Law Prohibits an Occupying Power Depriving an Occupied Community of Electricity Absent Compelling Military Necessity

The Humanitarian Law of belligerent occupation forbids an Occupying Power from denying the occupied population the essential minimal necessities of life, at least absent a compelling military necessity.⁸ The destruction of an occupied community's facilities for producing electric power to a community for lack of a permit, in a situation where the community has applied for a permit and no compelling military reasons exist to deny the permit is prohibited by treaty and customary humanitarian law.

As a general matter, access to electricity is an essential human need and public service in modern society, and therefore an Occupying Power cannot rely on administrative reasons, such as a lack of a permit, to deny an entire community access to electric power. The only reason that customary and conventional humanitarian law recognizes for the destruction of an essential service such as electric power is a compelling or absolute military necessity. Such necessity does not exist in this case.

Article 53 of the Fourth Geneva Convention provides that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.⁹

The destruction of the sole means of providing electricity to a poor, rural Palestinian village that pre-existed the occupation and dates back to the 19th century, where there is no urgent military necessity to do so, violates these provisions. The electricity generated by these

⁸ See generally Benvenisti Opinion, Exhibit B.

⁹ Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Part III: Status and Treatment of protected persons, 12 Aug. 1949 [hereinafter Geneva Convention IV].

solar panels are used to keep medicine and food refrigerated and are essential to the public health and well-being of the people living in the village. Without this electricity, children and other civilians became ill for lack of healthy food and medicines. While the Israeli government maintains that these solar panels' unpermitted status allows their destruction, Israel has a duty under customary international humanitarian law to ensure the maintenance of public health and hygiene, adequate food and medical supplies, a duty which is violated if the government refuses to permit electric generating structures that are essential to the refrigeration of medical and food supplies.

The lack of a permit thus cannot be utilized as a justification by the Israeli government to evade its international law obligations to ensure that the local population has access to electricity needed to ensure refrigeration and preservation of food and medicines. As Article 53 makes clear, only absolute military necessity would justify the destruction of a civilian structure essential to the maintenance of public health and security, not administrative reasons that the structure is unpermitted.

The solar panels are clearly real property protected pursuant to Article 53 and the military authorities can make no claim that the “destruction is rendered absolutely necessary by military operations.” The Commentary to Article 53 makes clear that the exception permitting destruction requires an imperative military necessity, and that even where the Occupying Power asserts some military necessity, the “occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.”¹⁰ Otherwise the important safeguard would be rendered “valueless.”¹¹ To destroy an essential electric generating

¹⁰ *Official Commentary to the Fourth Geneva Convention Article 53*, at 302 (Jean Pictet ed., 1958).

¹¹ *Id.*

structure without the articulation of an imperative military necessity on the grounds that the structure lacks a permit would violate the strictures of the Geneva Convention and customary humanitarian law.

International Humanitarian Law's recognition that civilian access to vital public services such as the provision of electricity should not be interfered with by the Occupying Power is reflected in Article 63 of the Fourth Convention. Article 63 provides that "subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power, the recognized National Red Cross societies shall be permitted to pursue their activities," and additionally requires that the "same principles shall apply to the activities" of other non-military civic organizations which exist "for the purpose of ensuring the living conditions of the civilian population by the maintenance of **the essential public utility services.**"¹² The importance of Article 63 in this context lies in its recognition that essential public utility services—traditionally defined as including the provision of electricity¹³—cannot be interfered with by the Occupying Power except as a temporary and exceptional measure imposed for "urgent reasons of security."¹⁴

The Hague Regulation, Article 43, which the Israeli Supreme Court recognizes reflects customary international law and applies to the occupied territories, also prohibits Israeli destruction of these solar panels. Article 43 states that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and

¹² Geneva Convention IV, *supra* note 9, art. 63.

¹³ *Black's Law Dictionary* defines a public utility as: "A company that provides necessary services to the public, such as telephone lines and services, electricity, and water. . . ." *Black's Law Dictionary* 1686 (9th ed. 2009).

