

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 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 petitioners, this is a result of disruptions caused by the IDF.

Held: The IDF's combat operations are governed by international humanitarian law. This requires 'protected civilians' to be treated humanely and protected against acts of violence; medical facilities and personnel may not be attacked, unless exploited for military purposes; the evacuation and treatment of the wounded and convoys of humanitarian relief should be allowed. The respondents do not dispute their duties under international humanitarian law and they gave detailed explanations of all the measures that have been and are being carried out in order to discharge these duties. In such circumstances, the court found no basis for granting relief.

Petition 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* (not yet reported decision of 30 January 2008).
- [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* (not yet published decision of 11 June 2008).
- [18] HCJ 393/82 *Jamait Askan Alalmoun 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 (the ‘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 mortars that are fired by members of the terrorist organizations that operate 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 became more intense and more numerous. 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, smuggled a huge quantity of weapons and missiles through hundreds of subterranean tunnels that they dug, improved the weapons that they used and increased the threat to the inhabitants within range of the missiles.

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3. On 27 December 2008 the IDF began a large-scale military operation that Israel initiated in the Gaza Strip, in order to stop the shooting of mortars and Qassam and Grad rockets 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 course of this operation, the Israeli Air Force attacked targets that are used by the Hamas leadership in the Gaza Strip, and on 3 January 2009 tanks, infantry and engineering forces entered 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 that are inhabited by the civilian population, and sometimes even in actual homes. Regrettably the local population is 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 of both of them. During the hearing it became clear from the state's response that the IDF had set up a humanitarian operations room, which was intended to contend with the coordination difficulties in evacuating the injured, and that operations were being carried out 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, in order to clarify the position and the manner in which the humanitarian mechanisms set up by the state were operating, and to respond to specific questions. We therefore decided at the end of the hearing that the state needed to submit a detailed response with regard to the mechanisms that it had set up and the steps that it had taken in order to allow the evacuation of the wounded in a more effective manner. We also found that we required an update with regard to the operations that were being carried out in order 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 an affidavit 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 affidavit 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 the IDF

forces shot at medical personnel while they were carrying out their duties, despite the fact that the vehicles and uniforms of the medical personnel bear the distinguishing mark that is recognized and agreed in the Geneva conventions. It alleges 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 it gave details 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, because of the ongoing military operations, the refusal of the army to allow movement between the north and the south of the Gaza Strip and coordination difficulties. According to the petitioner, many hours pass from the time when the coordination request is made until the time when 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 make an interim order that the respondents should 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 of the coordination efforts to evacuate them have been unsuccessful. In the petitioner's revised statement, which was only filed on the date of the last hearing, details were given of additional incidents in which it was alleged that shots were fired at medical personnel and swift assistance was not given to families that 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 the petition, the petitioners gave details of the quantities of electricity and industrial diesel oil that are needed in the Gaza Strip, as compared with 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 any entry of industrial diesel oil into the Gaza Strip, and as a result the power station in the Gaza Strip (which supplies approximately a third of the amount of electricity needed by the inhabitants of the Gaza Strip) has been completely shut down since 30 December 2008. It was also alleged in the

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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, including 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 Palestinian workers to make the repairs. The petitioners gave details in their petition of the humanitarian harm to the civilian population that results from the shortage of electricity: thousands of people do not have access to running water; sewage has spilled onto 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 so far 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 going to break down entirely because they are operating round the clock beyond their capacity; the activity of most of the bakeries in the Gaza Strip has been stopped because of a shortage of cooking gas and electricity, and this has led to a serious shortage of bread in the Gaza Strip. In this respect it was alleged in the petition that since the State of Israel controls the supply of electricity to the Gaza Strip, especially at the present when the IDF forces control large parts of the Gaza Strip, the State of Israel has a greater duty to provide the needs of the civilian population in the Gaza Strip, 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 argument 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 gave additional descriptions of the factual position in the Gaza Strip, in so 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 the dynamic picture of the battlefield to the court in real time. Notwithstanding the respondents stated

