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HCJ 4764/04

1. **Physicians for Human Rights**
2. **Association for Civil Rights in Israel**
3. **The Center for the Defense of the Individual – Founded
by Dr. Lota Salzberger**
4. **B'Tselem – The Israeli Information Center for Human
Rights in the Occupied Territories**
- v.
 1. **Commander of the IDF Forces in the Gaza Strip**
 - 2.

The Supreme Court Sitting as the High Court of Justice
[May 30, 2004]

Before President A. Barak, Justice J. Türkel and Justice D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice

For petitioners—Fatma Al-Aju

For respondents— Anner Helman, Yuval Roitman - Office of the
State Attorney

JUDGMENT

President A. Barak

Is the State of Israel, during the current military operations in Rafah, fulfilling its duties under international humanitarian law? This is the question before us.

Background

1. Since May 18, 2004, combat activities have been conducted in the area of Rafah in the Gaza Strip. *See* HCJ 4573/04 *Al-Besioni v. Commander of the IDF Forces*; HCJ 4584/04 *Shakfhat v. Commander of the IDF Forces in the Gaza Strip*; HCJ 4694/04 *Abu-Amra v. Commander of the IDF Forces in the Gaza Strip*. According to respondent, these combat activities, broad in scope, are directed against the terrorist infrastructure in that area. Their central objective is to locate the underground tunnels which are used to smuggle arms from the Egyptian side of Rafah to the Palestinian side. In addition, the military operations are aimed at arresting those wanted for terrorist activity and locating arms caches in the Rafah area. The activity includes battles against armed opponents. Explosive charges and gunfire have been directed against the Israeli Defense Forces (“IDF”).

2.

3. The city of Rafah consists of several neighborhoods. Most of the military operations took place in the neighborhood of Tel A-Sultan. The IDF also entered the neighborhood of Brazil. Between the time that this petition was submitted (May 20, 2004), and heard the next morning (May 21, 2004), the IDF withdrew from these two neighborhoods. The neighborhoods, however, remained surrounded and controlled by the IDF.

4.

5. Before the start of the military operations, the IDF, having learned from similar operations in the past, took three steps in anticipation of any humanitarian problems that could arise. First, a

“Humanitarian Hotline” was established. The Hotline was to serve as a contact for organizations outside the area of operations. Human rights organizations, for example, would be able to contact the Hotline and immediate efforts would be made to resolve specific humanitarian problems. Second, a District Coordination Office (“DCO”) was established. The DCO was to stay in constant communication with the Palestinian Ministry of Health, the Red Crescent, the International Red Cross, and local hospitals. The DCO, headed by Col. I. Mordechai, would resolve humanitarian problems that had arisen as a result of the operations. Third, a liaison officer of the Coordination Office was placed with every battalion in the area of operations. The liaison officer was to contend with humanitarian problems, such as the evacuation of Palestinian casualties.

6.

The Petition

7. Petitioners are four human rights organizations. They point to harm that has been caused to the local civilian population in Rafah as a result of the military operations – the demolition of houses and injuries caused to civilians. The petition asks that the IDF allow medical teams and ambulances to reach and evacuate the wounded in Rafah, that such evacuation not require coordination with the Hotline, that medical teams be neither threatened nor harmed, and that the transport of medical equipment into Rafah be allowed. The petition further asks that electricity and water provisions be restored to the neighborhood of Tel A-Sultan, that the IDF allow the provision of food and medicines to the residents of that neighborhood, and that a medical team of Petitioner 1 be allowed to enter hospitals in the Gaza Strip and assess the medical situation there. Finally, petitioners ask that a full investigation be made into an incident in which a number of residents were killed when a crowd of protesting civilians was shelled. Moreover, petitioners ask for an order prohibiting the shelling of civilians, even when among them are armed combatants, who do not pose an immediate threat to life.

8.

Respondent’s Answer

9. Respondent asks that the petition be denied. It emphasizes that military operations, including battles with armed combatants, continue in the area. Therefore, this Court should exercise caution in its judicial review of the actions of the security authorities. These actions lie at the outer limits of the reach of the judiciary. As to the substance of the petition, respondent asserts that underground tunnels from the Egyptian to the Palestinian side of the city constituted a central link in the smuggling of arms into the Gaza Strip. These arms are used against the IDF and Israeli communities both inside the Gaza Strip and outside of it. The purpose of the current IDF operations is to break up the Palestinian terror infrastructure in the area: to locate underground tunnels, to detain wanted terrorists, and to locate arms caches. During the operations, there occurred intensive battles between the IDF and combatants armed with explosive devices and other weapons.

10.

In both its written briefs and in its oral arguments, respondent emphasized that the IDF has made strong efforts to take the needs of the local population into consideration. These efforts led to the establishment of the Hotline and the District Coordination Office. Even so, the situation remains complex – armed combatants operate from within the population, employing houses as cover from which to fire on the IDF forces, and this presents difficult situations for the IDF. Despite these problems, however, the IDF is fulfilling its obligations towards the civilian population, and is doing everything possible to minimize the damage caused. Respondent supplied detailed responses to each of the petitioners' claims. It also asserts that the petition's description of the situation is based on Palestinian sources, whose sole purpose is to paint the humanitarian picture as being far more grim than reality.

The Proceeding

11. The petition was submitted on Thursday, May 20, 2004. Hearings were scheduled for the next morning, May 21, 2004. We ordered respondent to reply to the petition. Both sides, as well as the head of the District Coordination Office and the Judge-Advocate General, were present at the hearing. The head of the Coordination Office described

situations that he had dealt with. Several times during the hearing he requested some moments to determine the real-time situation in Rafah. He contacted his liaisons in Rafah, these would provide details, which he would relay back to the Court.

12.

At the end of hearing we suggested an arrangement regarding the burial of the dead. *See infra* para. 25. The State Attorney provided its updated answer regarding this arrangement on Sunday, May 23, 2004. On May 24, 2004, we ordered petitioners to respond to this answer. Before we received petitioners' response, we received an additional answer from the respondent. Petitioners' response, which concerned the burial of the dead and the provision of electricity to Rafah, was received the same day. Respondent's answer to this latter response was received on May 27, 2004, following the IDF withdrawal from Rafah on May 24, 2004, which returned the civil and security control in the city to the Palestinian Authority.