¹⁴ Geneva Convention IV, *supra* note 9, art. 63.

ensure, as far as possible, public security and safety, while respecting, unless absolutely prevented, the laws in force in the country.¹⁵

As the Israeli Supreme Court has recognized, Article 43 imposes a duty on a military commander for “the preservation of public welfare in his area.”¹⁶

Article 43’s expression “public order and safety” thus does not only refer to security issues. The French version of Article 43, which is the only authentic text, uses the words “l’ordre et la vie publics.” The legislative history of this provision offers evidence of a broader interpretation of those terms, which covers social functions and ordinary transactions which constitute daily life.¹⁷ Several courts have endorsed this broad construction. A tribunal set up in the British-occupied zone of Germany after World War II interpreted the French phrase “l’ordre et la vie publics” as relating to “the whole social, commercial and economic life of the community.”¹⁸ The Israeli Supreme Court adopted the same approach when stating that the obligation to restore and ensure public life and order encompasses “a variety of aspects of civil life, such as the economy, society, education, welfare, health, transport and all other aspects of life in a modern society.”¹⁹

The Supreme Court of Israel has specifically highlighted that the general obligation of Article 43 consists of both guaranteeing security and insuring that the basic necessities of civil

¹⁵ Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 43, 18 Oct. 1907, *available at* <http://www.icrc.org/ihl.nsf/WebART/380-600060?OpenDocument> [hereinafter Hague Convention IV].

¹⁶ HCJ 2150/07 *Abu-Safiya v. Israel* [2008] IsrSC 34(1).

¹⁷ Dinstein, *supra* note 2, at 94.

¹⁸ *Grahame v. Director of Prosecution*, [1947]. AD Case no. 103, at 228, 232 (Germany, British Zone of Control, Control Commission Court of Criminal Appeal).

¹⁹ H.C. 393/82, *Teachers’ Housing Cooperative Society v. Military Commander of Judea and Samaria Region*, [1983] 37(4) Piske Din 785/802, (1984) Israel YbkHR 301, at 306.

life are guaranteed.²⁰ It seems reasonable to contend that the second duty is particularly important as the occupation is prolonged over time and when the occupant is moving away from combat-like situations to issues related to the changing needs and the normal life of the civilian population.²¹

Indeed, the Israeli Supreme Court has noted that the Article 43 inquiry of the commander's authority "must be examined in view of the consequences of the restrictions, and must not focus merely on examining the motives for imposing them."²² Where the consequences of an action are, as here, to deprive a segment of the occupied community of all access to electric power, the destruction of the electricity generating facilities cannot be said to serve public security and order.

This is the case irrespective of whether the generating facilities are permitted or unpermitted by the Israeli authorities. The point is that where the consequences of destruction of an electric generating facility is to deprive a community of electricity, administrative reasons do not suffice to warrant such deprivation.

Similarly, Protocol I, Article 54, to the Geneva Conventions, which is considered part of binding customary international law,²³ would also prohibit Israeli destruction of the solar panels. Article 54(2) provides that:

It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for

²⁰ *Id.*

²¹ *See, e.g.*, Justice Shamgar of the Israeli Supreme Court qualified the second obligation as a "subsequent and continuous" duty which needs to be adjusted to changing social needs. *See* H.C. 69/81 & 493/81, *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) Piske Din.

²² *Abu-Safiya*, at ¶ 26.

²³ <http://www.icrc.org/eng/assets/files/other/customary-law-rules.pdf>.

the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.²⁴

Article 54 names examples of objects that are essential for the survival of the population by definition, independently of any proof of de-facto indispensability to the survival of the population. Therefore, the prohibition on destruction of foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works is absolute. However, as the commentary makes clear, this list is not meant to be exclusive and includes any object essential for the survival of the population.²⁵

In modern society, electric power falls within Article 54. As will be discussed more extensively in Point II *infra*, international agreements as well as the laws of numerous nations recognize that electric power is essential for the survival of the population in today's world. The facts of this case demonstrate that proposition—for the solar panels here are used, *inter alia*, for refrigeration, which is essential to the preservation of medicines and food necessary to allow the population to remain healthy and survive.

