HCJ 201/09

Physicians for Human Rights
and others
v.
Prime Minister of Israel
and others

HCJ 248/09

Gisha Legal Centre for Freedom of Movement
and others
v.
Minister of Defence

The Supreme Court sitting as the High Court of Justice
[19 January 2009]

Before President D. Beinisch and Justices A. Grunis, E. Rubinstein

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

Facts: Following years during which rockets were fired at Israel from the Gaza Strip, on 27 December 2008 the IDF began a large-scale military operation in the Gaza Strip. The petition in HCJ 201/09 concerns delays in evacuating the wounded to hospitals in the Gaza Strip, and claims that ambulances and medical personnel are being attacked by the IDF. The petition in HCJ 248/09 relates to the shortage of electricity in the Gaza Strip, which prevents hospitals, clinics, the water system and the sewage system from functioning properly. According to the petitioners, this is a result of disruptions caused by the IDF.

Held: The Court reconfirmed that the IDF's combat operations are governed by international humanitarian law (IHL). According to the fundamental principles of IHL that apply during the conduct of hostilities, 'protected civilians' — whether located in territory subject to belligerent occupation or within the sovereign territory of one of the parties to the conflict — in all circumstances are entitled, *inter alia*, to be treated humanely and to be protected against all acts of violence or threats. The Court referred specifically to those provisions within IHL that grant protection to medical facilities and staff against attack, unless such facilities are exploited for

military purposes. The Court also focused on provisions within IHL that require the parties to enable the evacuation and the treatment of the wounded. Furthermore, the Court reaffirmed that the protection of the civilian population includes the obligation to allow the free passage of humanitarian relief. The respondents did not dispute the obligations incumbent on them under IHL, as interpreted by the Court. They provided detailed explanations of all the measures that had been and continued to be implemented in fulfilment of these duties. Having considered all the circumstances and information presented to it, the Court found no basis to grant the relief sought by the petitioners. The petition was therefore denied.

Israeli Supreme Court cases cited:

[1] HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [2004] IsrSC 58(5) 385; **[2004] IsrLR 200**.

[2] HCJ 3452/02 *Almadani v. Minister of Defence* [2002] IsrSC 56(3) 30; **[2002-3] IsrLR 47**.

[3] HCJ 3114/02 *Barakeh v. Minister of Defence* [2002] IsrSC 56(3) 11; **[2002-3] IsrLR 39**.

[4] HCJ 769/02 *Public Committee against Torture v. Government* **[2006] (2) IsrLR 459**.

[5] HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* **[2005] (2) IsrLR 206**.

[6] HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [2002] IsrSC 53(3) 26.

[7] HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [2003] IsrSC 57(1) 385; **[2002 3] IsrLR 123**.

[8] HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [2003] IsrSC 57(1) 403.

[9] HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.

[10] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.

[11] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.

[12] HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* (not yet reported).

[13] HCJ 102/82 *Tzemel v. Minister of Defence* [1983] IsrSC 37(3) 365.

[14] HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(2) 197.

[15] HCJ 9132/07 *Albassioni v. Prime Minister* (2008) (not yet reported).

[16] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.

[17] CrimA 6659/06 *Iyad v. State of Israel* (2008) (not yet reported).

[18] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.

[19] HCJ 2936/02 *Physicians for Human Rights v. IDF Commander in West Bank* [2002] IsrSC 56(3) 3; **[2002-3] IsrLR 35**.

Jewish law sources cited:

[20] Jerusalem Talmud, *Sanhedrin* 4, 9

[21] Tosefta, *Shabbat* 16, 14.

For the petitioners — T. Feldman, Y. Elam, F. El-Ajou, H. Jabarin.

For the respondents — A. Helman, A. Segal-Elad, H. Gorni.

JUDGMENT

President D. Beinisch

1. We have before us two petitions filed by human rights organizations, which concern the humanitarian situation in the Gaza Strip due to the state of hostilities that prevails there as a result of the military operation known as 'Cast Lead'. The petition in HCJ 201/09 addresses delays in evacuating persons wounded in the Gaza Strip to hospitals, and claims that ambulances and medical personnel are being attacked by the Israel Defence Forces (hereinafter: IDF). The petition in HCJ 248/09 addresses the shortage of electricity in the Gaza Strip, which prevents hospitals, clinics, the water system and the sewage system from functioning properly. According to the petitioner, this is a result of disruptions caused by the IDF.

Background

2. For approximately eight years the towns near the Gaza Strip have confronted the threat of missiles and grenades that are fired by members of the terrorist organizations operating from within the Gaza Strip and are directed at the civilian population in the cities and towns of southern Israel. After the Hamas organization came to power in Gaza, the terrorist operations increased in intensity and in number. The scope of the attacks was extended to a large part of Israel; the range of the missile attacks became greater, causing the deaths of civilians and disrupting the lives of all the residents of southwest Israel.

For a long time, while Israel acted with restraint and moderation, the terrorist organizations in the Gaza Strip, led by Hamas, took steps to increase their abilities: they smuggled a huge quantity of weapons and missiles through hundreds of subterranean tunnels they had dug, improved the weapons they used and increased the threat to the inhabitants within range of the missiles.

3. On 27 December 2008 the IDF embarked on a large-scale military operation initiated by Israel in the Gaza Strip, in order to stop the firing of grenades and Quassam and Grad missiles at the Israeli towns in the south of the country, and to change the security position in the south of the country that had been brought about by Hamas, the terrorist organization that controls the Gaza Strip. In the framework of this operation, the Israeli Air Force attacked targets used by the Hamas leadership in the Gaza Strip, and on 3 January 2009 tanks, infantry and engineering forces joined in the fighting in the Gaza Strip. Intensive fighting is taking place in the area in difficult conditions. The military compounds and targets are situated in areas inhabited by the civilian population, and sometimes even in actual homes. Regrettably, the local population is consequently suffering serious and considerable harm.