that the IDF is operating in accordance with international humanitarian law, and it accepts 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 in it. Therefore there is today no 'military commander,' 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 set out 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 operation rooms was set up, each for a separate issue: 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 operation forces and the coordination authorities. Each of these war rooms operates twenty-four hours a day, with on-site professional and legal support. Furthermore, a humanitarian unit was established in each operational division; each of these has five officers, and their purpose is to coordinate the 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 the coordination of the movements of medical personnel in the Gaza Strip, it was argued in the state's response that the guideline that was given to the forces operating in the area is to refrain from attacking medical personnel and ambulances in the

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course of carrying out their duties, except in cases where it is clearly known that ambulances are been exploited for the purpose of fighting the IDF. According to the respondents, from intelligence information that they have in their possession it transpires that terrorists are making use of ambulances to carry out terrorist activity and to transport rockets and ammunition from one place to another, and in these circumstances even international humanitarian law provides that these protected institutions lose the protection that they usually enjoy. Setting up 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 in so far as medical personnel have been and are being harmed during the fighting, this has not been done intentionally, but it is a result of the hostilities that have been taking part in the vicinity. The respondents also pointed out in this respect that it is well known that IDF forces have also been injured by mistake as a result of shots fired by other IDF forces. The respondents gave details of the measures taken 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 operations in the Gaza Strip it is not possible to ensure there is no 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, operations were carried out all the time to repair the electricity lines that were damaged during the combat operations. 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, a fault would be repaired in the other line 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 in which we were requested 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 in our decision President A. Barak said the following:

‘Indeed, in a whole host of judgments the Supreme Court has considered the rights of the inhabitants of the territories. Thousands of judgments have been given by the Supreme Court, which, in the absence of any other competent judicial instance, has addressed these issues. These issues have concerned 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 needs 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 predominant character of the question in dispute was

legal. Admittedly, the legal answer is likely to have political and military ramifications. But they did not determine the nature of the question. It is not the results that arise from the judgment that determine its nature, but the questions that are considered by it and the way in which they are answered. These questions have in the past been, and they remain today, predominantly of a 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 occurrences, 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 discharging the duties 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 or with regard to the wisdom of the decisions to carry out military operations. Notwithstanding, 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 — both within the context of Israeli law and within the context of 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, and they request guidelines for the immediate conduct of the army in humanitarian matters in order to benefit the civilian population that finds itself at the heart of the hostilities taking place around it. Our judicial scrutiny is exercised in such a case while the hostilities are continuing. Naturally this imposes restrictions upon the court's ability to exercise its scrutiny 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 of the judgment). Indeed, while the hostilities are taking place it is not always possible to obtain all of the information that is required for exercising judicial scrutiny, 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 arrive at an agreed settlement. Thus, for example, I said in this respect in *Physicians for Human Rights v. IDF Commander in Gaza* [1] that:

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‘... 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 hold the judicial review process, while dynamic developments are taking place in the field of battle, makes it difficult to carry out the process and to make an investigation of 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 takes place after they have occurred and the particulars has been clarified, and the factual picture has been set out before the court, judicial review that seeks to examine the need for relief when the 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 heard while the changes and developments in the field were taking place during the hearing itself. The parties that presented their arguments before us based their contentions on continuous reports from the field of battle, and these reports changed the circumstances and the facts during the hearing of the petition. The factual description of ascertaining the particulars as aforesaid finds expression in the opinion of the President. In such circumstances, the judicial review process is limited and suffers from the lack of adequate arrangements with which to ascertain the relevant particulars in order to examine them in real time and to grant effective relief for them.’