Judicial Review

13. "Israel is not an isolated island. She is a member of an international system." H CJ 5592/02 *Yassin v. Commander of the Kziot Military Camp*. The military operations of the IDF are not conducted in a legal vacuum. There are legal norms – of customary international law, of treaties to which Israel is party, and of the fundamental principles of Israeli law – which set out how military operations should be conducted. In H CJ 3451/02 *Almandi v. The Minister of Defense*, I noted that:

14.

Israel finds itself in the middle of a difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. *See* The Charter of the United Nations, art. 51. This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, "When the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality...

The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law's war against those who rise up against it. See H CJ 320/80 *Kawasma v. The Minister of Defense*, at 132. Moreover, the State of Israel is founded on Jewish and democratic values. We established a state that upholds the law—it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these—the vision and the law—there lies only harmony, not conflict.

Indeed, all of the IDF's operations are subject to international law. For example, in H CJ 3114/02 *Barake v. Minister of Defense* I noted that “[e]ven in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population.”

15. In general, the judicial review of this Court is exercised *ex post facto*. A petition is submitted against an action that has already been taken. Occasionally, a significant period of time can elapse between the time the action is taken and before that action is examined by this Court. This, however, is not the case here. Petitioners have not requested that we examine the legal import of military operations that have already concluded. The purpose of this petition is to direct the present actions of the military. This is *ex ante* judicial review, exercised while military operations are currently underway. This imposes certain constraints on the Court. Of course, petitions that look towards the future are not novel to us. For example, in H CJ 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*, we examined the legality of guidelines that allowed for the imposition of moderate physical pressure on suspects of

an investigation. The purpose of our review there was not to examine actions that had been taken in the past, but to review investigations that were underway at that time. Even so, the current petition is unique in that it asks us to review military operations while they are underway and while IDF soldiers are subject to the dangers inherent to combat. As such, it is appropriate to emphasize that:

16.

Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangered the lives of soldiers.

Barake, at 16. The same applies here: humanitarian concerns have been resolved, without endangering the lives of soldiers or the military operations. Subject to this caveat, the situation before us is no different than other situations where this Court has reviewed the legality of military operations.

17. We do not review the wisdom of the decision to take military action. We review the legality of the military operations. As such, we presume that the operations in Rafah are necessary from a military standpoint. The question before us is only whether these military operations adhere to domestic and international law. The fact that operations are necessary from a military standpoint does not automatically mean that they fulfill legal requirements. Of course, with regard to issues of military concern, we do not stand in the stead of the military commander, and we do not substitute our discretion for his own. That is his expertise. We examine the legal import of his decisions. That is our expertise.

18.

The Normative Framework

19. The military operations of the IDF in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the

Laws and Customs of War on Land 1907 [hereinafter – the Hague Convention] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 [hereinafter – the Fourth Geneva Convention]. In addition, they are also governed by the principles of Israeli administrative law. *See* HCJ 393/82 *Almasualiah v. Commander of the IDF Forces in the West Bank*; HCJ 358/88 *Association for Civil Rights in Israel v. GOC Central Command*. According to these principles, the IDF must act with integrity (both substantive and procedural), with reasonableness and proportionality, and appropriately balance individual liberty and the public interest. *See* HCJ 3278/02 *The Center for the Defense of the Individual v. The Commander of the IDF Forces in the West Bank*.

20.

21. For our purposes, the central injunction of international humanitarian law applicable in times of combat is that civilian persons are “entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof.” Fourth Geneva Convention, § 27. *See also* the Hague Convention, § 46. This normative framework was formulated by Gasser:

22.

Civilians who do not take part in hostilities shall be respected and protected. They are entitled to respect for their persons, their honour, their family rights, their religious convictions, and their manners and customs. Their property is also protected.

Hans Peter Gasser, *Protection of the Civilian Population*, in *The Handbook of Humanitarian Law in Armed Conflicts* 211 (D. Fleck, ed., 1995). The basic assumption of this injunction is the recognition of the importance of man, the sanctity of his life, and the value of his liberty. *Compare* *The Basic Law: Human Dignity and Liberty*, § 1; J.S. Pictet, *Commentary: Fourth Geneva Convention* 199 (1958). His life may not be harmed, and his dignity must be protected. This basic duty, however, is not absolute. It is subject to “such measures of control and security in

regard to protected persons as may be necessary as a result of the war.” See Fourth Geneva Convention, § 27. These measures may not “affect the fundamental rights of the persons concerned.” See Pictet, at 207. These measures must be proportionate. See Fleck, at 220. The military operations are directed against terrorists and hostile combatants. They are not directed against civilians. See Fleck, at 212. When civilians, as often happens, enter a zone of combat – and especially when terrorists turn civilians into “human shields” – everything must be done in order to protect the dignity of the local civilian population. The duty of the military commander is double. First, he must refrain from operations that may cause harm to the civilian population. This duty is formulated in the negative. Second, he must take all measures required to ensure the safety of civilians. This latter duty calls for positive action. See Fleck, at 212. Both these duties – which are not always easily distinguishable – should be reasonably and proportionately implemented given considerations of time and place.

23. Together with this central injunction regarding civilians’ human dignity during times of combat, international humanitarian law imposes several specific obligations. These obligations do not exhaust the fundamental principle. They only constitute specific expressions of that principle. We shall note two of these obligations that are relevant to the case at hand.

24.

1. *The Provision of Food and Medicines*: “The Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.” The Fourth Geneva Convention, § 55; Pictet, at 300. As such, the Red Cross and other humanitarian organizations must be allowed to provide food and medicines. The Fourth Geneva Convention, § 59. Free passage of these consignments must be allowed. *Id.*; See also *Id.*, at § 23. Of course, the consignments may be searched to ensure that they are intended for

humanitarian concerns. *Id.*, at § 59.

2.