4. The two petitions were filed on 7 January 2009, and on 9 January 2009 we held an urgent hearing on both of them. During the hearing it emerged from the state's response that the IDF had set up a humanitarian operations room, which was intended to resolve the difficulties in coordinating the evacuation of the injured, and that action was being taken to restore the electricity infrastructure in the Gaza Strip. Unfortunately, the hearing on 9 January 2009 was not attended by any of the army personnel responsible for the humanitarian situation in the Gaza Strip, who would be able to clarify the position and the manner in which the humanitarian mechanisms set up by the state were operating, and respond to specific questions. We therefore decided at the end of the hearing that the state should submit a detailed response with regard to the mechanisms that it had established and the steps it had taken in order to enable the evacuation of the wounded in a more effective manner. We also found that we required an update with regard to the action that was being taken to repair the electricity lines and the electricity supply to the Gaza Strip. We therefore ordered counsel for the state to submit a revised detailed response, supported by a deposition of a senior officer responsible for the humanitarian arrangements in the Gaza Strip. On 13 January 2009, the state filed its detailed response together with the deposition of the head of the District Coordination Office

for the Gaza Strip, Colonel Moshe Levy, and on 15 January 2009 we held an additional hearing of the petition, to which Colonel Levy was summoned. Shortly before the hearing the petitioners also filed revised statements.

The arguments of the petitioner in HCJ 201/09

5. The petitioner claims that since the military operation in the Gaza Strip began on 27 December 2008, there have been many cases in which IDF soldiers fired on medical personnel while they were carrying out their duties, despite the fact that the vehicles and uniforms of the medical personnel bear the distinguishing insignia recognized and agreed in the Geneva conventions. It is alleged that on 4 January 2009 alone, four medical personnel were killed as a result of an IDF strike while they were carrying out their duties, and details were provided of additional cases in which medical personnel were injured as a result of IDF attacks. An additional claim made by the petitioner is that the Palestinian Red Crescent and the International Red Cross have encountered serious difficulties in coordinating the evacuation of the injured for medical treatment, on account of the ongoing military operations, the refusal of the Army to allow movement between the north and the south of the Gaza Strip, and due to the complicated methods of coordination. According to the petitioner, many hours elapse from the time a coordination request is made until the time it is actually carried out. It is alleged that in some cases, the medical personnel waited a whole day for coordination. According to the petitioner, these attacks on the medical personnel and the evacuation efforts are contrary to the provisions of customary international humanitarian law and are also prohibited under the constitution of the International Criminal Court; they are also contrary to the provisions of Israeli administrative law, in that they are disproportionate. Finally the petitioner requested that the court issue an interim order that the respondents allow and coordinate the evacuation of the injured members of the Elaidi family, who were injured by shells fired by the IDF at their home on the night of 3 January 2009 and who have been trapped in their home since that night because all efforts to coordinate their evacuation have failed. In the petitioner's revised statement, which was only filed on the date of the last hearing, details were provided of additional incidents in which it was alleged that shots were fired at medical personnel and rapid assistance was not given to families who were injured.

The arguments of the petitioners in HCJ 248/09

6. This petition focuses on the shortage of electricity in the Gaza Strip. In their petition, the petitioners furnished details of the quantities of

electricity and industrial diesel oil that are needed in the Gaza Strip, compared to the quantities that Israel allowed to enter the Gaza Strip in recent months. It was alleged that since 27 December 2008, the State of Israel has prevented all entry of industrial diesel oil into the Gaza Strip, and as a result the power station in the Gaza Strip (which supplies approximately one third of the amount of electricity required by the inhabitants of the Gaza Strip) has been completely shut down since 30 December 2008. It was also alleged in the petition that on 3 January 2009 an IDF attack in the Gaza Strip damaged seven of the twelve electricity lines that bring electricity from Israel and Egypt into the Gaza Strip. As a result, it was alleged that the inhabitants, as well as hospitals, the main sewage purification plant in the Gaza Strip and other essential facilities, were deprived of electricity. It was further alleged that it is impossible to repair the damaged electricity lines because Israel is preventing the transfer of the necessary spare parts and because of the ongoing hostilities, which do not allow sufficient time for repairs to be made by Palestinian. The petitioners provided details in their petition of the humanitarian damage to the civilian population that results from the shortage of electricity: thousands of people do not have access to running water; sewage is flowing in the streets as a result of the shortage of electricity for the sewage pumps and purification facilities, and at the purification plant in the city of Gaza the spillage has already reached a distance of approximately one kilometre from the plant; approximately a quarter of a million people have had no electricity for more than two weeks; the hospitals in the Gaza Strip are completely dependent on generators, which are about to shut down entirely because they are operating round the clock and beyond their capacity; the activity of most of the bakeries in the Gaza Strip has come to a halt due to a shortage of cooking gas and electricity, leading to a serious shortage of bread in the Gaza Strip. In this aspect it was alleged in the petition that since the State of Israel controls the supply of electricity to the Gaza Strip, especially at present when IDF troops control large parts of the Gaza Strip, its duty to provide the needs of the civilian population in the Gaza Strip is even greater, especially with regard to the proper functioning of medical facilities, water supply facilities and sewage facilities.

