

Israel, Evacuation of Bodies in Jenin

[See also on “Operation Defensive Wall”: United Nations, A/ES-10/186, Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10 (Report on Jenin), 30 July 2002, <http://unispal.un.org/UNISPAL.NSF/0/FD7BDE7666E04F5C85256C08004E63ED>]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: “Evacuation of bodies in Jenin – Decision of the Supreme Court Sitting as a High Court of Justice – April 14, 2002”, available on <http://www.court.gov.il>]

Evacuation of bodies in Jenin Decision of the Supreme Court Sitting as a High Court of Justice

14 Apr 2002

H.C. 3114/02 MOHAMMED BARAKEH, M.K. [Member of the Israeli Parliament] v. THE MINISTER OF DEFENCE, BENJAMIN BEN ELIEZER THE CHIEF OF THE GENERAL STAFF OF THE I.D.F., SHAUL MOFAZ THE COMMANDER OF I.D.F. FORCES IN THE JENIN AREA

H.C. 3115/02 AHMED TIBI, M.K. [Member of the Israeli Parliament] v. THE PRIME MINISTER, ARIEL SHARON THE MINISTER OF DEFENCE, BENJAMIN BEN ELIEZER THE CHIEF OF THE GENERAL STAFF OF THE I.D.F., SHAUL MOFAZ THE COMMANDER OF THE CENTRAL COMMAND, YITZCHAK EITAN

H.C. 3116/02 ADALAH – THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL LAW – THE PALESTINIAN ORGANIZATION FOR THE DEFENCE OF HUMAN RIGHTS v. THE COMMANDER OF

I.D.F. FORCES IN THE WEST BANK

In the Supreme Court sitting as the High Court of Justice Barak P., Or J., and Beinisch J.

Judgment

Barak P.

1. Combat activities have been taking place during the recent days in the areas of Judea and Samaria ("operation Defensive Wall"). The operation began (on March 29th 2002) as a result of a government decision. Its objective – to defeat the Palestinian terror infrastructure, and to prevent the reoccurrence of the multiple terrorist attacks which have plagued Israel. In the framework of this activity, I.D.F. forces entered (on April 3rd, 2002) the area of the city of Jenin, and the refugee camp adjacent to it. According to the information relayed to us by the Respondents' counsel, Mr. Blass, a widespread terror infrastructure (a bona fide "Palestinian Military Industries", in the words of Mr. Blass) has developed in the city of Jenin and in the refugee camp. More than twenty-three suicide bombers have come from that area, about one fourth of all of the terrorists who have committed suicide bombing attacks (including the attacks during Passover, in the Matza Restaurant in Haifa and in the Sbarro Restaurant in Jerusalem; the train station in Benyamina; the bus attack at the Mosmos junction and the attack at the junction adjacent to Army Base 80).

2. As I.D.F. forces entered the refugee camp, they found that a large proportion of the houses were empty. The civilian population was mainly in the center of the camp. As I.D.F. forces arrived, they called out a general appeal to residents to come out of the houses. According to what has been relayed to us, the call was not answered until the night of April 7, 2002. At that point, approximately one hundred people left the camp. In order to apprehend the terrorists, weapons, and explosives, I.D.F. forces began combat activity from house to house. Among other reasons, this technique was adopted in order to prevent massive casualties to innocent civilians. A skirmish developed. It turned out that empty houses had been booby-trapped. As a result of this fighting, 23 of our soldiers fell in battle. After a few days of combat, from house to house, the army achieved control of the camp. According to the claim of Respondents' counsel, after a stage in which a call was given to evacuate the houses, bulldozers destroyed the houses during the fighting, and some Palestinians were killed.

3. Bodies of Palestinians remained in the camp. Until the camp was completely under control of the I.D.F., it was impossible to evacuate them. When the camp was under control, a process of searching began, during which the explosive charges which the Palestinians had scattered around the refugee camp were neutralized and removed. Up to the point when these petitions were served, thirty-seven bodies had been found. Eight bodies were given over to the Palestinian side. Twenty-six bodies have not yet been evacuated.

4. In the three petitions before us, we were asked to order the Respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp. In addition, we were asked to order the Respondents to refrain from burying the bodies of those determined to be terrorists in a cemetery in the

Jordan Valley. The Petitioners request that the task of locating and collecting the bodies be given to medical teams and representatives of the Red Cross. In addition, they request that the family members of the deceased be allowed to bring their dead to a timely, appropriate and respectable burial.

5. [...] [T]he President of this Court decided to give a temporary order forbidding the evacuation of bodies of Palestinians from the places where they lay, until the hearing. [...]

7. The principle which serves as a starting point, is that in the circumstances of this case, the responsibility for the location, identification, evacuation and burial of the bodies belongs to the Respondents. These are their obligations according to the rules of international law. The Respondents accept this position, and it guides their action. In the framework of this position – and according to the procedures which were decided upon – teams were assembled, including the bomb squad unit, medical representatives and other professionals. These teams will locate the bodies. They will expedite the identification process. They will evacuate the bodies to a central point. In response to our questions, Mr. Blass responded that the Respondents are willing to include representatives of the Red Cross in the various teams. In addition, they are willing to consider, with a positive outlook – according to the judgment of the Military Commander, in consideration of the changing circumstances – the participation of a representative of the Red Crescent in the location and identification process. We suggest that a representative of the Red Crescent be included, subject, of course, to the judgments of the military commanders. It is also acceptable to the Respondents that the process of identification, during the stage after the location and evacuation of the bodies, will include local representatives who are capable of assisting in this matter. Identification activities on the part of the I.D.F. will include, among other things, photography and documentation according to standard procedure. These activities will be done as quickly as possible, with respect for the dead and while safeguarding the security of the acting forces. These principles are also acceptable to the Petitioners.