3. *Medical Supplies*: The proper operation of medical establishments must be ensured. Fourth Geneva Convention, § 56. Persons engaged in searching for the wounded must be protected. *Id.*, at § 20. The Red Cross and the Red Crescent must be allowed to pursue their activities in accordance with the principles of the International Red Cross. *Id.*, at § 63.

4.

From the General to the Particular

25. In their briefs and in their oral arguments, petitioners presented a list of respondent's violations of international humanitarian law. We ordered respondent to reply to each item on this list, both in writing and during oral arguments. We also received updated replies from Col. Mordechai. We will now turn to each of these specific topics.

26.

Water

27. Petitioners asserted that the entrance of tanks into the neighborhood of Tel A-Sultan has wrecked the water infrastructure and, as a result, the provision of water in all of Rafah has been disrupted. As of oral arguments, one of the wells had been repaired, but a severe water shortage persisted. Petitioners ask that we order respondent to restore the provision of water to the neighborhood of Tel A-Sultan. During oral arguments Col. Mordechai confirmed that the wells in the neighborhood of Tel A-Sultan have indeed been damaged. Repairs have been delayed as the Palestinian repair team, wary of the hostilities, did not want to enter Tel A-Sultan. Later, under the initiative of Col. Mordechai, the Red Cross entered the neighborhood and most wells were repaired. In areas where running water is as yet unavailable, as in Tel A-Sultan, the military has allowed water tankers to enter. Currently, there are five water tankers in Tel A-Sultan, and residents may reach them without difficulty. As he was explaining the situation to us, it was reported to Col. Mordechai – and he, in turn, reported to us – that six additional water tankers had entered the

neighborhood. Similarly, we have been informed that all the wells have been repaired. Diesel fuel has been brought into the neighborhood to allow the pumping of water from the wells. As such, there is currently running water in all neighborhoods of Rafah.

28.

29. It is the responsibility of the military commander to ensure the provision of water in the area of combat activities. This includes not only the responsibility to ensure that no damage is caused to the sources of water, but also the positive obligation to provide water in areas of shortage. Everything should be done in order to ensure the provision of water; sources of water must be repaired with due speed. Water tankers should be provided if no running water is available. As Col. Mordechai has informed us, these issues have been resolved. Of course, the lessons learned here must serve the army in the future.

30.

Electricity

31. Petitioners claim that Rafah's neighborhoods are without electricity. An attempt to connect the Tel A-Sultan neighborhood failed, and the entire city is without electricity. They ask that we order respondent to restore electricity to the affected areas. During oral argument, Col. Mordechai informed us that electricity in the southern Gaza Strip comes from Israel. The electric infrastructure was damaged during the course of combat activities. The IDF – in coordination with the Rafah municipality – is working on repairing the damage. The repairs take time, as the workers occasionally have difficulty finding the source of the problem. In addition, the battles taking place on the scene make the proper reestablishment of the electrical network difficult. At the moment, there is electricity in the great majority of Rafah, and everything will be done to ensure that electricity is restored to the entire area. In light of all this, we believe that this Court need not make any additional orders concerning this issue.

32.

On May 24, 2004, petitioners informed us that several houses in Rafah remained without electricity. The equipment necessary to repair the network is not available in Gaza, and must be imported from Israel.

The closure of Karni crossing, however, has prevented the equipment from being imported. After the withdrawal of the IDF, and after military operations had ceased, respondent informed us (May 27, 2004) that Rafah had been returned to the civilian and security control of the Palestinian Authority, and that the area is no longer under the control of the IDF. Moreover, we were informed that the required materials may be brought in through Karni crossing, as long as arrangements are made with the appropriate authorities in the IDF.

Medical Equipment and Medicines

33. Petitioners claimed that there is a severe shortage of medicines, medical equipment, and donated blood in the A-Najar hospital, which, although located outside the area of combat, serves the area which is controlled by the IDF. The shortage was reported by the hospital to Professor Donchin, a member of Petitioner 1 (Physicians for Human Rights). Petitioner 1 prepared a vehicle full of medicines, bandages, and donated blood. The vehicle is waiting outside Erez Crossing, and it is not permitted to enter the Gaza Strip. Petitioners request that we order respondent to allow the supply of medicines to the residents in the Tel A-Sultan neighborhood. They also request that we order respondent to allow the passage of vehicles carrying medical equipment between Rafah and the hospitals outside of it, in Khan Younis and Gaza City. Col. Mordechai mentioned in his written response that medicines and medical equipment are being allowed to be brought into the Rafah area. There is nothing preventing the transfer of medical equipment from one area to another. The international border crossing at Rafah, which had been closed due to the combat, was opened for this specific purpose, in order to enable trucks bearing medical equipment from Egypt to enter the Gaza Strip area. In his oral response Col. Mordechai added that the entrance to the combat zone is through Karni Crossing. Any medical equipment brought to that gate will be transferred immediately to its destination, on condition that it is not accompanied by Israeli civilians, for fear that they may be taken hostage. As to the situation regarding medicines in the hospital, Col. Mordechai claimed that he has been in contact, at his own initiative, with the hospital director. At first, he was told of the shortage

of donated blood and of basic medical equipment. After a short while, he was told that donated blood had been received and that there was no longer a shortage. The shortage of first aid equipment, he reported, continues. That same night a truck with medical equipment from Tunisia entered the Gaza Strip from Egypt. In addition, four Red Cross trucks with medicines entered via Karni Crossing. Col. Mordechai remains in direct contact with the Red Cross regarding this issue. Every request for the supply of medicines is received and expedited. During the battles, oxygen tanks were allowed to be taken out of Gaza, filled in Israel, and returned to the hospital. In response, petitioners noted that contact had just been made between Petitioner 1 and the Red Cross, and that the vehicle prepared by them, and the equipment upon it, will be brought to its destination. Respondent informed us that he had just gotten word that four trucks with medical equipment had passed through Karni Crossing.

34.