The respondents' arguments

7. The respondents' preliminary response to the two petitions, which was filed on 8 January 2009, contained legal arguments and initial factual contentions on the merits of the case. In their revised statements that were filed in the court and at the hearings that we held on the petitions, the respondents provided additional descriptions of the factual position in the

Gaza Strip, as far as circumstances allowed. Originally they requested that we dismiss the petitions *in limine* because they are too general and because the matters raised in them are not justiciable. They argued that while the hostilities are taking place, the court cannot address issues of this kind, if only for the reason that it is not possible to present a dynamic picture of the battlefield to the court in real time. Nevertheless, the respondents stated that the IDF is operating in accordance with international humanitarian law, and they accept that the army has duties to respect the humanitarian needs of the civilian population even during hostilities and that preparations to this effect should be made in advance, as this court held in HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [1], subject to any changes required by the circumstances. In this context it was alleged that since the Disengagement Plan was implemented in September 2005, there is no longer any state of occupation in the Gaza Strip and the State of Israel has no control over what is done there. Therefore, there is no 'military commander' today, within the meaning of this term under the laws of occupation, who can operate throughout the Gaza Strip. It was also argued that since there are no channels of communication between Israel and the terrorist leadership of the Hamas organization in the Gaza Strip, it is necessary to make the various humanitarian arrangements with international organizations and with the Palestinian Civil Committee, whose offices are in Ramallah.

8. With regard to the various mechanisms that have been established by the State of Israel for providing humanitarian assistance for the civilian population in the Gaza Strip, the state specified in its response that prior to the military operation known as 'Cast Lead', an additional sixty-six reserve officers and twenty regular officers were assigned to the District Coordination Office for Gaza, and the District Coordination Office as a whole was increased to a complement of three hundred staff. Moreover, a set of humanitarian war rooms was established, each for a separate subject — health, international organizations and infrastructures. The purpose of these is to provide a solution in real time for the humanitarian problems that arise during the fighting, and to strengthen communications between the combat forces and the coordination and communication authorities. Each of these war rooms operates around the clock, with on-site professional and legal support. Furthermore, a humanitarian unit was established in each operational division, each comprising five officers, for the purpose of coordinating operations in the field with the international organizations. It was claimed that the activities are also coordinated with private organizations that are known to the District Coordination Office, and also with the doctor in charge

at Al-Shifa Hospital, the Ministry of Health in Ramallah and sometimes also with individual doctors and ambulance drivers.

9. With regard to the evacuation of the wounded and coordination of the movements of medical personnel in the Gaza Strip, it was argued in the state's response that the order issued to the forces operating in the area is to refrain from attacking medical personnel and ambulances in the course of carrying out their duties, except in cases where it is clear and known that ambulances are being exploited for the purpose of fighting the IDF. The respondents claim that from intelligence information in their possession, it transpires that terrorists are making use of ambulances to perpetrate terrorist activity and to transport missiles and ammunition from one place to another, and that in these circumstances, even international humanitarian law provides that these protected institutions lose the protection that they normally enjoy. Establishing the coordination mechanism was intended to ensure that humanitarian rescue operations are carried out. The respondents further argued that they do not have complete and up-to-date information, but if indeed medical personnel have been and are being injured during the fighting, this has not been done intentionally, but results from the hostilities that have been taking place in the vicinity. The respondents also pointed out in this respect that it is well known that IDF soldiers have also been injured by mistake as a result of fire from other IDF troops. The respondents provided details of the measures adopted before and during the military operations in order to maintain and improve the coordination of the evacuation of the wounded. With regard to the application for an interim order for the immediate evacuation of the members of the Elaidi family, the respondents said at the hearing of 9 January 2009 that after making arrangements with the forces in the field and the Palestinians, the evacuation of the members of the family was completed, with the exception of two adult women who chose not to be evacuated.

10. With regard to the claims concerning the supply of electricity to the Gaza Strip during the Operation, the respondents said that in view of the ongoing combat activities in the Gaza Strip, it is not possible to totally prevent damage to the local electricity network. They argued that although the electricity network in the Gaza Strip was indeed damaged during the IDF's combat operations, constant efforts were being made to repair the electricity lines that were damaged. At the last hearing that we held, we were told that nine of the ten electricity lines that provide electricity from Israel to the Gaza Strip had been repaired, that there was a fault in the other line that would be repaired and that the state was taking steps to allow optimal supply

of electricity to the Gaza Strip, subject to the security restrictions and constraints that will be described below.

Judicial review

11. It should be stated at the outset that we do not accept the preliminary arguments of the state whereby we were asked to dismiss the petitions *in limine* because they are not justiciable. We have already held in a series of judgments that the combat operations of the IDF do not take place in a normative vacuum. There are legal norms in customary international law, in treaties to which Israel is a party and in Israeli law, which provide rules and principles that apply in times of war and which demand that steps are taken to provide humanitarian assistance and protection for the civilian population (see, for example, HCJ 3452/02 *Almadani v. Minister of Defence* [2], at p. 35 {53}; HCJ 3114/02 *Barakeh v. Minister of Defence* [3], at p. 16 {46}; *Physicians for Human Rights v. IDF Commander in Gaza* [1], at pp. 391-393 {205-208}). In HCJ 769/02 *Public Committee against Torture v. Government* [4], we discussed this question at length, and we said as follows, per President A. Barak:

> 'Indeed, in a long string of judgments the Supreme Court has considered the rights of the inhabitants of the territories. Thousands of judgments have been handed down by the Supreme Court, which, in the absence of any other competent judicial instance, has addressed these issues. Our concern has been with the powers of the army during combat and the restrictions imposed on it under international humanitarian law. Thus, for example, we have considered the rights of the local population to food, medicines and other requirements of the population during the combat activities (*Physicians for Human Rights v. IDF Commander in Gaza* [1]); we have considered the rights of the local population when terrorists are arrested (HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [5]); when transporting the injured (HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [6]; when besieging a church (*Almadani v. Minister of Defence* [2]); during arrest and interrogation (HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [7]; HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [8]; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [9]). More than one hundred petitions have

> examined the rights of the local inhabitants under international humanitarian law as a result of the construction of the separation fence (see HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [10]; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [11]; HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* [12]). In all of these the dominant characteristic of the question in dispute was legal. Admittedly, the legal answer was likely to have political and military ramifications, but these did not determine the nature of the question. It is not the results deriving from the judgment that determine its nature, but the questions considered therein and the way in which they are answered. These questions have in the past been, and they remain today, of a predominantly legal nature' (*Public Committee against Torture v. Government* [4], at para. 52).