Indeed, the Israeli Supreme Court has long recognized that electric generating installations are objects that can be essential for the survival of the civilian population.²⁶ In *Electric Company for the Jerusalem District Ltd. v. Minister of Defense*, the Court accepted that “the supply of electricity needed by the local population is unquestionably a function imposed on

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 54, available at <http://www.icrc.org/ihl.nsf/full/470?opendocument>.

²⁵ Commentary to Protocol I, art. 54, ¶ 2, at 655.

²⁶ HCJ 9132/07 *Jaber Al-Bassiouni Ahmed and others v. Prime Minister, Minister of Defence* (2008); HCJ 256/72 *Electric Company for the Jerusalem District Ltd. v. Minister of Defense*, Piske Din 27(1) 124, 138.

the military government, so as to ensure proper living conditions of the population.”²⁷ More recently, the Court in *Jaber Al-Bassiouni Ahmed v. Prime Minister* asserted that under international humanitarian law, Israel had a duty to ensure that the essential humanitarian needs of the civilian population in the Gaza Strip were met. The Court understood that the provision of at least a basic level of electric power was essential for the survival for the civilian population. While the Court’s decision that Israel was in fact providing sufficient electric fuel and power to meet the essential humanitarian needs of the civilian population was controversial, that electric power was a basic necessity of life was not contested. Moreover, in this context, unlike that of the Gaza Strip, it is also uncontested that Israel is an Occupying Power, and thus not only has the duty to provide for those objects that are essential to the survival of civilian life, but also has, according to the international law of belligerent occupation, “a general duty to ensure the welfare of the residents” of the occupied territory.²⁸ Nor is there any argument here that the electric power being generated by the solar panels at issue here are being used for military purposes.

The destruction of the solar panels constructed by development organizations in this village therefore is inconsistent with the Israel government’s duty under customary international humanitarian law to ensure that the essential objects and necessities for the survival of the civilian population are indeed available to that population. Neither administrative convenience, nor the administration of a permit system, can be allowed to function so as to deprive a civilian population of electricity, and to destroy structures which are undeniably essential for that population to have access to electric power. The issue involved in this case is not Israel’s affirmative duty to supply electricity to an occupied civilian population, but rather whether the Israeli authorities can destroy structures that the local population, with outside assistance, has

²⁷ *Electric Company for the Jerusalem District Ltd. v. Minister of Defense*, Piske Din 27(1) at 138.

²⁸ *Jaber Al-Bassiouni Ahmed*, at ¶ 12.

erected to gain access to electric power where no other access exists. Customary humanitarian law unequivocally does not permit Israel to do so.

II. Human Rights Law Also Treats Electricity As a Basic Right or Necessity

International Human Rights law is also applicable to territories which are subject to a Belligerent Occupation, as is the West Bank.²⁹ Various international and regional agreements and declarations, as well as judicial decisions from national courts, recognize the importance of electricity to the maintenance of the basic social and economic rights to food, health and housing. International human rights law thus increasingly recognizes a governmental duty to provide access to electricity and other essential public services, particularly for poor, vulnerable communities. For the Israeli government to utilize a planning, permitting scheme to destroy electric power generating installations of a poor community, thereby rendering that community without electricity services, would contravene human rights norms.