35. It is the duty of the military commander to ensure that there is enough medical equipment in the combat zone. This is surely his obligation towards his soldiers; but his obligation is also towards the civilian population under his control. In the framework of the preparation for a military operation, this issue – which is always to be expected – must be taken into account. In this regard, both the local medical system as well as the ability of local hospitals to give reasonable medical care during combat must be examined in advance. Medical equipment must be prepared in advance in case of shortage; provision of medical equipment from different sources must be allowed in order to relieve the shortage; contact must be maintained, to the extent possible, with the local medical services. The obligation is that of the military commander, and the receipt of assistance from external sources does not release him from that obligation. *Compare* the Fourth Geneva Convention, § 60. However, such external assistance is likely to lead to the fulfillment of the obligation, *de facto*. It seems to us now that this issue is reaching solution and we do not think that there is a need for additional remedies from this court.

Food

36. According to petitioners, a full curfew and sealing off of some of the neighborhoods of Rafah were imposed along with the commencement of military activity. These are lifted and imposed intermittently, according to the area in which combat is taking place at any given time. In the neighborhood of Tel A-Sultan, continuous combat has been taking place since the morning of May 18, 2004. For three days now, the curfew has cut the residents of the neighborhood off from the outside world. They suffer a shortage of water (*see supra* para. 14), medicine (*see supra* para. 17), and food. In four Rafah neighborhoods, there is no milk or basic food products. Contact with other neighborhoods – which would solve the problem – is denied by the IDF; nor is food provided to the area. Petitioners ask that we order respondent to allow food supply to the residents of the neighborhood of Tel A-Sultan. In his response, Col. Mordechai mentioned that, when a curfew is imposed, standard procedure is to allow restocking of food 72 hours from the curfew's commencement. In this case, the IDF allowed trucks laden with food, prepared by the Red Cross, into the area within 48 hours. Food stations were designated in different parts of the neighborhoods, and food was distributed to the residents. For this purpose, the IDF is in contact with the mayor of Rafah and with the Ministries of the Palestinian Authority. During the day, additional food trucks were allowed in. Every request from an outside source to supply food will be approved and expedited. The same applies to milk. In Col. Mordechai's opinion, there is currently no shortage of food. He emphasized that, even before the operation, UNRWA was allowed to fill its warehouses with food.

37.

38. On the normative level, the rule is that a military commander that takes over an area by way of combat must provide for the nutritional needs of the local residents under his control. The specific details of this obligation depend, of course, upon the current state of the combat. However, it is prohibited for combat to cause the starvation of local residents under the control of the army. *See Almandi*, at 36. On the practical level, it seems to us that the food problem has been solved. Nonetheless, we must note once again, that just like the medicine

problem, the issue of food for the civilian population must be part of any advance planning for a military operation. The full responsibility for this issue lies with the IDF. The IDF is, of course, likely to be assisted by international organizations, such as the Red Cross and UNRWA. However, the actions of the latter do not relieve the army, which has effective control of the area, from its basic obligation towards the civilian population under its control. *Compare* the Fourth Geneva Convention, § 60.

39.

Evacuation of Casualties

40. Petitioners claim that, as the military operation commenced, the road from Rafah to Khan Younis was blocked in both directions. That morning, ambulances evacuating casualties from Rafah to Khan Younis did not succeed in returning to Rafah. Therefore, wounded persons remained in the A-Najar hospital. That hospital is not equipped or advanced enough to treat the tens of wounded arriving. Due to the blocking of the road, the lives of many wounded are in danger. Moreover, evacuation of the wounded from A-Najar hospital in Rafah to hospitals outside of Rafah is allowed only on the condition that the name and identification number of the wounded person and the license number of the ambulance intended to evacuate him are provided. Whereas the demand for the license number of the ambulance is possible to satisfy – though with difficulty – it is impossible to provide the name and identification number of the wounded. The reason for this is that many of the wounded are not conscious and their identity is not known. As such, ambulances are unable to evacuate unidentifiable casualties. Moreover, the entrance of additional ambulances into the A-Sultan neighborhood is prevented due to the excavations that the IDF is carrying out in the area. In one instance, shots were even fired on an ambulance of the Red Crescent. Petitioners request that we order the IDF to refrain from hurting or threatening the medical teams or civilians engaged in the evacuation of casualties. They also request that medical teams and Palestinian ambulances be allowed to reach the wounded in Rafah in order to evacuate them to hospitals. Finally, they request that we order respondent to allow the transfer of wounded in ambulances from the hospital in

Rafah to other hospitals in the Gaza Strip with no need for advance permission, or provision of the identities of the wounded.

41.

42. In his written response, Col. Mordechai stated that the IDF allows the entrance of ambulances and medical teams into Rafah to evacuate casualties. The evacuation is coordinated with Red Cross and Red Crescent officials, the Palestinian Civilian Liaison office, various UNRWA officials, different Palestinian officials, and Israeli human rights organizations that contacted the Humanitarian Hotline. On the whole, IDF forces are not preventing the entrance of ambulances into the Rafah area or the passage of ambulances from the Rafah area to the Khan Younis area. Regarding the demand for the identification of the ambulances and the wounded, Col. Mordechai mentioned, in his written response, that these demands are based on the desire to ensure that Palestinian medical teams are indeed transferring people who are wounded, and that the vehicles are indeed ambulances and not vehicles used for other purposes. In past experience, Palestinian terrorists have used ambulances for terrorist activities, including the transportation of armed Palestinians and the smuggling of arms from one area to another. During oral arguments, Col. Mordechai added that a Coordination Office Officer is attached to each battalion. One of his main duties is to insure the orderly evacuation of the wounded, in coordination with the ambulance teams. During the operation, more than eighty ambulances have passed from the northern Gaza Strip to Rafah in the south. The IDF permits the passage of any ambulance, provided that such passage is coordinated with it. The search of the ambulance – to ensure that forbidden combat equipment is not being transferred from one area to another – is completed in a matter of minutes. The evacuation of the wounded is not contingent upon the relaying of their names and identification numbers. Those whose identities are not known are also being evacuated. However, if it is possible to receive the name and identity number, this information is requested and received. Col. Mordechai mentioned, regarding the evacuation of wounded to locations outside of Rafah, that more than 40 ambulances have exited Rafah, heading north. Every ambulance requesting exit is allowed to do so. All that is required is coordination regarding the route. As for the shooting

upon an ambulance, Col. Mordechai stressed that it was not intentional. There are clear instructions that shooting on ambulances is prohibited. “Ambulances are out of bounds” – so stated Col. Mordechai before us. Col. Mordechai informed us, that tens of ambulances passed with no harm done to them. It is to be regretted if a single exception occurred. Wireless contact exists between ambulance drivers and officers of the DCO, by which proper coordination between forces maneuvering in the field and ambulances is maintained. When the passage of an ambulance is prevented by dirt piled on the road, all is done – after coordination – to bring a bulldozer to remove the obstacle.