12. As can be seen from the judgment in *Physicians for Human Rights v. IDF Commander in Gaza* [1] and from additional judgments, cases in which the court examines the legality of military operations while they are happening are not uncommon, in view of the reality of our lives in which we are constantly confronting terrorism that is directed against the civilian population of Israel, and in view of the need to respond to it while fulfilling the obligations imposed by law even in times of combat. Of course, the court does not adopt any position with regard to the manner in which military operations are conducted nor with regard to the wisdom of the decisions to conduct military operations. Nevertheless, it is the role of the court, even in times of combat, to determine whether, within the framework of the combat operations, the obligation to act in accordance with legal guidelines —within the context of both Israeli law and international humanitarian law — is being upheld.

13. In the present case the petitions were filed while the hostilities were still taking place in the area, with the purpose of obtaining guidelines for the immediate conduct of the army in humanitarian matters, for the benefit of the civilian population that found itself at the heart of the hostilities taking place around it. Our judicial scrutiny is being exercised here while the hostilities are continuing. Naturally this imposes restrictions upon the court's ability to exercise judicial review and to ascertain all of the relevant facts at this stage of the hostilities. The difficulty of obtaining information in real time was discussed in our judgment in *Physicians for Human Rights v. IDF Commander in Gaza* [1] (at para. 8). Indeed, while the hostilities are taking

place it is not always possible to obtain all the information that is required for exercising judicial review, in view of the dynamic changes that are continually occurring. But the court endeavours to examine the claims in real time, so that it may grant effective relief or set up an arrangement. Thus, for example, I said in this respect in *Physicians for Human Rights v. IDF Commander in Gaza* [1] that:

> '… judicial review concerning the fulfilment of humanitarian obligations during wartime is limited for many reasons. First, from a practical viewpoint, the urgency with which the court is required to conduct the judicial review process, while dynamic developments are taking place on the battlefield, makes it difficult to carry out the process and to investigate the facts required to authenticate the contentions of the parties. Unlike the process of judicial review in regular petitions, where the mechanism of ascertaining the facts operates after they have occurred and the particulars has been clarified, and the factual picture has been laid out before the court, judicial review that seeks to examine the need for relief when combat activities are still in progress requires a judicial proceeding of a special kind, and the petition before us is a clear example of this. The petition was being heard at the very time that changes and developments in the field were taking place. The parties who presented their arguments before us based their contentions on continual reports from the field of battle, and these reports changed the set of circumstances and the facts during the hearing of the petition. The factual description of ascertainment of the particulars as aforesaid finds expression in the opinion of the President. In such circumstances, the judicial review process is limited and suffers from a lack of adequate tools with which to ascertain the relevant particulars in order to examine them in real time and to grant effective relief in respect of them.'

Naturally, where it is not possible to obtain all the necessary information in real time, the legality of specific incidents is often reviewed retrospectively, after all of the necessary information has been obtained; at the time that hostilities are taking place, however, the role of the court focuses upon judicial review of whether the army is upholding the rules of customary international law, international treaties and Israeli administrative law during the hostilities.

The normative arrangements

14. The normative arrangements that govern the armed conflict between the State of Israel and the Hamas organization are complex. They revolve around the international laws relating to an international armed conflict. Admittedly, the classification of the armed conflict between the state of Israel and the Hamas organization as an international conflict raises several difficulties. Nevertheless, in a string of judgments we have regarded this conflict as an international conflict. Thus, for example, we held in *Public Committee against Torture v. Government* [4], *per* President Barak, as follows:

> 'Contending with the risk of terror constitutes a part of international law that concerns armed conflicts of an international nature…
>
> The premise on which the Supreme Court has relied for years — and which also was always the premise of counsel for the state before the Supreme Court — is that the armed dispute is of an international character. In this judgment we are adhering to this approach. It should be noted that even those who think that the armed dispute between Israel and the terrorist organizations is not of an international character hold that it is subject to international humanitarian law or international human rights law' (*Public Committee against Torture v. Government* [4], at para. 21).

In addition to the laws concerning international armed conflict, the laws of belligerent occupation may also apply. In HCJ 102/82 *Tzemel v. Minister of Defence* [13], this court held that the application of the laws of occupation in international humanitarian law depends upon the existence of the potential to exercise administrative powers on the ground as a result of the entry of military forces, and not necessarily upon the actual exercise of such power. It was also held that —

> 'If the army takes *de facto* and effective control of a certain area, the temporary nature of the presence in the area or the intention to maintain only temporary military control cannot derogate from the fact that such conditions give rise to the application of those provisions of the laws of war that address the consequences that also arise in the belligerent occupation. Moreover, the application of the third chapter of the Hague Regulations and the application of the corresponding provisions

> in the Fourth Geneva Convention are not contingent upon the establishment of a special organizational system that takes the form of military rule. The duties and powers of the military force that derive from the effective occupation of a certain territory come into being as a result of the military control of the territory, i.e., even if the military force exercises its control solely through its ordinary combat units, without establishing and designating a special military framework for the purposes of the administration (see HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [14])' (*Tzemel v. Minister of Defence* [13], at p. 373).