The Convention on the Elimination of Discrimination against Women (CEDAW) requires States to eliminate discrimination against women particularly in rural areas and to ensure that they “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.”³⁰ Israel has ratified CEDAW and has an obligation to apply its provisions in the Occupied Territories. The facts of this situation illustrate that the deprivation of solar energy to the village would fall most heavily on women

²⁹ See *Legal Consequences*, *supra* note 1, at ¶ 106. See also *Abu-Safiya*, at ¶ 16 (“wherever a lacuna exists in the aforesaid laws of armed conflict, it may be filled by provisions of international human rights law”), citing CrA 6659/06 *Anon. v. State of Israel*, per President D. Beinisch, at ¶ 9; HCJ 10356/02 *Hess v. IDF Commander in West Bank*, [2004] IsrSC at 455; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352, at 364; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807, at 827; HCJ 1661/05 *Gaza Coast Regional Council v. Knesset* [2005] IsrSC 59(2) 481, at 517; HCJ 7957/04 *Mara’abeh v. Prime Minister of Israel* [2006] IsrSC 60(2) 477, at 492; HCJ 7862/04 *Abu Da*.

³⁰ Art. 14 (2)(h) Convention on the Elimination of all Forms of Discrimination against Women, GA Res. 34/180 34 UNGAOR Supp. (No. 46, UN Doc. A/34/46, at 193 (1979), *reprinted in* 19 ILM 33 (1980)).

who spend most of their time in their houses and heavily utilize the refrigerators that are powered by the solar electricity.

Thus CEDAW imposes a duty on Israel to ensure that the women in the village of Imneizel enjoy access to adequate electricity. To destroy their only source of electric power would be to violate the Convention. The lack of a permit simply is not an adequate reason under the Convention to totally deny these women adequate living conditions—which under the Convention includes electricity. Under the Convention, Israel has an obligation to permit the electric generating facility absent some compelling military reasons to the contrary.

Other international agreements such as the International Covenant on Social, Economic and Cultural Rights also support the notion that governments have an obligation to provide access to electricity to people living in territory under their control. The reporting requirements of State Parties to the International Covenant on Economic, Social, and Cultural Rights (ICESCR) include electricity. State Parties are expected to periodically submit information on household amenities such as heating and electricity to the Committee on Economic, Social, and Cultural Rights (CESCR).³¹ This implies that heating and electricity are considered to be a component of an adequate standard of living by the CESCR and the United Nations itself under the ICESCR.

The CESCR also considers that the right to adequate housing includes access to electricity.³² CESCR requires that whenever dwellings are demolished the inhabitants are to be

³¹ Committee on Economic, Social and Cultural Rights, *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the ICESCR*, ¶ 3, U.N. Doc. E/C.12/1991/1 (June 17, 1991).

³² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing Contained in Art XI(1) of the ICESCR*, ¶ 8(b), E/1992/23 (13 Dec. 1991).

relocated to places that have access to electricity.³³ The Special Rapporteur on adequate housing has regarded the mandate of adequate housing to include access to essential civic services such as electricity.³⁴ Housing adequacy is assessed in a similar fashion under the UN Housing Program in regards to basic services such as electrical supply systems.³⁵

Further links between socio-economic rights and access to modern energy services are evident in the work of a wide range of international organizations and agencies. These entities recognize that access to electricity is an essential requirement for ensuring that people have a decent standard of living. For example, in the sustainable development framework, access to energy is referred to in paragraph 18 of the Johannesburg Declaration on Sustainable Development as a basic requirement for human dignity.³⁶ The 1992 UN Rio Conference on the Environment and Development stated that “energy is essential to economic and social development and an improved standard of living.”³⁷

³³ Committee on Economic, Social and Cultural Rights, *Conclusions and Recommendations of the Committee on Economic, Social and Cultural Rights, Dominican Republic*, ¶ 11, U.N. Doc. E/C.12/1994/15 (1994), available at <http://www1.umn.edu/humanrts/esc/DOMINICA.htm>.

³⁴ U.N. Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, ¶ 35, 46(b), U.N. Doc. E/CN.4/2002/59 (Mar. 1, 2002) (prepared by Miloon Kothari).