43.

44. There is no disagreement regarding the normative framework. The army must do all possible, subject to the current state of the combat, to allow the evacuation of local residents wounded during combat activities. On this issue, Justice Dorner gave the ruling of this court more than two years ago in H CJ 2936/02 *Physicians for Human Rights v. Commander of IDF Forces in the West Bank*:

45.

[O]ur combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill, and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the State. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state.

In H CJ 2117/02 *Physicians for Human Rights v. Commander of IDF Forces in the West Bank*, Justice Dorner stated:

[I]nternational law provides protection for medical stations and personnel against attack by combat forces ... [It is forbidden], under all circumstances, [to] attack stations and

mobile medical units of the “Medical Service,” that is to say, hospitals, medical warehouses, evacuation points for the wounded and sick, and ambulances However, the “Medical Service” has the right to full protection only when it is *exclusively* engaged in the search, collection, transport and treatment of the wounded or sick [P]rotection of medical establishments shall cease if they are being “used to commit, outside their humanitarian duties, acts harmful to the enemy,” on condition that “a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.”

It appears to us that the passage of ambulances to and from Rafah proceeded properly. This was made possible, among other means, by the contact between the IDF – via officers of the DCO – and the ambulances. This contact was proper, and it was put into effect properly. In addition, ambulances move freely to and from the area. The demand of the IDF regarding the license plate numbers of ambulances is reasonable. It is appropriate not to make the transfer of wounded contingent upon the relaying of their names and identification numbers. However, we see no fault in the attempt to receive this information when it is attainable, assuming that receipt of this data is not a condition for transport outside of the combat area and does not cause unreasonable delay in transport. The single instance of shooting on an ambulance was an exception. We have been convinced that the instructions forbidding such activity are clear and unequivocal. It seems to us, therefore, that as far as this issue is concerned, the petition has been satisfied.

Burying the Dead

46. Petitioners’ attorney maintains that, at A-Najar Hospital in Rafah, there are 37 bodies of residents that were killed during the course of the IDF operation. It is not possible to bury them due to the restrictions imposed by the army. In his response before us, Col. Mordechai noted that, as far as the army is concerned, there is no impediment to the burial of the dead in cemeteries. These are located, to the best of his knowledge,

outside the neighborhood of Tel A-Sultan and, as such, the burials can be carried out immediately. In their response, petitioners noted that the funerals had not been conducted because the army has surrounded the neighborhood of Tel A-Sultan, and is not allowing relatives of the dead to participate in the funerals. Col. Mordechai admitted that this is true.

47.

48. This response does not satisfy us. We noted that a solution to this problem must be found quickly. Thus, for example, we asked why the relatives, whether all or some or some of them, are not being allowed to participate in the funerals. Col. Mordechai promised us an answer to this question. In an updated statement we received on May 23, 2004, we were informed by respondent, on behalf of Col. Mordechai, that respondent had decided (on May 21, 2004) to allow a number of family members of all those killed to leave the Tel A-Sultan neighborhood in order to conduct funerals. This proposal was rejected by the Palestinians. That statement also noted that on that same day (May 21, 2004) respondent had offered, as a goodwill gesture, to allow two vehicles from each family to leave the area of Tel A-Sultan in order to participate in their relatives' funerals. This proposal was also rejected by the Palestinians. On Saturday (May 22, 2004) respondent was prepared, as a goodwill gesture and in response to a request by the Red Cross, to allow the family members of all of the dead to leave the neighborhood in order to take part in funeral ceremonies, without limit on number, provided that the funerals not all be conducted at the same time. The Palestinians rejected this proposal as well. On Sunday (May 23, 2004) respondent announced that he was prepared, as a goodwill gesture, and in coordination with the Palestinian Authority, to allow several buses to leave the neighborhood in order to allow family members to take part in their relatives' funerals. According to respondent, the Palestinians had begun organizing the buses needed to transport those family members leaving Tel A-Sultan for the funerals. A complementary statement from the respondent (dated May 25, 2004) informed us that the attempt (on May 23, 2004) to transport family members out of the neighborhoods on organized buses for the funerals had not been successful due to the opposition of the Palestinians. Respondent added that on that same day (May 23, 2004), after IDF troops pulled out of the Tel A-Sultan neighborhood, 22 funerals took place, and

there had been no impediment to the participation of family members who reside in the neighborhood of Tel A-Sultan, as traffic between the neighborhood and the area where the funerals took place was not held up by the IDF.

49.

50. In their response of May 24, 2004, petitioners reported, after discussions with the mayor of Rafah, that the residents of Rafah had indeed refused the IDF's proposals, and that this had significantly limited the participation of families in the funerals. The residents preferred to perform the funerals after the curfew was lifted in order to ensure that the prayer for the dead was recited and that a temporary structure would be erected for the mourners so that they could receive those who come to comfort them, in line with Islamic law. We were further informed that the mayor of Rafah had announced that, since the end of the closure on Tel A-Sultan, the residents of Rafah had begun organizing a mass funeral for 23 dead. The funeral would take place in the afternoon and was expected to continue until the late afternoon due to the large number of dead.

51.