Recently, in HCJ 9132/07 *Albassioni v. Prime Minister* [15], we discussed the changes in the factual and normative position in the Gaza Strip after the implementation of the Disengagement Plan and the abrogation of Israeli military rule in the Gaza Strip. We held:

> 'Since September 2005 Israel no longer has effective control of what happens in the territory of the Gaza Strip. The military administration which governed this territory in the past was terminated by a decision of the government, and Israeli soldiers are no longer present in this territory on a permanent basis, nor do they control what takes place there. In such circumstances, the State of Israel does not have a general duty to ensure the welfare of the inhabitants of the Gaza strip and to maintain public order in the Gaza Strip under all of the laws of occupation in international law. Israel also does not have the ability in its present status to effectively impose order and to manage civilian life in the Gaza Strip. In the circumstances that have been created, the main obligations incumbent on the State of Israel with regard to the inhabitants of the Gaza Strip derive from the state of hostilities that prevails between it and the Hamas organization that controls the Gaza strip; these obligations derive also from the degree to which the State of Israel controls the border crossings between it and the Gaza Strip, as well as from the connection that was created between the State of Israel and the territory of the Gaza Strip following years of Israeli military rule of the territory, as a result of which the Gaza Strip is at present almost completely dependent upon the supply of electricity from Israel' (*Albassioni v. Prime Minister* [15], at para. 12).

The position described in *Albassioni v. Prime Minister* [15] as aforesaid is also dynamic and variable, and at this time it is not yet possible to draw conclusions with regard to the factual position in the territory of the Gaza Strip and the scope of control of the IDF in the new situation that has arisen. However, it is not necessary to decide this question now, since the state in any case agrees that the humanitarian laws relevant to the petitions apply.

15. In accordance with the aforesaid, the normative arrangements that govern the State of Israel when it conducts combat operations in the Gaza Strip derive from several legal sources. These legal sources include international humanitarian law, which is enshrined mainly in the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1907, and the Regulations appended thereto, the provisions of which have the status of customary international law; the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, the customary provisions of which constitute a part of the law of the State of Israel and have been interpreted by this court in several judgments (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [16], at p. 364 {95-96}; *Marab v. IDF Commander in Judaea and Samaria* [9]; *Marabeh v. Prime Minister of Israel* [11], at para. 14); and the first Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereinafter: "the First Protocol"), to which Israel is not a party, but whose customary provisions also constitute a part of Israeli law (see *Public Committee against Torture v. Government* [4], at para. 20; CrimA 6659/06 *Iyad v. State of Israel* [17], at para. 9). In addition to international law, the fundamental rules of Israeli public law also apply (see HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [18], at p. 810; *Ajuri v. IDF Commander in West Bank* [16], at p. 365 {96}; *Marabeh v. Prime Minister of Israel* [11], at para. 14; *Public Committee against Torture v. Government* [4], at para. 18). According to Israeli public law, the army is liable to act, *inter alia*, fairly, reasonably and proportionately, while striking a proper balance between the liberty of the individual and the needs of the public and while taking into account security considerations and the nature of the hostilities occurring in the area (see *Physicians for Human Rights v. IDF Commander in Gaza* [1], at para. 10).

16. The fundamental provision of international humanitarian law that applies during the conduct of hostilities (in both territory subject to belligerent occupation and territory of the parties to the conflict) is enshrined in art. 27 of the Fourth Geneva Convention, which provides that protected

civilians — whether they are located in territory that is subject to belligerent occupation or territory that is under the sovereignty of the parties to the conflict — are entitled in all circumstances, *inter alia*, to be treated humanely and to be protected against all acts of violence or threats thereof (see also art. 46 of the Hague Regulations). However, these basic obligations vis-à-vis the civilian population are not absolute; rather, they must be balanced against security considerations and the measures that are required as a result of the hostilities. Alongside this general and basic provision, international humanitarian law contains additional specific obligations that relate directly to the matters raised in the petitions.

17. Before we turn to the specific laws governing the matters raised in the petitions, we should point out that in practice there is no dispute between the parties with regard to the binding legal arrangements. Everyone agrees that the rules of customary international law — which grant protection to medical personnel and institutions, require enabling the wounded to be evacuated from the site of the hostilities, and also require that the civilian population be protected and its basic rights upheld — apply to the combat activities that are involved in the Cast Lead campaign and are binding on the IDF.

The prohibition against intentionally harming medical personnel

18. The provisions of international humanitarian law provide protection to medical facilities and staff against attack. Thus art. 18 of the Fourth Geneva Convention provides protection for hospitals; arts. 24-25 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, prohibit any attack upon medical personnel, if they are exclusively or at the time engaged in medical activities; art. 26 of the Fourth Geneva Convention extends this protection to members of the Red Cross or other international organizations that fulfil similar functions (see also art. 20 of the Fourth Geneva Convention). A detailed definition of what constitutes protected medical personnel is laid down in art. 8(c) of the First Protocol, and detailed provisions with regard to the protections that are granted to medical personnel are laid down in arts. 12-16 of the First Protocol.

19. It is clear from these provisions that international humanitarian law attaches great importance to medical personnel and facilities. Nevertheless, this protection is not absolute, and it will be withdrawn if use is made of medical facilities for non-humanitarian purposes, or if they are exploited for military purposes. In accordance with this principle, medical personnel are entitled to full protection only when they are exclusively engaged in the

search for, or the collection, transport or treatment of the wounded or sick, and similar matters (arts. 24-26 of the First Geneva Convention), whereas the protection of medical facilities will cease if use is made of them, in departure from their humanitarian functions, for the perpetration of acts harmful to the enemy (art. 21 of the First Geneva Convention; art. 19 of the Fourth Geneva Convention). In this regard, in *Physicians for Human Rights v. IDF Commander in West Bank* [6], at p. 29, the Supreme Court emphasized that the abuse of medical personnel, hospitals and ambulances that sometimes occurs requires the IDF to act to prevent such activity, but it does not *per se* permit a blanket violation of the principles of humanitarian law, and that 'this **is the position required not only by international law, on which the petitioners rely, but also by the values of the State of Israel as a Jewish and democratic state**.'

