

## Preamble

**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: *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip*, HCJ 4764/04, The Supreme Court Sitting as the High Court of Justice, May 30, 2004]

## **HCJ 4764/041. Physicians for Human Rights [et al.]v.1. Commander of the IDF Forces in the Gaza Strip**

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

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

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

[...]

### **Judgment**

**President A. Barak**

Is the State of Israel complying with various humanitarian obligations to which it is subject under international humanitarian law, during the military operations taking place in Rafah? This is the question before us.

### **Background**

1. Since 18 May 2004, active combat has been taking place in the area of Rafah in the Gaza Strip. [...]

According to the respondent's statement, the combat activities are on a large scale. They are intended to damage the terror infrastructure in that area. The main goal is to locate tunnels that are used for smuggling weapons from the Egyptian part of Rafah to the Palestinian part. The fighting also has the aim of arresting persons wanted for acts of terror and locating weapons in the Rafah area. The activity taking place there includes battles with armed opponents. Many explosive charges have been directed against the IDF forces, and various weapons are being fired at them.

2. The city of Rafah is divided into several neighbourhoods. Most of the military operations were in the neighbourhood of Tel A-Sultan. The IDF also entered the Brazil neighbourhood. During the night between the filing of the petition (20 May 2004) and the hearing the next morning (21 May 2004), the IDF left these two neighbourhoods, but the neighbourhoods are surrounded and controlled by the army.
3. Before the fighting – in the light of experience from similar operations carried out in the past – the army took three steps that were intended to facilitate the solution of humanitarian problems. *First*, a “humanitarian centre” was set up. This centre maintains contact with parties outside the area of operations. Thus, for example, various human rights organizations contact it. An attempt is made, on the spot, to resolve concrete problems arising in the course of the fighting. *Second*, a District Coordination Office (“DCO”) was established. This DCO is in constant communication, with regard to humanitarian matters arising as a result of the fighting, with personnel from the Palestinian Ministry of Health, the Palestinian Red Crescent and the International Red Cross. The person in charge of the DCO in the southern part of the Gaza Strip is in direct contact with personnel from the Palestinian Ministry of Health and with local hospitals. It is his job to find a solution to problems arising as a result of the fighting. The person in charge of the DCO in the area of the Gaza Strip is Colonel Y. Mordechai. *Third*, every battalion involved in the fighting has an officer from the DCO. His job is to deal with humanitarian issues arising from the fighting, such as the evacuation of the Palestinian dead and wounded.

## The petition

1. The petitioners are four human rights organizations. They point to various instances of harm suffered by the local population in Rafah – which we will discuss below – as a result of the army's military operations. They are petitioning that the army should allow medical teams and ambulances to reach the wounded in Rafah in order to evacuate them; that the evacuation should take place without prior coordination with the humanitarian centre; that the transport of medical equipment between Rafah and the hospitals outside it should be allowed; that medical teams or civilians involved in the evacuation of the dead or wounded should not be harmed or threatened; that the electricity and water supply to the neighbourhood of A-Sultan should be renewed and the supply of food and medicines for the residents of the neighbourhood should be allowed; that a team of physicians on behalf of the Physicians for Human Rights Organization (the first petitioner) should be allowed to enter hospitals in the Gaza Strip in order to assess the medical needs there. Finally, the petitioners ask that an incident (on 19 May 2004) in which a crowd of civilians was shelled and several residents were killed should be investigated. They also ask that an order should be made prohibiting the shooting or shelling of a crowd of civilians even if they contain armed persons who do not pose an immediate danger to life.

[...]