Naturally, where it is not possible to obtain all of the necessary information in real time, the legality of specific incidents is often reviewed retrospectively, after all of the necessary information has been obtained, whereas while the hostilities are taking place, the role of the court focuses upon exercising scrutiny as to 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

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difficulties. But in a host of judgments we have regarded this conflict as an international conflict. Thus, for example, we held in the judgment in *Public Committee against Torture v. Government* [4], per President Barak:

‘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 continuing with 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 an international armed conflict, the laws of belligerent occupation may also apply. In H CJ 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 a potential to exercise administrative powers on the ground as a result of the entry of military forces, and not necessarily upon the actual exercising 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 dependent 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 existence 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 setting up and designating a special military framework for administration

purposes (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 that governed this territory in the past was abrogated 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 an effective ability in its present status to impose order and to manage civilian life in the Gaza Strip. In the circumstances that have been created, the main obligations imposed 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 rules 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 and also from the connection that was created between the State of Israel and the territory of the Gaza Strip after years of Israeli military rule of the territory, as a result of which for the time being the Gaza Strip is almost completely dependent upon the supply of electricity from Israel’ (*Albassioni v. Prime Minister* [15], at para. 12 of the judgment).

The position described in *Albassioni v. Prime Minister* [15] as aforesaid is also dynamic and variable, and currently 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 that the IDF has in the new situation that has arisen. Notwithstanding, there is no need to decide this question now, since the state in any case agrees that the humanitarian laws that are relevant to the petitions apply.

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15. According to 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 annexed thereto, whose provisions have the status of customary international law; the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, whose customary provisions constitute a part of the law of the State of Israel and have required interpretation 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 of the judgment); 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 (hereafter — ‘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 of the judgment; *Public Committee against Torture v. Government* [4], at para. 18). According to the rules of Israeli public law, the army is liable to act, *inter alia*, fairly, reasonably and proportionately, while properly balancing the liberty of the individual against 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 while conducting hostilities (both in a territory subject to a belligerent occupation and in the 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 a territory that is subject to a belligerent occupation or a territory that is under the sovereignty of the parties to the conflict — are entitled in all circumstances, *inter alia*, to be humanely treated and to be protected against all acts of violence or threats thereof (see also art. 46 of the Hague Regulations). Notwithstanding, these basic obligations to the civilian population are not absolute, but they should

be balanced against security considerations and the measures that need to be taken 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 that govern the matters raised in the petitions, we should point out that *de facto* 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, demand that the wounded should be allowed to be evacuated from the site of the hostilities and require the civilian population to be protected and its basic rights to be upheld — apply to the combat operations that are being carried out in the ‘Cast Lead’ operation and bind the actions of the IDF.

The prohibition of intentionally harming medical personnel

18. The provisions of international humanitarian law grant protection to medical facilities and personnel from being attacked. 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 currently 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 given 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. Notwithstanding, this protection is not absolute, and it will be lost if use is made of medical facilities for non-humanitarian purposes, or if they are exploited for military purposes. In accordance with this principle, the medical personnel are only entitled to full protection 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 they are used ‘to commit, outside their humanitarian duties, acts harmful to the enemy’ (art. 21 of the First Geneva Convention; art. 19 of the Fourth Geneva

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Convention). In this regard, the Supreme Court emphasized in *Physicians for Human Rights v. IDF Commander in West Bank* [6], at p. 29, that the abuse that is sometimes made of medical personnel, hospitals and ambulances requires the IDF to act in order to prevent such activity, but it does not in itself permit a sweeping violation of the principles of humanitarian law, and that ‘this position is 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 given 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 respect, art. 16 of the Fourth Geneva Convention provides a special protection for the sick and wounded, and it requires the parties to the conflict to allow and facilitate searches for and assistance of the wounded and to protect them from improper treatment, in so 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 supplied).