³⁵ U.N. Housing Rights Programme, *Monitoring Housing Rights: Developing a Set of Indicators to Monitor the Full and Progressive Realisation of the Human Right to Adequate Housing, Working Paper No. 1*, at 13, 29 (2003) (the UN World Population and Housing Census Recommendations also include an assessment of the type of lighting and/or electricity employed), available at http://www.unhabitat.org/downloads/docs/3674_40241_UNHRP-WP-01.pdf.

³⁶ U.N. Doc. A/CONF.1999/L.6Rev. (4 Sept. 2002). Paragraph 18 states: “We welcome the Johannesburg Summit focus on the individuality of human dignity and are resolved through decisions on targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, energy, health care, food security and the protection of biodiversity. . . .”

³⁷ Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1, vol. I, Res. 1, Annex II, Agenda 21, ¶ 9.9 (1992), available at <http://documentsdds-ny.un.org/doc/UNDOC/GEN/N92/836/55/pdf/N9283655.pdf?OpenElement>.

Regional treaties also recognize the importance of access to electricity to human dignity and human rights. Most importantly, the European Union has recognized that its member states have a legal obligation to provide universal access to electric power to individuals, and that administrative proceedings such as permitting requirements, cannot be utilized to deprive underserved communities of electric power.

The European Court of Justice and the European Commission have held that the provision of electricity is a “service of general economic interest” under the Treaty on the European Union.³⁸ The European Commission has stated that services of general interest “are a part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation. . . . These services are a pillar of European citizenship, forming some of the rights enjoyed by European citizens. . . .”³⁹

That the provision of electricity is a service of general interest triggers the public service obligations of Member States to provide universal service and also the “right for every citizen to access certain services considered essential.”⁴⁰ Most recently, the European Parliament and European Council have promulgated an Electricity Directive that further elaborates on the universal service obligations of member states to provide electricity to all citizens.⁴¹

³⁸ Case C-393/92, *Almelo v. IJsselmij*, 1994 E.C.R. I-1277 ¶¶ 46-48; Commission Decision 91/50/EEC of 16 Jan. 1991.

³⁹ Commission of the European Communities, *Green Paper on Services of General Interest*, at ¶ 2, Brussels, COM (2003) 270 final (May 21, 2003), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0270en01.pdf [hereinafter *Green Paper*].

⁴⁰ Council Directive 2002/22 art. 3(1), 2002 O.J.(L 108) 51 (EC); *Green Paper*, *supra* note 39, at ¶ 50.

⁴¹ Directive 2009/72/EC (Brussels, July 13, 2009), available at http://europa.eu/legislation_summaries/energy/renewable_energy/127035_en.htm.

Article 3 of the Electricity Directive is entitled Public Service Obligations and Consumer Protection. Paragraph 3 of Article 3 provides that “Member States **shall** ensure that all household customers . . . enjoy **universal service, that is the right to be supplied with electricity** of a specified quality at reasonable, easily and comparable, transparent, and non-discriminatory prices.”⁴² The Directive explicitly requires Member States to “take all measures Necessary to ensure that **administrative proceedings**” are not used to preclude the access to electricity from sources registered in another state.⁴³ In addition, the Directive requires that “Member States shall take appropriated measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect **vulnerable customers**.”⁴⁴ Vulnerable customers are viewed as those without easy access to energy, and “Member States shall ensure that the rights and obligations linked to vulnerable customers are applied,” particularly in “remote areas.”⁴⁵

These rights and obligations addressing access to electricity promulgated by the European Parliament and Council strongly support the proposition that the Israeli government cannot use administrative reasons to destroy electricity producing facilities used by vulnerable, poor Palestinians who have no other access to electricity. Under the European system, a government could not use the denial of a permit to deny a rural community access to an energy source, even a source that emanated from outside of the country.

⁴² *Id.* art. 3 ¶ 3, O.J. 211/64 14.8.2009 (emphasis added).