The duty to allow the evacuation and medical treatment of the wounded

20. In addition to the protections granted by international humanitarian law to medical personnel and facilities, there are provisions that require the parties to allow the evacuation and medical treatment of the wounded. In this context, art. 16 of the Fourth Geneva Convention prescribes special protection for the sick and wounded, and it requires the parties to the conflict to enable and facilitate searches for and provision of assistance to the wounded and to protect them from improper treatment, **as far as military considerations allow**:

> 'The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.
>
> **As far as military considerations allow**, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded...' (Emphasis added — D.B.).

In addition, art. 15 of the First Protocol states that medical personnel should be allowed access to every site where they are needed, subject to supervision and security measures that are essential to the relevant party. In *Physicians for Human Rights v. IDF Commander in Gaza* [1] the court held in this context that —

> 'The army must do everything possible, subject to the state of the fighting, to allow the evacuation of local inhabitants who were wounded in the fighting' (*ibid*. [1], at para. 23).

(See also HCJ 2936/02 *Physicians for Human Rights v. IDF Commander in West Bank* [19], at pp. 4-5 {37}; *Physicians for Human Rights v. IDF Commander in West Bank* [6], at p. 29).

The duty to ensure the needs of the civilian population

21. One of the fundamental principles of international humanitarian law is the principle that distinguishes between combatants and military targets on the one hand and civilians and civilian targets on the other, and grants protection to the latter (see *Public Committee against Torture v. Government* [4]). *Inter alia*, the protections granted to the civilian population of all parties to the conflict also include the duty to allow free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity, subject to a number of restrictions (art. 23 of the Fourth Geneva Convention). Article 70 of the First Protocol provides a more general and broader duty, whereby parties to a conflict are obliged to allow the passage of items that are essential for the civilian population, at the earliest opportunity and without delay. Article 30 of the Fourth Geneva Convention requires parties to a conflict to allow citizens to contact the Red Cross or similar international organizations, in order to receive assistance. In *Albassioni v. Prime Minister* [15] we considered these provisions explicitly, and we held:

> 'The state's arguments on this matter are based on norms that are a part of customary international law, and that specify basic duties that are incumbent upon combatant parties during an armed conflict and require them to guarantee the safety of the civilian population and to protect its dignity and its basic rights. It is not superfluous to add that according to the rules of customary international humanitarian law, each party to a conflict is bound to refrain from impeding the transfer of basic humanitarian items of aid to the population requiring them in the areas that are under the control of that party to the dispute.'

From general principles to the specific case

22. The respondents' position, as it was presented to us in their written statements and in the testimony of Colonel Levy during the hearing, is that they do not deny the obligations enshrined in international law as specified above and as they were interpreted by the court in *Physicians for Human Rights v. IDF Commander in Gaza* [1]. Accordingly, during the hearing of the petitions Colonel Levy explained the mode of operation of the various mechanisms that the state established in order to discharge the humanitarian obligations binding it, and it discussed the various difficulties with which they must contend due to the complexity of the conflict and the lack of cooperation with the Hamas authorities. These difficulties include, for

example, the refusal of the Hamas authorities to allow the IDF to evacuate the wounded for treatment in the territory of the State of Israel, and the cynical exploitation by Hamas of the IDF-initiated humanitarian cessations of hostilities, in order to rearm and carry out attacks against the IDF. From the aforesaid it appears that the dispute between the parties does not relate to the legal arrangements that bind Israel, but rather, the manner in which these obligations are discharged *de facto*. We shall therefore provide details below of the developments and changes in Israel's deployment for and ways of dealing with the humanitarian problems that underlie the petitions.

23. Within the framework of the obligations that the IDF confirms are binding upon it, preparations were made — some in advance and some in response to developments in the course of the fighting — to deal with the collateral damage to the civilian population and to provide a response to the humanitarian needs of the local inhabitants. With regard to the various mechanisms that were established and improved during the fighting to deal with the difficulties of coordinating the evacuation of the wounded, the respondents said that on 5 January 2009 a special health operations room was set up, under the command of an officer with the rank of major, who is responsible for providing a response to any civilian population that is in danger, and for coordinating the evacuation of the wounded and the dead from the area where fighting is taking place. Professional matters that arise in the operations room are decided by a doctor, who is an officer with the rank of lieutenant-colonel and who is prepared to receive communications from Palestinian inhabitants, the Palestinian health coordinator, the Red Cross and human rights organizations around the clock. Colonel Levy informed us in great detail, orally and in writing, about the deployment of the officers and soldiers of the District Coordination Office among the combat units, and he explained how the various units communicate with one another to coordinate the evacuation of the wounded and to make it possible for them to be given safe passage by the combat units. Colonel Levy also elaborated on the way in which each body contacts the humanitarian operations rooms that have been set up, and said that upon receiving a request to coordinate the evacuation of a wounded person, the health-related operations room initiates contact with an international organization (the Red Cross operating through the Red Crescent or UNWRA) in order to coordinate the evacuation and the provision of assistance to Palestinian personnel, and the IDF makes the utmost effort to overcome delays in evacuating the wounded — delays which are sometimes caused as a result of the hostilities or damage to infrastructures. With regard to the alleged attacks on medical personnel, the respondents told us that if

indeed any medical personnel who were genuinely seeking to provide medical assistance were injured, this was not the result of a deliberate attack on the medical personnel. It was also claimed that quite a few problems have been caused by the conditions in which the fighting is taking place, and Israeli soldiers have similarly sustained serious injuries as a result of friendly fire.