## Judicial Review

1. "Israel is not an island. It is a member of an international community..." [...]. The military operations of the army are not conducted in a legal vacuum. There are legal norms – some from customary international law, some from international law enshrined in treaties to which Israel is a party, and some from the basic principles of Israeli law – which provide rules as to how military operations should be conducted. I discussed this in one case, where I said: 'Israel finds itself in a difficult war against rampant terror. It is acting on the basis of its right to self-defence (see art. 51 of the United Nations Charter). This fighting is not carried out in a normative vacuum. It is carried out according to the rules of international law, which set out the principles and rules for waging war. The statement that "when the cannons speak, the Muses are silent" is incorrect. Cicero's aphorism that at a time of war the laws are silent does not reflect modern reality... The reason underlying this approach is not merely pragmatic, the result of the political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic state that is fighting for its survival and the fighting of terrorists who want to destroy it. The State is fighting for and on behalf of the law. The terrorists are fighting against and in defiance of the law. The war against terror is a war of the law against those who seek to destroy it [...]. But it is more than this: the State of Israel is a state whose values are Jewish and democratic. We have established here a state that respects law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular; between these two there is harmony and agreement, not conflict and alienation" [...]. Indeed, all the military operations of every army are subject to the rules of international law governing these operations. I discussed this in one case where I said: "Even in a time of combat, the laws of war must be upheld. Even in a time of combat, everything must be done in order to protect the civilian population..." [...].
1. The judicial review of the Supreme Court is normally exercised ex post facto. The act which is the subject of the complaint has already been committed. Occasionally, a significant period of time elapses between the event and its review in the Supreme Court, which examines the legal consequences after the event. This is not the case here. We were not asked by the petitioners to examine the legal significance of military operations that have already been carried out and completed. The purpose of the petition is to direct the immediate conduct of the army. Our judicial review is prospective. It is exercised while the military activity is continuing. This imposes obvious constraints on the court. [...] [T]he case before us is special in that the judicial review is taking place before the military operations have ended, and while IDF soldiers are facing the dangers inherent in the combat. In this regard, it should be emphasized once again that: "Certainly this court will not adopt any position regarding the manner in which the combat is being conducted. As long as soldiers' lives are in danger, the decisions will be made by the commanders. In the case before us, no claim was brought before us that the arrangement that we reached endangers our soldiers" [...].
1. Judicial review does not examine the wisdom of the decision to carry out military operations. The issue addressed by judicial review is the legality of the military operations. Therefore we presume that the military operations carried out in Rafah are necessary from a military viewpoint. The question before us is whether these military operations satisfy the national and international criteria that determine the legality of these operations. The fact that operations are necessary from a military viewpoint does not mean that they are lawful from a legal viewpoint. Indeed, we do not replace the discretion of the military commander in so far as military considerations are concerned. That is his expertise. We examine their

consequences from the viewpoint of humanitarian law. That is our expertise.

## The normative framework

1. The military operations of the IDF in Rafah, in so far as the local inhabitants are concerned, are governed by the Hague Convention Respecting the Laws and Customs of War on Land, 1907 (hereafter – the Hague Convention) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter – the Fourth Geneva Convention). In addition to this, there are the general principles of administrative law, which accompany every Israeli soldier [...]. According to these general principles of Israeli administrative law, the army must act in the occupied area, inter alia, with (substantive and procedural) fairness, reasonableness and proportionality, with a proper balance between individual liberty and the public interest [...].
2. The basic injunction of international humanitarian law applicable in times of combat is that the local inhabitants are "... entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof..." (art. 27 of the Fourth Geneva Convention; see also art. 46 of the Hague Convention). [...]

What underlies this basic provision is the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty [...]. His life or his dignity as a human being may not be harmed, and his dignity as a human being must be protected. This basic duty is not absolute. It is subject to "... such measures of control and security in regard to protected persons as may be necessary as a result of the war" (last part of art. 27 of the Fourth Geneva Convention). These measures may not harm the essence of the rights [...]. They must be proportionate [...]. Indeed, the military operations are directed against terrorists and hostile acts of terror. They are not directed against the local inhabitants [...]. When these, as sometimes happens, enter a combat zone – and especially when terrorists turn the local inhabitants into "human shields" – everything must be done in order to protect the lives and dignity of the local inhabitants. The duty of the military commander, according to this basic rule, is twofold. First, he must refrain from operations that attack the local inhabitants. This duty is his "negative" obligation. Second, he must carry out acts required to ensure that the local inhabitants are not harmed. This is his "positive" obligation [...]. Both these obligations – the dividing line between which is a fine one – should be implemented reasonably and proportionately in accordance with the needs of the time and place.