⁴³ *Id.* art. 3 ¶ 4 (emphasis added).

⁴⁴ *Id.* art. 3 ¶ 7 (emphasis added).

⁴⁵ *Id.*

The European Committee of Social Rights (ECSR), whose mission is to ensure that European States Parties comply with the provisions of the European Social Charter (ESC) has also recognized that electricity is essential to ensuring the right to housing. For example, in the case of *European Roma Rights Centre v. Italy*, no. 27/2004, the ECSR found that Article 31(1) taken together with Article E was being violated by Italy because the housing conditions for Roma lacked basic health requirements such as electricity.⁴⁶

Adequate housing under Article 31(1) of the ESC means a dwelling which is “safe from a sanitary and health point, i.e., it possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity.”⁴⁷ Article E requires a ban on all forms of indirect discrimination, which can arise “by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.”⁴⁸ The ESCR held that Italy was required to take the appropriate measures necessary in Roma’s particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless. This case clearly establishes that not only is adequate housing a basic human right guaranteed to all in the European community, but also electricity itself is considered a basic amenity necessary for adequate housing and living conditions.

The American Convention on Human Rights also recognizes that the right to access to electricity and other basic public services are basic human rights. Article 11 of the Additional

⁴⁶ *European Roma Rights Center v. Italy*, Complaint No. 27/2004 (Decision on the Merits), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC27Merits_en.pdf.

⁴⁷ *Id.* at § 35.

⁴⁸ *Autism-Europe v. France*, Complaint No. 13/2002 (decision on the merits of Nov. 4, 2003, § 52), available at http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC13Merits_en.pdf.

Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights provides that “everyone shall have the right to live in a healthy environment and to have access to basic public services.”⁴⁹ Public services include the supply of electricity. Moreover, other public services such as transport, health and clean water, are themselves not available without energy. The Additional Protocol went into effect in 1999 and has been ratified by numerous American States.

A similar link between energy, in this case electricity, and socio-economic rights also is contained in Article 16 of the African Charter on Human and Peoples’ Rights, that confers on all individuals the right to enjoy the best attainable state of physical and mental health, and requires States parties to take the necessary measures to protect the health of their people.⁵⁰ The African Commission on Human and Peoples Rights found that the failure of the Zaire (Democratic Republic of the Congo) Government to supply basic services such as safe drinking water and electricity was a violation of that Article.⁵¹

So too, the Constitutional Court of South Africa recognized that the realization of the right to housing could require the provision of other services including energy:

The state’s obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to

⁴⁹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 Nov. 1988, *reprinted in* 28 ILM 156.

⁵⁰ African (Banjul) Charter on Human and Peoples’ Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *reprinted in* (1982) 21 ILM 58.

⁵¹ *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples’ Rights, ¶ 47, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), *available at* www1.umn.edu/humanrts/africa/comcases/25-89_47-90_56-91_100-93.html (accessed 13 Mar. 2005).

finance; some may need access to services such as safe water, sewage, electricity and roads.⁵²

Moreover, the judicial and political branches of a number of industrialized States have recognized that electricity access qualifies as a human right or is essential to human rights. For example, the United Kingdom has noted that “equity of access to basic energy services for cooking, space heating and lighting, like access to water, could be considered a human right.”⁵³ French legislation on electricity states that the law “contributes to social cohesion by satisfying everyone’s **right to electricity**.”⁵⁴

South African law imposes duties upon electricity service providers to supply electricity “to every applicant who is in a position to make satisfactory arrangements for payment.”⁵⁵ This obligation has been interpreted to the effect that applicants enjoy a right entitling them to demand electricity once they have satisfied these supply conditions.⁵⁶

Moreover, a number of national courts have explicitly recognized a duty on the part of government to provide electricity. For example, the South African Constitutional Court explicitly recognized that there was a “‘right’ to receive electricity as a basic municipal service.”⁵⁷ The Court stated:

⁵² *Government of the Republic of South Africa v. Grootboom*, (11) BCLR 1169, ¶ 37 Judgment, available at www.concourt.gov.za/files/grootboom1.pdf.