8. At the end of the identification process, the burial stage will begin. The position of the Respondents is that burial will be performed in a timely manner, by the Palestinian side. Successful expedition obliges agreement between the Respondents and the Palestinian side, of course. If it turns out that the Palestinian side is refraining from bringing the bodies to immediate burial, the possibility of bringing the bodies to immediate burial by the Respondents – in light of the concern that such a situation will compromise security – will be weighed. Needless to mention, the Respondents' position is that such burial, if performed by the Respondents, will be done in an appropriate and respectful way, while ensuring respect for the dead. In this, no differentiation will be made between located bodies, and no differentiation will be made between bodies of armed terrorists and civilians. This position is acceptable to the Petitioners.

9. Indeed, there is no real argument between the parties. The location, identification and burial of bodies are very important humanitarian acts. They are deduced from the principle of respect for the dead. Respect for all dead. They are placed at the base of our existence as a state whose values are Jewish and democratic. The Respondents declared that they are acting in accordance with this attitude, and their attitude seems to us to

be appropriate. That is to say: in order to prevent rumors, it is fitting to include, in the body location stage, representatives of the Red Crescent. It is also fitting – and this is acceptable to the Respondents – that during the identification of bodies, local Palestinian authorities will be included. Finally, it is fitting – and this is even the original position of the Respondents – that the burial should be done respectfully, according to the religious customs, by local Palestinian authorities. All these acts need to be done in as timely a manner as possible. All the parties are in agreement in that regard. Needless to say, all the above is subject to the security situation in the field, and to the judgment of the Military Commander.

10. On the humanitarian issues, it is indeed usually possible to arrive at understanding and arrangement. Respect for the dead is important to us all, for humankind was created in the likeness of God. All the parties hope to finish the location, identification, and burial process as soon as possible. The Respondents are willing to include representatives of the Red Cross, and, during the identification stage after the location and evacuation stages, even local authorities (subject to specific decision of the Military Commander). All are in agreement that burial should be done with respect, according to religious custom, in a timely manner.

11. It was claimed in the petitions that a massacre had been committed in the Jenin refugee camp. The Respondents disagree most strongly. In Jenin there was a battle – a battle in which many of our soldiers fell. The army fought from house to house, not by bombing from the air, in order to prevent, to the extent possible, civilian casualties. Twenty-three I.D.F. soldiers lost their lives. Scores of soldiers were wounded. The Petitioners did not lift the burden of evidence which laid on their shoulders. A massacre is one thing. A difficult battle is something else. The Respondents repeat their claim before us, that they wish to hide nothing, and that they have nothing to hide. The pragmatic arrangement to which we have arrived is an expression of that position.

12. It is good that the parties to these petitions before us reached understanding. This understanding is desirable. It respects the living, and the dead. It avoids rumors. Of course, legal rules apply always and immediately. Mr. Blass relayed to us that in all their activities, the military authorities are advised by the Chief Military Attorney. This is how it should be. Even in a time of combat, the law applying to combat must be upheld. Even in a time of combat, all must be done in order to protect the civilian population [...]. Clearly this court will take no position regarding the way the combat is being managed. As long as the soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangers the soldiers. Nor was the claim made before us that by giving the temporary order there is any danger to soldiers. On the contrary; the arrangement to which we arrived is an arrangement in which all are interested.

In light of the arrangement detailed above, it is acceptable to all the parties before us, that the petitions are rejected.

Discussion

1. How would you qualify the hostilities that took place in Jenin? Was it an international or a non-international armed conflict? Is Jenin's location in Palestinian occupied territory or in autonomous Palestinian territory crucial in determining the applicable humanitarian law? Is Convention IV applicable to this situation? Even though Israel has declared that it only agreed to apply de facto the "humanitarian provisions" of Convention IV, which it has ratified?

2. Is the destruction of housing in conformity with IHL? If the houses were booby-trapped? If there were an element of doubt? If there were a high level of risk that the destructions would cause civilian casualties? As an act of reprisal against suicide attacks committed by Palestinians from Jenin? (HR, Arts 23(g) and 50; GC IV, Arts 33, 53 and 147; CIHL, Rules 50-51, 103 and 147)

3. a. Which IHL provisions are concerned with the identification, repatriation and burial of the deceased? (GC I, Arts 15(1), 16 and 17; GC II, Arts 18(1) and 20; GC III, Art. 120; GC IV, Art. 130; P I, Arts 17(2), 32, 33(4) and 34; CIHL, Rules 114-116) Are some of these provisions applicable to the case in question? If not, why? If yes, which ones? In which capacity? Do some have a customary value?

b. If the said provisions are not applicable, why does the Court deem that "the responsibility for the location, identification, evacuation and burial of the bodies belongs to the Respondents", and that these are obligations "according to the rules of international law" (para. 7)? To what provisions of international law could the Court be referring? Are the said provisions part of the "humanitarian provisions" that Israel agrees to apply? Are there "non-humanitarian" provisions in IHL? [See also Israel, Cases Concerning Deportation Orders]

c. Is the involvement of civil society organizations and in particular of the Palestinian Red Crescent in these activities obligatory? Optional? Why is it necessary in this case?

d. Is the ICRC's participation in these activities obligatory? Optional? What is the ICRC's mandate? May it play a role with regard to people deceased during the conflict? Is this not mainly the task of the parties to the conflict? May the ICRC nevertheless offer its services? (GC IV, Arts 10, 140 and 143)

e. Was an agreement between the Israeli and Palestinian authorities vital? Advisable in these circumstances? Could the military authorities bring these agreements to an end for security reasons, as the Court seems to say? Could they for the same reasons cease to comply with their obligations "according to the rules of international law"?