1. In addition to the basic injunction regarding the human dignity of the local inhabitants during military operations, international humanitarian law establishes several secondary obligations. These are not a full expression of the general principle. They are merely a specific expression of it. Of these secondary obligations, we shall mention two that are relevant to the petition before us:
  1. The supply of food and medicines: "...the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate" (art. 55 of the Fourth Geneva Convention [...]). In this context, humanitarian organizations and the Red Cross should be allowed to supply food and medicines (art. 59 of the Fourth Geneva Convention). Free passage of these consignments should be permitted (ibid., and see also art. 23 of the Fourth

Geneva Convention). Of course, the consignments may be searched in order to ascertain that they are intended for humanitarian purposes (art. 59 of the Fourth Geneva Convention).

2. Medical services: The proper operation of medical establishments in the area under belligerent occupation should be ensured (art. 56 of the Fourth Geneva Convention). Persons engaged in searching for the wounded shall be protected. They shall be recognizable by means of an identity card certifying their status (art. 20 of the Fourth Geneva Convention). The Red Cross and the Red Crescent shall continue their activities in accordance with the principles of the Red Cross (art. 63 of the Fourth Geneva Convention).

## **Water**

1. Counsel for the petitioners argued before us that the entrance of tanks into the neighbourhood of Tel A-Sultan has destroyed the water infrastructure and as a result the supply of water to the whole of Rafah has been disrupted. [...] The petitioners ask that we order the respondent to renew the water supply to the neighbourhood of Tel A-Sultan. In his oral response, Colonel Y. Mordechai said that the water wells in the neighbourhood of Tel A-Sultan were indeed damaged. As a result of this, there is a shortage of water in the southern part of the Gaza Strip. According to his report, as of the date when matters were presented before us, four out of five water wells had been repaired. The delay in the repairs was caused because the Palestinian repair team did not want to enter the neighbourhood of Tel A-Sultan, for fear of being injured. Later, on the initiative of Col. Mordechai, the Red Cross came in an international vehicle and most of the wells were repaired. In areas where there is still no running water (like in the neighbourhood of Tel A-Sultan), the army allows water to be brought in tankers. As of now, there are five water tankers in the neighbourhood, to which the inhabitants have access without difficulty. [...] As a result of this, there is now running water in all the neighbourhoods of Rafah. [...]
2. It is the duty of the military commander to ensure the supply of water in the area subject to military activities. This duty is not merely the (negative) duty to prevent damage to water sources and to prevent a disruption of the water supply. The duty is also the (positive) duty to supply water if there is a shortage. Everything should be done in order to protect water sources and to repair them with due speed. Water tankers should be provided if the normal water supply is not functioning properly. Lessons will certainly have been learned in this regard for the future.

## **Electricity**

1. The petitioners claim that the neighbourhoods in Rafah are without electricity. An attempt to connect the Tel A-Sultan neighbourhood to the electricity network failed, and the whole city is without electricity. They ask that we order the respondent to restore the supply of electricity. [...] Col. Mordechai said that electricity in the southern part of the Gaza Strip comes from Israel. During the military operations, the electricity infrastructure was damaged. The army – in coordination with the Rafah municipality – is working on repairing the damage. This takes time, as sometimes the workers have difficulty finding the source of the problem. In addition, the fighting taking place in the area makes it difficult to repair the electricity network properly. At the moment, there is electricity in the vast majority of Rafah, and everything will be done in order to complete the repairs so that electricity is restored for the whole area. Against this background, it seems to us that there is no need for any further action on our part. [...]