Despite Colonel Levy's willingness to answer all our questions, it is clear that he lacked information about the various incidents that took place during the evacuation of the wounded, insofar as the extent of the attacks on ambulances and medical personnel was concerned. Nonetheless, the specific case of evacuation for which an order to ensure the evacuation was sought in the petition was resolved during the hearing of the petition; with regard to other cases there is insufficient information at this stage to examine the contentions, and we have asked Colonel Levy to provide us with detailed information concerning the additional cases that were brought before us by the petitioners on the date of the hearing. The alleged use of ambulances and medical facilities by the terrorist organizations to carry out and further combat operations without doubt greatly undermined the coordination of evacuation and rescue operations, and this is to be regretted. But as we said above, the army is obliged to examine each case on its merits and to do all that it can in order to allow the swift and safe passage of ambulances and medical teams to the areas where there are injured and wounded persons requiring treatment.

In view of the establishment and improvement of the humanitarian mechanisms, which it may be assumed will prove their effectiveness; in view of the statement made to us that a serious effort will be made to improve the evacuation and treatment of the wounded; in view of the establishment of a clinic in the vicinity of the Erez crossing (and to the extent that the Palestinian side will also agree to the transfer of the wounded to Israel for treatment), it is to be hoped that the humanitarian mechanisms will operate properly in accordance with the obligations of the State of Israel. In these circumstances, we see no further reason to grant relief in the form of an order *nisi* at this time.

24. With regard to the problems of the electricity supply to the Gaza Strip, we were informed that an infrastructures operations room was set up, which is staffed twenty-four hours a day and is under the command of an officer with the rank of lieutenant-colonel, who is responsible for providing a response to infrastructure problems in the combat areas, obtaining an up-to-

date picture of the economic situation and coordinating consignments of humanitarian aid to the Gaza Strip. In this respect, the respondents explained that upon receiving a request to coordinate the handling of infrastructure problems, the operations room examines the nature of the problem and its effect on the civilian population, and subsequently, where required, it coordinates the arrival of Palestinian technical personnel at the site of the problem, together with an international organization. With regard to the current position concerning the supply of electricity to the Gaza Strip, we were told at the last hearing of the petitions that, as of the date of the hearing (15 January 2009), nine out of the ten electricity lines that transfer electricity from the State of Israel to the Gaza Strip had been repaired and were operating, and that the remaining line would be repaired. In addition, we were told that there is direct contact between the Palestinian Energy Authority and the Israeli Electric Corporation in order to identify problems and repair them as soon as possible. With regard to the two electricity lines that are transferring electricity from Egypt to the Gaza Strip, the respondents informed us that as of the morning of 13 January 2009 the two lines were intact and operational. We were also told that as of 11 January 2009, the line that transfers electricity from the Palestinian power station throughout the Gaza Strip had been repaired and that the power station had returned to partial operation, with a supply of 50% of the manufacturing capacity of the station. In this respect Colonel Levy told us that in the course of the fighting significant quantities of industrial diesel oil had been brought into the Gaza strip for the use of the Palestinian power station. According to him, the supply of industrial diesel oil was reduced after a tunnel was discovered near the Nahal Oz crossing, containing preparations for a major attack. Nevertheless, and despite the risk, the supply of industrial diesel oil to the Gaza Strip was renewed via the Kerem Shalom crossing. Colonel Levy also told us that part of the fuel waiting on the Palestinian side of the Nahal Oz crossing is not being moved on from there by the Palestinians, because the international organizations have other priorities. He also clarified that the intention is to continue to send industrial diesel oil into the Gaza Strip for the purpose of operating the power station, subject to security constraints. In addition, he said that four trucks containing equipment for maintaining the electricity network in the Gaza Strip entered the Gaza Strip between 9 January 2009 and 12 January 2009 (in this context the petitioners claim in their revised statement that these spare parts were destroyed in an IDF bombardment of the storage facility to which the parts were transported from

the Karni terminal, and on this matter Colonel Levy was unable to provide us with any information).

25. We were informed by the respondents that in addition to the industrial diesel oil that was intended for operating the Palestinian power station, 200,000 litres of diesel oil for transport, 234 tons of cooking gas, water hygiene and purification kits, and bottled water were also brought into the Gaza Strip in the course of the fighting. It was also stated that in order to enable distribution of the humanitarian supplies to the inhabitants of the Gaza Strip, the respondents decided to introduce lulls in fighting in the Gaza Strip for several hours, during which they did not initiate any combat operations. However, exploitation of these lulls by the Hamas organization in order to rearm and carry out shooting attacks sometimes interrupts the transfer of the humanitarian aid. We were also told of the establishment of an operations room for dealing with the international organizations, under the command of an officer with the rank of lieutenant-colonel, which is responsible for coordinating the movement of the workers and vehicles of the international organizations within the framework of their (non-medical) humanitarian work in the Gaza Strip, and for coordinating the transfer of humanitarian donations from international organizations or foreign countries. This operations room is also responsible for obtaining an up-to-date picture of the humanitarian situation, on the basis of reports received from the various international bodies. Finally, we were told that an additional humanitarian operations room had been established in Tel-Aviv, under the command of a reserve officer with the rank of lieutenant-colonel, for the purpose of improving the coordination work in the field of humanitarian aid between the security establishment and the representatives of the international organizations.

26. From the aforesaid it transpires that steps are being taken to repair the faults in the electricity network in the Gaza Strip, and that despite the state of combat and the security risks, efforts are being made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station in Gaza, as well as other humanitarian requirements, such as cooking gas, diesel oil, water, food and medications. In these circumstances, this petition too should be denied.