52. The problem of burying the dead was resolved. Nevertheless, there are lessons to learn from the incident. Our assumption is that the fundamental principle that the dignity of local residents must be protected, as enshrined in section 27 of the Fourth Geneva Convention, encompasses not only local residents who are living, but also the dead. *Compare* Fourth Geneva Convention, §130; *see* Pictet, at 506; *see also* H CJ 3436/02 *The International Custodian of Terra Santa v. The Government of Israel*, at 22, 25. Human dignity includes the dignity of the living and the dignity of the dead. The same applies with regard to domestic Israeli law. *See* CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum*, at 464; FH H CJ 3299/93 *Wixelbaum v. The Minister of Defense*, at 195; CA 6024/97 *Shavit v. Rishon Lezion Jewish Burial Society*, at 600. "The protection of the dead and their dignity is just like the protection of the living and their dignity." *See* Justice J. Türkel in H CJ 81/66 *The Inspector-General of The Israel Police v. Ramla Magistrate Court Judge Mr. Baizer*, at 337, 353. The military commander is duty-bound to search for and locate dead bodies. *See* H CJ 3117/02 *The Center for the Defense of the Individual – Founded by Dr.*

Lota Salzberger v. The Minister of Defense, at 17, 18. After bodies are found, he is obligated to ensure that they are accorded a dignified burial. In the *Barake* case, which discussed the duty of the military commander regarding dead bodies during army operations, we stated:

53.

Our starting point is that, under the circumstances, respondents are responsible for the location, identification, evacuation, and burial of the bodies. This is their obligation under international law. Respondents accept this position... The location, identification, and burial of bodies are important humanitarian acts. They are a direct consequence of the principle of respect for the dead—respect for all dead. They are fundamental to our existence as a Jewish and democratic state. Respondents declared that they are acting according to this approach, and this attitude seems appropriate to us... Indeed, it is usually possible to agree on humanitarian issues. Respect for the dead is important to us all, as man was created in the image of God. All parties hope to finish the location, identification, and burial process as soon as possible. Respondents are willing to include representatives of the Red Cross and, during the identification stage after the location and evacuation stages, local authorities as well (subject to specific decision of the military commander). All agree that burials should be performed with respect, according to religious custom, in a timely manner.

Id., at 15.

The army attempted to act according to these principles in the case at hand. The dead were identified and transferred to A-Najar Hospital. At both these stages the Red Cross and the Red Crescent were involved. The problem here, however, concerned burial. Respondent was obviously prepared to bury the dead, but it believed that it had discharged this duty by transferring the bodies to A-Najar Hospital. This was not the case. The

duty of the respondent is to ensure a dignified burial for the bodies. To this end, he must negotiate with the local authorities, to the extent that they are functioning, and find respectful ways to carry out this duty. As is clear from the information presented to us, the main difficulty which arose was the participation of the relatives of the dead. This matter was in the power of the respondent, whose forces controlled all entrances and exits to Tel A-Sultan, and respondent was obviously limited by security considerations. Apparently, the later proposals should have been proposed earlier. The changing position of respondent indicates that it did not prepare for the situation in advance, and it improvised the proposed solutions on the spot. This should not have happened. Preparations for dealing with the dead should have been planned in advance. Clear procedures should be fixed regarding the different stages of the process. Of course, if, at the end of the day, the dead are in a hospital and their relatives refuse to bury them, they should not be forced to do so. Nevertheless, everything should be done in order to reach an agreement on this matter.

Shelling of the March

54. Petitioners claim that on Wednesday, May 19, 2004, thousands of Palestinians from Rafah participated in a quiet and non-violent procession. They marched in the direction of Tel A-Sultan. Some of the participants were armed and masked. The marchers included men and women, both children and adults. Many of the marchers held food and water, which they intended to bring to the residents of Tel A-Sultan, who had been completely cut off from all outside contact for three days. While they were marching three or four tank shells and two helicopter missiles were fired towards them. According to reports from the marchers, the fire came only from the direction Tel Al-Zuareb observation post, a post manned by the IDF. The fire towards the marchers caused the deaths of eight civilians. About half of the casualties were minors. Petitioners ask that we order a probe of the incident by Military Police Investigations. They also ask that we order respondent to issue an unequivocal order absolutely forbidding the shooting or shelling of civilian gatherings, even

if there are armed elements among them, if they do not pose an immediate danger to life.

55.

56. Respondent informed us that an initial investigation was conducted immediately. It found that there was a mishap while firing tank shells towards an abandoned building, and the eight Palestinians were killed by shrapnel. One of them was an armed activist of the Islamic Jihad. The other seven victims were completely innocent. It was emphasized that there is a great deal of arms in Rafah, including armor-piercing weapons. It was also emphasized that, in the past, terrorists have often attempted to use civilians as cover to strike at the IDF. It was also feared that the protesters would climb onto the armored vehicles with soldiers inside them. The procession took place in a combat zone. Among the marchers were armed elements. In initial negotiations with the protesters, the attempt was made to halt the procession. The attempt failed. Afterwards, deterrents were employed. These also failed and the procession continued on its way. It was then decided to fire hollow shells toward the abandoned building.

57.

The full investigation is yet to be completed. With its completion the material will be passed on to the Judge-Advocate General, who will decide on the matter. Respondent added that IDF rules of engagement for opening fire, which also address situations of civilian gatherings, incorporate the legal and ethical stance of preventing harm to the innocent. Nevertheless, he reiterated that this was a situation of active warfare and danger to troops in an area densely populated with civilians, where the combatants do not differentiate themselves from the civilian population, but conceal themselves within it. The deliberate use of the population as a human shield, in contravention of the basic rules of combat, constitutes a war crime.

58. The investigation of this tragic event has not yet been completed. All the material will be passed on to the IDF Judge-Advocate General. Under these circumstances, there is no call, at this stage, for any action on our part. Petitioners must wait for the findings of the investigation and

the decision of the Judge-Advocate General. It may be assumed that lessons will be drawn, and if there is a need for a change in the instructions that are given to the troops, this will be implemented. At this stage, in the absence of facts, we can only repeat the obvious: the army must employ all possible caution in order to avoid harming a civilian population, even one that is protesting against it. The necessary precautions are, obviously, a function of the circumstances, such as the dangers posed to the civilians and the soldiers. *Compare* CA 5604/94 *Khemed v. The State of Israel*.

59.