## **Medical equipment and medicines**

1. Counsel for the petitioners said that there is a severe shortage of medicines, medical equipment and blood units in the A-Najar hospital, which, although it is located outside the area of combat, serves the area which is controlled by the IDF. Notice of this was given by the hospital to Professor Donchin, a member of the first petitioner (Physicians for Human Rights). The first petitioner prepared a vehicle containing medicines, bandages, and blood units. The vehicle is waiting by Erez Crossing, and it is not being allowed to enter the Gaza Strip. The petitioners request that we order the respondent to allow the supply of medicines to the inhabitants in the Tel A-Sultan neighbourhood. They also request that we order the respondent to allow the passage of vehicles carrying medical equipment between Rafah and the hospitals outside it, in Khan Younis and Gaza City. In his written response, Col. Mordechai said that the entry of medicines and medical equipment to the Rafah area is being allowed on a regular basis. There is nothing preventing the transfer of medical equipment from one area to another. The international border crossing at Rafah, which was closed during the fighting, was opened for this very purpose, in order to allow trucks carrying medical equipment from Egypt to enter the Gaza Strip area. In his oral response Col. Mordechai added that the entrance to the combat zone is through Karni Crossing. Any medical equipment that is brought to that gate will be transferred immediately to its destination, provided that it is not accompanied by Israeli civilians, because of the fear that they may be taken hostage. [...]
2. It is the obligation of the military commander to ensure that there is sufficient medical equipment in the war zone. This is certainly his obligation to his own soldiers. But his obligation extends also to the civilian population under his control. Within the framework of the preparations for a military operation, this issue – which is always to be expected – must be taken into account. In this regard, both the local medical system and the ability of the local hospitals to give reasonable medical care during the fighting must be considered in advance. Medical equipment must be prepared in advance in case of a shortage; the entry of medical equipment from various sources must be allowed in order to alleviate the distress; contact must be maintained, in so far as possible, with the local medical services. The obligation is that of the military commander, and the receipt of assistance from external sources does not release him from that obligation (cf. art. 60 of the Fourth Geneva Convention). However, such external assistance may lead to the *de facto* fulfilment of the obligation. It seems to us that this issue has now been resolved and we do not think that there is a basis for any additional relief from the court.

## Food

1. According to the claim of counsel for the petitioners, when the military activity began, the army imposed a full curfew and sealed off some neighbourhoods in Rafah. These are lifted and imposed intermittently, depending upon the area where combat is taking place at any given time. In the neighbourhood of Tel A-Sultan, continuous combat has been taking place since the morning of 18 May 2004. Because of the curfew, the residents of the neighbourhood have been cut off from the outside world for three days. They suffer from a shortage of water (see para. 14 *supra*), medicine (see para. 17 *supra*), and food. In four neighbourhoods of Rafah, there is no milk nor any basic food products. Contact with other neighbourhoods – which would solve the problem – is prevented by the army. Moreover, no food is being brought in from outside the area. The petitioners request that we order the respondent to allow the supply of food to the residents of the neighbourhood of Tel A-Sultan. In his response, Col. Mordechai said that the usual procedure is that, when a curfew is imposed, a restocking of food should be allowed within 72 hours from the beginning of the curfew. In the case before us, the army allowed food trucks



prepared by the Red Cross to be brought into the area within 48 hours. Food stations were designated in various parts of the neighbourhoods, and food was distributed to the residents. In this regard, the IDF is in contact with the mayor of Rafah and with the ministries of the Palestinian Authority. During the day, additional food trucks will be allowed to enter. Every request from an outside source to supply food will be approved and allowed. The same applies to milk. In Col. Mordechai's opinion, there is currently no shortage of food. He emphasized in this regard that, even before the operation, UNRWA was allowed to fill its storage facilities with food.