⁵³ UK Dep’t for Int’l Dev., *Energy for the Poor: Underpinning the Millennium Development Goals* 5, 8 (2002).

⁵⁴ Electricity Act, art. 1 (2000) (Fr.) (emphasis added)

⁵⁵ Electricity Act 41 of 1987 § 10(1) (1987) (S. Afr.).

⁵⁶ *Meyer v. Moqhaka Local Municipality*, Case No. 4008/2003, ¶ 24 (S. Afr. High Ct., Orange Free State Provincial Div.) (unreported per Rampai J.).

⁵⁷ *Joseph and Others v. City of Johannesburg*, Case CCT 43/09 [2009] ZACC 30.

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. . . . The provision of electricity is one of those services that local government is required to provide. . . . In *Mkontwana*, Yacoob J. held that “municipalities are *obliged* to provide water and *electricity* to the residents in their area *as a matter of public duty*. Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society. . . .

Although in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it.⁵⁸

The German Constitutional Court has also recognized the indispensability of energy supply and the corresponding duty of government to provide energy service. While, the German Constitution, as with the South African, does not have any provision explicitly mentioning energy, the German Constitutional Court has held that ensuring that the population has energy is of “the greatest general interest,”⁵⁹ that the permanent availability of energy is an “indispensable prerequisite to the functioning of an economy.”⁶⁰ The Court has held that the provision of energy is a “service of general economic interest,” which means that the provision of a basic minimum of energy constitutes a general obligation and duty of the state, essential for individuals to live in dignity.⁶¹

So too, the Belgium Court of Appeal, while holding that the cutoff of electricity for failure to pay the bill did not constitute torture under the European Convention of Human Rights and permitting the cutoff of service, nevertheless recognized that access to electricity and gas services are indispensable to human dignity. The Court noted that public authorities have a

⁵⁸ *Id.* at ¶¶ 34, 40 (emphasis in original).

⁵⁹ BVerfGE 91, 186, 206.

⁶⁰ *See* BVerfGE 30, 292, 323–24.

⁶¹ BVerfGE 66, 248, 258. *See also* Article I(1) German Constitution.

positive duty to provide gas and electric service within the framework of the social welfare services.⁶²

While the United States does not generally accept the concept of social and economic constitutional rights, United States federal courts have also recognized that a permanent deprivation of electricity can deny prisoners a “minimal civilized measure of life’s necessities.” *Abascal v. Fleckenstein*, 2008 U.S. Dist. LEXIS 60322 (W.D.N.Y. Aug. 7, 2008). These courts have accepted that the “[d]eprivation of electricity can form the basis of an Eighth Amendment conditions—of confinement claim” constituting cruel and unusual punishment. *Id.*, citing *Powell v. Beilien*, 2005 U.S. Dist. LEXIS 8182 (W.D.N.Y. Apr. 25, 2005).

In summary, the concept that access to electricity forms an essential service of modern life has become generally accepted. Indeed, international treaties such as CEDAW, regional arrangements such as the European Union, and national court opinions increasingly recognize that governments are under an obligation and duty to provide electricity service to their population. That well-recognized obligation is applicable to the Israeli military authorities with respect to the Palestinian population on the West Bank and precludes the destruction of solar panels essential for the provision of electricity to rural villages, whether such panels are accorded permits to operate or not. Indeed, the human rights obligation accepted by the Israeli government to accord access to electricity, particularly to women in rural villages, requires the

⁶² Luis Aviles, *Electric Energy Service in European Law: A Human Right?* n.19 citing Decision of Feb. 25, 1988, J.L.M.B. 1989, at 1132.

government to permit villages with no other access to electric power to construct and maintain civilian solar electricity facilities.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jules Lobel". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Professor Jules Lobel
April 20, 2012