In addition, art. 15 of the First Protocol provides 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 regard that:

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

(See also H CJ 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 combatants and military targets from civilians

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and civilian targets, and grants protection to the latter (see *Public Committee against Torture v. Government* [4]). *Inter alia*, the protections given to the civilian population of all of the 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 several 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 articles 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 expressly, and we held:

‘The state’s arguments in this regard are based on norms that are a part of customary international law, which set out basic duties that govern 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 that requires 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 repudiate the obligations enshrined in international law as set out above and as they were interpreted by the court in *Physicians for Human Rights v. IDF Commander in Gaza* [1]. Thus Colonel Levy explained during the hearing of the petitions the mode of operation of the various mechanisms that they state set up in order to discharge the humanitarian obligations that govern it, and it discussed the various difficulties with which they were required to contend as a result of 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 to receive treatment in the State of Israel and the Hamas organization’s cynical exploitation of the humanitarian ceasefires, which

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were initiated by the IDF, 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 concerns the manner in which these obligations are to be discharged *de facto*. We shall therefore give 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 during the war — in order to contend with the collateral damage to the civilian population and in order to provide a response to the humanitarian needs of the local inhabitants. With regard to the various mechanisms that were established and enhanced during the fighting in order to contend with the difficulties of coordinating the evacuation of the wounded, the respondents said that on 5 January 2009 a special health operations room was established, 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 hostilities are 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 available around the clock to receive communications from Palestinian inhabitants, the Palestinian health coordinator, the Red Cross and human rights organizations. Colonel Levy told us in great detail, in writing and orally, 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 in order 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 gave details of the way in which each party contacts the humanitarian operations rooms that were set up, and he said that when a request is made to coordinate the evacuation of a wounded person, the 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 assistance of Palestinian personnel, and the IDF does all that it can in order to overcome difficulties in evacuating the wounded, 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 in so far as there were any attacks upon medical personnel that were genuinely seeking to provide medical assistance, this did

not happen as a result of a deliberate attack on the medical personnel. It was also claimed that a considerable number of problems have been caused by the conditions in which the fighting is taking place, and in the same way Israeli soldiers have sustained serious injuries as a result of friendly fire.

Although Colonel Levy was willing to answer all of our questions, it was clear that he lacked information about the various incidents that took place during the evacuation of the wounded, in so far as the extent of the attacks on ambulances and medical personnel was concerned. Notwithstanding, the specific case of evacuation, for which an order was requested 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 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 use of ambulances and medical facilities that was allegedly made by the terrorist organizations in order 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 has a duty 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 personnel to the areas where there are injured and wounded persons that require treatment.

In view of the establishment and enhancement 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 setting up 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 told that an infrastructures operations room was set up, and this 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 after

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receiving a request to coordinate the treatment of infrastructure problems, the operations room examines the nature of the problem and its effect on the civilian population, and subsequently, where this is 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 apprised 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 had been reduced after a tunnel was discovered near the Nahal Oz crossing point, in which there was evidence of preparations for a major attack. Notwithstanding, despite the risk, the supply of industrial diesel oil to the Gaza Strip was renewed via the Kerem Shalom crossing point. Colonel Levy also told us that some of the fuel that is waiting on the Palestinian side of the Nahal Oz crossing point is not being transported 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. He also said that four large vehicles 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 regard the petitioners claim in their revised statement that these spare parts were destroyed as a result of an IDF bombardment of the storage facility where the parts were transported from the Karni station, and in this matter Colonel Levy was unable to provide us with any information).

25. In addition to the industrial diesel oil that was intended for operating the Palestinian power station, we were told by the respondents that in the course of the fighting 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. He also said that in order to allow the distribution of the humanitarian supplies to the inhabitants of the Gaza Strip, the respondents decided to introduce cessations of hostilities in the Gaza Strip for several hours, during which they did not initiate any combat operations. Notwithstanding, these cessations of hostilities are exploited by the Hamas organization in order to rearm and carry out shooting attacks, and this sometimes interrupts the transfer of the humanitarian aid. In addition, we were 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, who 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 that are 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 can be seen that steps have been taken in order to repair the faults in the electricity network in the Gaza Strip, and despite the state of combat and the security risks, efforts have been made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station in Gaza, as well as additional humanitarian requirements, such as cooking gas, diesel oil for transport, water, food and medications. In these circumstances, this petition should also be denied.