2. On the normative level, the rule is that the military commander who is holding an area under belligerent occupation must provide the food requirements of the local inhabitants under his control. Carrying out this obligation in practice is naturally dependent on the conditions of the fighting. However, it is prohibited for the fighting to result in the starvation of local inhabitants under the control of the army [...]. On the practical level, it seems to us that the food problem has been resolved, but we should repeat that, like the problem of medicines, the question of food for the civilian population must be part of the advance planning for a military operation. The full responsibility for this issue lies with the IDF. The IDF may, of course, be assisted by international organizations, such as the Red Cross and UNRWA, but the actions of these do not discharge it, since it has effective control of the area, of its basic obligation to the civilian population under its control (cf. art. 60 of the Fourth Geneva Convention).

## **Evacuation of the wounded**

1. The petitioners claim that, when the military operation began, the road from Rafah to Khan Younis was blocked in both directions. Ambulances that evacuated the wounded from Rafah to Khan Younis on that morning did not succeed in returning to Rafah. Therefore, wounded persons remained in the A-Najar hospital. That hospital is not equipped, nor is it sufficiently advanced, to treat the dozens of wounded coming to it. Because of the blocking of the road, the lives of many wounded are in danger. Moreover, when the army allows the evacuation of the wounded from A-Najar hospital in Rafah to hospitals outside Rafah, it allows the evacuation only on the condition that the name and identity number of the wounded person and the licence number of the ambulance which is supposed to evacuate him are provided. While the demand for giving the licence number of the ambulance can be satisfied, albeit with difficulty, the demand that the name and identity number of the wounded person are provided is an impossible demand. The reason for this is that many of the wounded are not conscious and their identity is not known. Because of this demand, ambulances are unable to come to evacuate wounded persons whose identities are not known. Moreover, the entry of additional ambulances into the A-Sultan neighbourhood is prevented because of digging that the IDF is carrying out in the area. In one case, shots were even fired on an ambulance of the "Red Crescent." The petitioners request that we order the IDF to refrain from harming or threatening the medical teams or civilians involved in the evacuation of the wounded or the dead. They also request that medical teams and Palestinian ambulances are allowed to reach the wounded in Rafah in order to evacuate them to hospitals. Finally, they request that we order the respondent to allow the transfer of the wounded in ambulances from the hospital in Rafah to other hospitals in the Gaza Strip without any need for prior arrangement, including giving details of the identity of the wounded.
2. [...] Col. Y. Mordechai said that the IDF allows the entry of ambulances and medical teams into Rafah in order to evacuate the dead and wounded. This is coordinated with Red Cross and Red Crescent officials, the Palestinian Civilian Liaison office, various UNRWA officials, various Palestinian officials,