The Requested Remedies

60. In their petition, Petitioners listed seven remedies that they requested from us, *see supra* 4. Regarding six of these seven, we have examined the specific issues detailed by petitioners. *See* para. 14 (water), para. 15 (electricity), para. 16 (medical equipment and medicines), para. 18 (food), para. 20 (evacuation of wounded), para. 27 (investigation of the fire on the march). The final request remains. This is petitioners' request that we order respondent to allow the entry of a delegation of three doctors from Petitioner 1 (Physicians for Human Rights) into hospitals in the Gaza Strip, in order to provide for their medical needs, and bring in equipment and suitable medical practitioners.

61.

62. In his written response, Col. Mordechai noted that any delegation of doctors from petitioner 1 or any other authorized body may enter the area and visit the hospitals. The single condition that respondent insists upon is that there be no Israelis among the visiting doctors. This is due to fear of harm to them or their group, an occurrence which could complicate the security situation further. In this context, he noted that there is already a team from the International Committee of the Red Cross in the field, and that the head of the International Red Cross Bureau in Israel is in direct contact with the IDF. During oral arguments, respondent added that there is no impediment to the visit of non-Israeli doctors who are employees of Israeli hospitals. Moreover, there is nothing stopping doctors employed in hospitals in Judea and Samaria, or hospitals in the Gaza Strip, from visiting and investigating the situation. These proposals

did not satisfy petitioners, who insisted that Israeli doctors be authorized to enter hospitals in the Gaza Strip.

63.

64. Regarding this matter, we do not find any flaw in the position of respondent. We are convinced that respondent's stance is purely security-related, and that he has no motivations that are not founded on a concern for security issues. Indeed, fears for the welfare of Israelis who enter the Gaza Strip in general, and combat zones in particular, are justified. Respondent has enforced a similar rule even when no military operation was under way, and this stance was deemed legal. This was the case regarding the entry of Knesset members into the Gaza Strip, *see* HCJ 9293/01 *Barake v. The Minister of Defense*, at 509. It was so even with regard to the entrance of doctors from Petitioner 1 into the Gaza Strip, *see* HCJ 3022/02 *Physicians for Human Rights v. The Commander of the IDF Forces in the Gaza Strip*, at 39. Israel has a duty to protect its citizens. It does not forfeit this duty because some citizens are "prepared to take the risk." The State remains responsible for the safety of its citizens, and it must do its utmost to return them safely to Israel. Allowing the entrance of Israeli doctors to a combat zone in Gaza creates a real danger to the safety of the doctors and to the interests of the State. There is no reason to place the State in this danger. It has been noted that there should be no difficulty for Petitioner 1 to find three non-Israeli doctors – be they from Gaza itself, Judea and Samaria, Israel or the rest of the world – who will be prepared to carry out for it the required inspection. In this matter the petition is denied.

65.

The Future

66. According to the humanitarian principles of international law, military activities require the following: First, that the rules of conduct be taught to, and that they be internalized by, all combat soldiers, from the Chief of General Staff down to new recruits. *See Physicians for Human Rights*, at 5. Second, that procedures be drawn up that allow implementation of these rules, and which allow them to be put into practice during combat. An examination of the conduct of the army while fighting in Rafah, as detailed in the petition before us – and we have

nothing other than what has been presented to us – indicates significant progress compared to the situation two years ago. *See Barake; Physicians for Human Rights* and other decisions. This is the case regarding the implementation of the duty to ensure water, medical equipment, medicines, food, evacuation of the wounded, and the burial of the dead. This is also the case regarding the preparation of the army, and the design of procedures that allow humanitarian obligations to be satisfied. The establishment of the Humanitarian Hotline and the District Coordination Office, as well as the assignment of a liaison officer of the Coordination Office to every battalion, greatly aided the implementation of humanitarian principles.

67.

68. In the framework of our discussion regarding the internalization of humanitarian laws, we emphasize that it is the duty of the military commander not only to prevent the army from harming the lives and dignity of the local residents (the “negative” duty: *see supra* para. 11). He also has a “positive” duty (*para.* 11). He must protect the lives and dignity of the local residents. For example, regarding the burial of local residents, the military commander was satisfied that the corpses were transferred to A-Najar Hospital. But this was not enough. He is obligated to do his utmost to ensure that the bodies be brought to a dignified burial according to local custom. He must make prior arrangements in order to ensure there are sufficient supplies of food and water. Damage to the water supply is something that can be anticipated from the outset, and if it cannot be avoided, a solution to this problem must be prearranged. Supplies of medicines, medical equipment and food should also be prepared in advance. Harm to local residents is expected and if, despite every effort to limit this, in the end there will be casualties among residents, this must be prepared for from the outset. Respondent should not rely solely on international and Israeli aid organizations to solve these problems, though their aid is important. The recognition that the basic duty belongs to the military commander must be internalized, and it is his job to adopt different measures from the outset so that he can fulfill his duty on the battlefield.

69.

70. Additional measures should be adopted so that the established

institutional arrangements (*see supra* para. 3) will be more effective. We were informed that those who called the Humanitarian Hotline had to wait many hours. Col. Mordechai noted several times that some issues should have been referred to him, and not to the Humanitarian Hotline. The lack of information led, on several occasions, to inefficiency in aid efforts by third parties. Thus, for example, a vehicle of Petitioner 1 laden with medical equipment and medicines waited at Erez Crossing while the entrance point was Karni Crossing. However, at Karni Crossing their entrance was again denied, since Israeli doctors were among the passengers in the vehicle, and the army was only prepared to allow the entry of non-Israeli doctors. These issues and others need to be addressed. It is possible that the Humanitarian Hotline needs to be expanded, and there needs to be more effective communication between it and the District Coordination Office and the Coordination Office's liaison officers placed with the combat battalions. It is possible that there is a need, with regard to international and Israeli organizations whose humanitarian involvement is anticipated, to bypass the Humanitarian Hotline and facilitate direct contact with the DCO. It is possible that there is a need to take other measures. This matter is for the respondent to address; it must learn from the events of the day.

71.