Conclusion

27. The civilian population is suffering greatly as a result of the IDF combat operations. The operations are taking place in built-up, densely populated areas. Owing to these conditions, many of the victims — hundreds

of dead and thousands of wounded — are civilians who were not involved in the dispute and who are paying a high price. Regrettably, children on both sides are innocent victims, suffering the consequences of the intense fighting. The circumstances under which the hearing took place meant that we did not receive all the information that was needed to clarify the position, but it cannot be denied that a strenuous effort should be made to discharge the humanitarian obligations of the State of Israel. It is true that the IDF is fighting against a terrorist organization. That organization does not observe international law; it does not respect humanitarian obligations; there is also no channel of communication with it that might further the implementation of the principles and laws that govern parties involved in armed conflict of the type that is raging here. We appear to be on the verge of a ceasefire; however, the state of conflict is still continuing, and in that state, as long as Israel controls the transfer of essentials and the supply of humanitarian needs to the Gaza Strip, it is bound by the obligations enshrined in international humanitarian law, which require it to allow the civilian population access, to — *inter alia* — medical facilities, food and water, as well as additional humanitarian items that are necessary for the maintenance of civilian life.

28. We have heard the petitioners' claims, and we requested and received detailed responses from the respondents regarding the various humanitarian concerns that were raised in the petitions. It was made clear to us that the IDF and the senior commanders acting in its name are aware of and prepared to carry out their humanitarian obligations. We said in a similar context in *Albassioni v. Prime Minister* [15]:

> 'The Gaza Strip is controlled by a murderous terrorist organization, which acts incessantly to harm the State of Israel and its inhabitants and violates every possible rule of international law in its acts of violence, which are directed indiscriminately against civilians — men, women and children. Nevertheless, as we said above, the State of Israel is obliged to act against the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from any intentional attack upon the civilian population in the Gaza Strip' (*ibid*. [15], at para. 22).

29. As we have said, at the time of handing down of this judgment, the combat may be about to end; no-one, however, disputes that the humanitarian aid and rehabilitation work is not yet finished. It is our hope that the state will indeed do its very best to comply with Israeli and international law, in order

to alleviate the suffering of the civilian population in the Gaza Strip, which has been seriously affected by the combat. This suffering is a result of the mode of conduct of the cruel terrorist organization that controls the Gaza Strip and operates from within the civilian population while endangering it and abandoning it to its fate. Despite this, even in the face of a terrorist organization whose declared objective is to harm the civilian population of the State of Israel indiscriminately, we shall carry out our duty to uphold the principles and values that are the foundation of our existence as a Jewish and democratic state, which cherishes human rights and humanity.

Subject to all of the aforesaid, the petitions are denied.

Justice E. Rubinstein

1. I agree with the opinion of my colleague, the President. The combat in which the State of Israel is engaged is not 'symmetrical' in the extent to which the parties respect the law. As noted by my colleague, following many years of restraint, Israel was forced into battle in self-defence — lawfully, and in accordance with the Charter of the United Nations and deeply entrenched international law — against those who seek to take our lives. It is difficult to imagine many free world countries holding back for so very long while many of their citizens were subject to the constant — and all too often realized — threat of missile fire, bodily harm and damage to property. The enemy is cynical and cruel, and, beyond its disregard for every established norm, operates within a civilian populace, which regrettably pays the price of its actions. It deliberately and openly directs its weapons indiscriminately at the Israeli civilian population, while our forces are ordered to take every possible measure to avoid harming civilians, as prescribed by binding legal norms.

2. This court has a responsibility to deal immediately with petitions that raise humanitarian concerns, and so it did in the present case. Often, the role of the court in such cases is to urge and monitor compliance with the provisions of Israeli and international law, even where it knows and trusts that the authorities are unreservedly committed to the appropriate legal framework; it does so, however, from the judicial perspective aimed at capturing the broad picture. There is therefore constant need for judicial review.

3. My colleague mentioned the difficulty of classifying the battle against terrorism in terms of international law. The international legal system encounters, from time to time, distressing innovations on the part of

international terrorism, including the weapons it employs (aided by members of the United Nations, ostensibly committed to international law) and its methods of combat. Steady efforts toward legislation and enforcement notwithstanding, the international legal system has been unable to cope with these constant new challenges. Nevertheless, the State of Israel, probably the most prominent victim of terrorism among the countries of the free world, sees itself — as noted by President Barak in *Public Committee against Torture v. Government* [4], cited by my colleague — as committed in this conflict to the various aspects of international humanitarian law.

4. We have become convinced, in hearing these petitions, of the commitment of the military establishment and the political echelon to the pertinent legal norms. This commitment means, in practice, a systematic, unceasing effort at implementation, learning the lessons from difficulties and mishaps in real time, and persistent attempts toward improvement.

5. Indeed, not infrequently under the current circumstances, the Israeli system finds itself between a rock and a hard place, for, as the President noted, accidents happen in times of war, including injury to our soldiers from friendly fire; on occasion, our battle against the enemy, even when intentions and planning are above reproach, yields tragic cases of harm to Palestinian civilians, among them innocent bystanders, including children — and this fills the heart with grief. Israel, too, has experienced such tragedy, and has seen its own children suffer, and so it deeply regrets casualties on the other side. A concerted effort must be maintained at all levels — and we have no reason to believe that it is not — to restrict lamentable accidents to a minimum, even in evil or inconceivable scenarios.

6. Finally, as a Jewish and democratic state, we are committed to the norms prescribed by Jewish law with respect to the proper attitude toward human beings created in the image of God in heaven, whoever they may be. The Jerusalem Talmud (*Sanhedrin* 4:9 [20]) states: 'Therefore man [Adam] was created alone, to teach you that whoever destroys one person is deemed to have destroyed an entire world, and whoever saves one person is deemed to have saved an entire world.' And, where matters of life and death are concerned, 'nothing stands in the way of saving a life, except for idolatry, adultery and murder' (Tosefta, *Shabbat* 16:14 [21]). This ethos has accompanied the Jewish people from time immemorial, and will continue to do so in the future.

Justice A. Grunis

I agree with the opinion of my colleague, President D. Beinisch, on the merits of the case. In the circumstances I see no need to address the question of justiciability.

Petition denied.

23 Tevet 5769.
19 January 2009.