and Israeli human rights organizations that have contacted the humanitarian centre. [...] With regard to the demand for the licence plate number of the ambulances and the identity of the wounded, Col. Mordechai said [...] that these demands are based on a desire to ensure that it is indeed wounded persons that are being transferred by Palestinian medical teams, and that it is indeed an ambulance and not vehicles that are being used for another purpose. Experience has shown that Palestinian terrorists have used even ambulances for terrorist activities, including the transport of armed Palestinians and the smuggling of weapons from one area to another. [...] Col. Y. Mordechai added that a DCO officer is attached to each battalion. One of his main duties is to ensure the evacuation of the wounded in coordination with the ambulance team. During the operation, more than eighty ambulances passed from the northern part of the Gaza Strip to Rafah. The IDF allows the passage of every ambulance, provided that it is coordinated with the army. The search of the ambulance – in case it contains prohibited military equipment that is being transported from one place to another – is completed within minutes. With regard to the evacuation of the wounded, this is not made conditional on providing the names and identity numbers. Even someone whose name and identity is unknown is evacuated, but if it is possible to obtain the name and identity number, the information is requested and received. Without regard to the evacuation of the wounded to somewhere outside Rafah, Col. Mordechai says that more than 40 ambulances have left Rafah, heading north. Every ambulance requesting to leave is permitted to do so. All that is required is coordination with regard to the route. With regard to the shooting on an ambulance, it was stressed before us that the shooting was unintentional. There are clear orders that shooting at ambulances is prohibited. “Ambulances are out of bounds” – so Col. Mordechai told us. [...] It is to be regretted if even a single exception occurred. Wireless contact exists between ambulance drivers and officers of the DCO, by which proper coordination between the forces moving in the field and ambulances is maintained. When the passage of an ambulance is prevented by earth on the road, everything is done – after coordination – so that a tractor is brought to that place to remove the earth. There is no dispute regarding the normative framework. 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. In this respect, it was held by this court, per Justice Dorner, more than two years ago: “... our combat forces are required to abide by the rules of humanitarian law regarding the treatment of the wounded, the sick and dead bodies. The abuse committed by medical teams, hospitals and ambulances has made it necessary for the IDF to act in order to prevent such activities, but it does not, in itself, justify a sweeping violation of humanitarian rules. Indeed, this is the declared position of the State. This position is required not only by international law, on which the petitioners are relying, but also by the values of the State of Israel as a Jewish and democratic state” [...]. It appears to us that the passage of ambulances to and from Rafah took place properly. This was made possible, inter alia, by the contact between the IDF – through the officers of the DCO – and the ambulance drivers. This contact is proper, and it worked properly. Also the movement of ambulances to and from the area was unrestricted. The demand of the IDF regarding the licence plate numbers of ambulances is reasonable. It is correct not to make the transfer of the wounded conditional upon giving their names and identity numbers, but we see nothing wrong in the attempt to receive this information when it is available, provided that obtaining this information is not made a condition for transporting them outside the combat area and does not cause an unreasonable delay in the transport. The single case of shooting on an ambulance was an exception. We are persuaded that in this respect the orders prohibiting such activity are clear and unequivocal. It seems to us, therefore, that in this regard the petition has been satisfied.



## Burying the dead

1. Counsel for the petitioners said that the A-Najar Hospital in Rafah has 37 bodies of inhabitants who were killed in the course of the IDF's operations. Because of the restrictions imposed by the army, it is impossible to bury them. In his response before us, Col. Mordechai said that, in so far as the army is concerned, there is nothing to prevent the dead being buried in the cemeteries. These are located, to the best of his knowledge, outside the neighbourhood of Tel A-Sultan and therefore the funerals can be carried out today. In her response, counsel for the petitioners said that the funerals had not taken place because the army is surrounding the neighbourhood of Tel A-Sultan, and it is not possible for the relatives of the dead to participate in the funerals. Col. Mordechai admitted this to be true.
2. This response did not satisfy us. We said that a solution to this problem must be found quickly. Thus, for example, we asked why all or some of the relatives are not being allowed to participate in the funerals. Col. Mordechai promised us an answer to this question. In an updated statement we received on 23 May 2004, after the pleadings were concluded, we were notified by counsel for the respondent, on behalf of Col. Mordechai, that the respondent decided (on 21 May 2004) to allow several family members of each of the dead to leave the Tel A-Sultan neighbourhood in order to hold the funerals. The proposal was rejected by the Palestinian authorities. That statement also said that on that same day (21 May 2004) the respondent was prepared to allow, as a good will gesture, two vehicles from each family to leave the area of Tel A-Sultan in order to participate in their relatives' funerals. This proposal was also rejected by the Palestinians. On Saturday (22 May 2004) the respondent was prepared to allow, as a good will gesture and in response to a request by the Red Cross, the family members of each of the dead to leave the neighbourhood in order to take part in the funeral ceremonies, without any limit on the number, provided that the funerals should not be conducted at the same time, but one after the other. The Palestinians rejected this proposal as well. On Sunday (23 May 2004) the respondent announced that he was prepared, as a good will gesture and in coordination with the Palestinian Authority, to allow several buses to leave the neighbourhood in order to allow family members to take part in their relatives' funerals. To the best of the respondent's knowledge, the Palestinians began organizing the buses needed to transport the family members from the neighbourhood of Tel A-Sultan for the funerals. A further statement from the respondent (on 24 May 2004) told us that the attempt (on 23 May 2004) to transport family members from the neighbourhood on organized buses for the funerals was unsuccessful because of the opposition of the Palestinians. The respondent added that on that day (24 May 2004), after IDF troops left the Tel A-Sultan neighbourhood, 22 funerals took place, and there was nothing to prevent the participation of family members living in the neighbourhood of Tel A-Sultan, as traffic between the neighbourhood and the area where the funerals took place was not held up by the IDF.
3. In their response (which was received on 24 May 2004), counsel for the petitioners said that, after making enquiries with the mayor of Rafah, it became clear that the residents in Rafah did indeed refuse the IDF's proposals, which significantly limited the participation of the families in the funerals of their relatives. The residents preferred holding the funerals after the siege on the neighbourhoods was lifted, in order to ensure that the prayer for the dead would be recited and that a mourners' tent would be erected for receiving condolences, as Islamic law mandates. We were further told that the mayor of Rafah announced that, in view of the end of the curfew on the neighbourhood of Tel A-Sultan, the inhabitants of Rafah are organizing a mass funeral for the 23 dead in Rafah. The funeral will take place in the afternoon and is expected to continue until the late afternoon because of the large number of the