72. With the conclusion of the arguments in the petition, we ordered that the military staff in the area ensure that they solve not only the problems raised by petitioners, but also anticipate new problems that, in the nature of things, will arise in the future. For this reason it has been decided that Col. Mordechai will appoint a senior officer who will remain in direct contact with petitioners. This is the least that should have been done at the time the events were unfolding. The main thing is that it must be done now in order to learn lessons from the episode.

73.

74. Before we conclude we wish to inform petitioners' attorney Fatima Al-Aju that she presented the position of petitioners clearly and responsibly. Respondent's attorneys, Anar Helman and Yuval Roitman, also provided us with the most comprehensive and up-to-date information possible in a very short space of time. We also express thanks to Col. Mordechai, who was good enough to explain to us the details of the area

and the activities of respondent and, to the best of his ability, translated humanitarian standards into practical language.

75.

76. The outcome is, therefore, that the petition is granted regarding six of petitioners' seven requests. The seventh request – the entry of Israeli doctors from Petitioner 1 to the area in general and A-Najar Hospital in particular – is denied, due to the danger to the doctors. In this matter one must be satisfied by the proposal of respondent – which has been rejected by petitioners – that non-Israeli doctors (whether from the Gaza Strip, Judea and Samaria, Israel, or anywhere else in the world), will be allowed to enter the area.

77.

Justice J. Türkel

I concur.

Justice D. Beinisch

I concur with the opinion of the President. I also concur with his conclusions regarding the principles of the IDF's obligation to satisfy its responsibilities – under customary international law, under treaties to which Israel is a party, and under the fundamental principles of domestic Israeli law – towards the civilian population in combat areas. Similarly, I also concur with regard to the particulars at issue here: that the situation regarding the requested remedies was clarified by a close investigation of the facts together with our holding regarding the specific obligations of the IDF to enable the civilian population to continue its routine, especially regarding the provision of medicines, food, medical assistance, water, electricity, evacuation of casualties and burial of the dead.

As such, I join the President's conclusion that all military operations require advance preparation regarding all issues concerned with the civilian population in the combat zone. Such advance preparation will take into account humanitarian obligations towards the civilian population, the possibility of harm to it, and consequences that must be

prevented or – at the least – minimized.

Even if it is impossible to forecast the course of military operations, there is no doubt that the basic needs of the civilian population in the combat zone – whose lives and property stand a substantial chance of being harmed – can be predicted. As such, in planning military activities, the humanitarian obligations towards the civilian population, which is caught between the cynical exploitation of terrorists and the military operations seeking to uproot that terrorist infrastructure, must be taken into account. The military forces operating within that population bear the two responsibilities outlined by the President: the obligation to refrain, to the extent possible, from harming civilians, and the positive obligation to ensure that these civilians are not harmed. In any case, the IDF must minimize, to the extent possible, the suffering of those in the combat zone. This is all subject to the requirements of the military operation, and does not diminish the military commander's obligation to protect the lives of soldiers under his command.

If these obligations are not satisfied, the doors of this Court remain open – in times of war as in times of peace – to those injured (In practical terms, the injured may be represented by organizations). At the same time, the difficulty of employing judicial review as combat continues reduces the effectiveness of that review and makes intervention by the Court difficult.

As the President noted, this court does not examine the wisdom of the military operations. Neither does it intervene in decisions concerning when military action should be taken. Judicial review, as it requires detailed clarification of a situation, is constrained during times of combat. First, from a practical standpoint, the fact that the Court must review an ever-changing battle situation and deliver its opinion swiftly, makes verification of the party's claims and clarification of the factual situation difficult. As distinct from regular petitions, where the factual situation can be laid out before the Court, judicial review exercised during combat activities requires a unique type of process, and the current petition constitutes a stark example of that. The facts here were clarified, and they

changed and developed, during combat itself. During arguments, the parties stood in contact with and reported from the combat zone. These reports, as they came in, changed the factual situation before us. The President's opinion details how this occurred in practice. In such situations, judicial review is an inadequate tool with which to review real-time developments and to grant effective and efficient remedies.

Second, judicial review during active combat brings the Court closer to the zone of combat, and requires a new balance between conflicting values – between the fact that the Court will not intervene in the combat activity itself, and between the need to ensure, at the same time, that combat proceeds according to humanitarian obligations. These constraints do not deter the Court from exercising judicial review in real-time and from handing down orders. Judicial review is exercised despite these constraints. This is not the first time that we have examined the implementation of humanitarian principles during combat, as the cannons roar and the sounds of fire are still being heard.

In these circumstances, a heavy burden is placed on the combat forces. Even so, the burden does not excuse the duty, and the military commander must prepare in advance in order to satisfy his obligations. As such, I concur with the President that institutional arrangements must be fashioned that will allow the implementation of humanitarian principles during times of combat. This will require an infrastructure and logistical planning before military operations are commenced. Medical equipment and medicines must be provided and means of transporting these to the battle zone must be made available. Essential services such as water and food must be provided to the civilian population. Substitutes for the civilian infrastructure that will be damaged must be prepared. Appropriate arrangements for the evacuation of casualties must be provided. This also applies to other issues that can be predicted. The ability to determine the needs of the civilian population must be provided for; arrangements for coordination between the military and between humanitarian organizations, local governments, and bodies that represent the population must be prepared. These are difficult in the current circumstances: where the civilian population is hostile, where that

populations recoils from actions that may be interpreted as cooperation, and where terrorists cynically exploit that population for their own purposes. This reality, however, is the reality in which the military commander must satisfy his humanitarian obligations.

Even if, in Israel's difficult reality, the following does not guarantee an optimal solution, it will promise improvement: the establishment of detailed guidelines, of logistical planning, of rules for the security forces in their interaction with the civilian population, and of a mechanism for direct communication with the bodies that act on behalf of that population. These will ensure that the harm caused to the civilian population is minimized, that international and Israeli law is followed, that effective solutions will be found, and that the need to resort to judicial review in order to protect the law will be reduced.

Decided as per the opinion of President Barak.

May 30, 2004

THIS DOCUMENT IS A DRAFT, AND IS SUBJECT TO FURTHER
REVISION.

Comments, questions and suggestions are all welcomed, and may be directed
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