Conclusion

27. The civilian population is suffering considerably as a result of the IDF's combat operations. The operations are taking place in built-up and densely populated areas. Because of these conditions, many of the victims — hundreds of dead and thousands of wounded — are civilians who were not involved in the dispute and are paying a high price. Regrettably, the children

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on both sides are innocent victims who are suffering the consequences of the intense fighting. Because of the circumstances in which the hearing took place, we did not receive all of 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 the IDF forces are 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 the parties that are involved in the armed conflict of the type that is being waged here. It appears that there may soon be a ceasefire. Notwithstanding, the state of conflict is still continuing, and in this context, as long as Israel has control of the transfer of necessities 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 to have access, *inter alia*, to medical facilities, food and water, as well as additional humanitarian products that are needed to maintain civilian life.

28. We have heard the petitioners' claims, and we requested and received detailed responses from the respondents with regard to the various humanitarian concerns that were raised in the petitions. It was made clear to us that the IDF and the high-level command authorities acting on its behalf 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 continually 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. Notwithstanding, 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 said above, at the time of giving judgment it is possible that the combat activities are about to end. Notwithstanding, no-one disputes that the humanitarian aid and rehabilitation work has not yet ended. 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

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Strip, which has been seriously affected by the combat operations. This suffering is a result of the 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 that has declared its goal of harming the civilian population of the State of Israel indiscriminately, we shall carry out our duty to uphold the principles and values underlying 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 so far as respect for the law is concerned. As noted by my colleague, Israel was forced into battle in self-defence — lawfully, in accordance with the Charter of the United Nations and international law — against those who seek to take our lives, and it is doing so only after many years of restraint. It is difficult to imagine many free-world countries holding back for such a long time while many of their citizens are subject to the constant — and all-too-often realized — threat of missile fire resulting in physical injury and property damage. The enemy is cynical and cruel, and in addition to its disregard for every accepted norm of conduct, it also operates from within a civilian population, which regrettably pays the price of its actions. It openly, deliberately and indiscriminately targets 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 is disposed to hearing petitions that raise humanitarian concerns without delay, and this is what it has done 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 when it knows and trusts that the authorities are unreservedly committed to the appropriate legal framework; the court has a judicial perspective that allows it to see the whole picture. Therefore judicial review is always called for.

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

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efforts toward legislation and enforcement notwithstanding, the international legal system has been unable to contend with these new challenges. Despite this, as President Barak said in *Public Committee against Torture v. Government* [4], which was cited by my colleague, the State of Israel, which is probably the most prominent victim of terrorism among the countries of the free world, regards itself as committed in this conflict to the various aspects of international humanitarian law.

4. In hearing these petitions, we have been persuaded that the military establishment and the political echelon are committed to the relevant legal norms. In practice, this commitment should mean a systematic and unceasing endeavour to implement these norms, to learn from failures and mistakes and to make persistent efforts to improve.

5. Indeed, in the current situation the Israeli establishment not infrequently finds itself ‘between a rock and a hard place,’ since, as my colleague the president said, accidents happen in times of war, and our soldiers have also been hit by friendly fire; sometimes in our fight against the enemy, even when the intentions and planning are beyond reproach, harm is caused to Palestinian civilians, including innocent bystanders and children, for whom the heart grieves. Israel has also suffered such losses and seen its own children suffer, and so it deeply regrets casualties on the other side. A concerted effort should be made at all levels — and we have no reason to believe that it is not — to restrict regrettable accidents to a minimum, even in evil or unimaginable scenarios.

6. Finally, as a Jewish and democratic state, we are committed to the norms prescribed by Jewish law with regard to the proper attitude towards human beings, who were all created in the image of God. The Jerusalem Talmud (*Sanhedrin* 4, 9 [20]) states: ‘Therefore 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.’ Where matters of life and death are concerned, ‘nothing stands in the way of saving a life, except for idolatry, sexual immorality and homicide’ (Tosefta, *Shabbat* 16, 14 [21]). This ethos has accompanied the Jewish people throughout the generations, and will continue to do so.

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.

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Petition denied.
23 Tevet 5769.
19 January 2009.