dead.

4. The problem of burying the dead has been resolved. Nevertheless, there are lessons to learn from the incident. The premise is that the basic principle enshrined in art. 27 of the Fourth Geneva Convention, according to which the dignity of the local inhabitants must be protected, applies not only to the local inhabitants who are alive, but also to the dead (cf. art. 130 of the Fourth Geneva Convention [...]). Human dignity is the dignity of the living and the dignity of the dead [...]. After bodies are found, he is obliged to ensure a dignified burial is held. In *Barakeh v. Minister of Defence* [...], which considered the duty of the military commander with regard to the bodies of persons killed in military operations, we said: "The basic premise is that, in the circumstances of the case, the responsibility for locating, identifying, evacuating and burying the dead rests with the respondents. This is their obligation under international law. The respondents accept this position, and they act accordingly..... The location, identification and burial of the dead are very important humanitarian acts. They derive from respect for the dead – respect for all dead. They are fundamental to our being a state whose values are Jewish and democratic. The respondents declared that they are acting in accordance with this approach, and their approach seems correct to us..... in the humanitarian sphere, it is usually possible to reach an understanding and an arrangement. Respect for the dead is important to us all, for man was created in the image of God. All the parties wish to finish the procedure of locating, identifying and burying the dead as soon as possible. The respondents are prepared to allow the participation of the Red Cross and, during the identification stage after the evacuation, also local authorities (subject to the specific decision of the military commander). In locating the bodies, everyone agrees that burials should be carried out with respect, in accordance with religious custom and as quickly as possible" [...]. The army tried to act in accordance with these principles in the case before us. The dead were identified and transferred to A-Najar Hospital. During all these stages, the Red Cross and the Red Crescent were involved. The problem that arose in the case before us is the problem of burial. The respondent was naturally prepared to bury the dead, but he thought that when he transferred the bodies to A- Najar Hospital he had discharged his duty. This was not the case. The duty of the respondent is to ensure a dignified burial for the bodies. In this regard, he must speak with the local authorities, to the extent that they are functioning, and find dignified ways to carry out this duty. As is clear from the information presented to us, the main difficulty that presented itself was with regard to the participation of the relatives of the dead. [...] A clear procedure should be adopted with regard to the various steps that should be followed in this matter. Naturally, if in the final analysis the bodies are in a hospital and their relatives refuse to bury them, they should not be forced to do so. Nonetheless, everything should be done in order to reach an agreement on this matter.

## **Shelling on a procession**

1. The petitioners claim that on Wednesday, 19 May 2004, thousands of Palestinians from Rafah participated in a quiet and non-violent procession. They marched in the direction of the neighbourhood of Tel A-Sultan. None of the participants were armed or masked. The marchers included men and women, children and the elderly. [...] While they were marching, three or four tank shells and two helicopter missiles were fired at them. According to reports from the participants in the procession, shots were fired also from the direction of the Tel Al-Zuareb observation post, which is an observation post manned by the IDF. The shooting at the crowd resulted in the deaths of eight civilians. About half the dead were minors. The petitioners request that we order an investigation by the Military Police

Investigations Department. They also request that we order the respondent to issue an unequivocal order absolutely forbidding the shooting or shelling of civilian gatherings, even if there are armed men among them, if they do not pose an immediate danger to life.

2. Counsel for the respondent told us that an initial investigation was conducted immediately. It found that because of a mishap, a shell was fired at an abandoned building, and eight Palestinians were killed by shrapnel. One of these was an armed activist of the Islamic Jihad. The other seven victims were completely innocent. In this regard it was emphasized that there are considerable amounts of weapons in Rafah, including armour-piercing weapons. It was also emphasized that, in the past, terrorists have made many attempted to use civilians to attack the IDF. It was also feared that the protesters would climb onto the armoured vehicles with soldiers inside them. The procession took place in the middle of a war zone. There were armed elements among the marchers. In an initial attempt to speak with the marchers, an attempt was made to stop the procession. The attempt failed. Afterwards, deterrents were used. These also failed and the procession continued on its way. In these circumstances, it was then decided to fire a hollow shell at an abandoned building. [...] The respondent further said in his written response that the rules for opening fire in effect in the IDF, including with regard to dealing with civilian gatherings, were formulated on the basis of the ethical and legal outlook of preventing harm to the innocent, in so far as possible. Nevertheless, he reiterated that this was a situation of active warfare and danger to our forces in an area densely populated with civilians, where those persons fighting against the army do not separate themselves from the civilian population, but hide within it. They deliberately use the population as a human shield, contrary to the basic rules of war, which amounts to a war crime.
3. [...] At this stage, in the absence of a factual basis, we can only repeat the obvious, that the army must employ all possible caution in order to avoid harming the civilian population, including one that is protesting against it. The necessary precautions are naturally a function of the circumstances, including the dangers facing civilians on the one hand and the army on the other [...].

## **What of the future ?**

1. According to the humanitarian rules of international law, military activity has the following two requirements: first, that the rules of conduct should be taught to all combat soldiers and internalized by them, from the Chief of General Staff down to the private [...]; second, that institutional arrangements are created to allow the implementation of these rules and putting them into practice during combat. An examination of the conduct of the army while fighting in Rafah, as it appears from the petition before us – and we only have what has been presented before us – indicates significant progress as compared with the position two years ago [...]. This is the case regarding the internalization of the obligation to ensure water, medical equipment, medicines, food, evacuation of the wounded, and the burial of the dead. This is also the case regarding the preparedness of the army and the creation of arrangements for realizing the humanitarian obligations. The establishment of the humanitarian centre and the District Coordination Office, as well as the assignment of a liaison officer from the Coordination Office to each battalion have greatly facilitated the implementation of humanitarian principles.
2. Within the framework of the internalization of humanitarian laws, it should be emphasized that the duty of the military commander is not restricted merely to preventing the army from harming the lives and dignity of the local residents (the “negative” duty: see para. 11 supra). He also has a “positive” duty (ibid.). He must protect the lives and dignity of the local residents [...]. The recognition that the basic obligation rests with the military commander must be internalized, and it is his job to carry out various

measures from the outset so that he can fulfil his duty in times of war.

[...]

1. Against this background, when the arguments in the petition were completed, we wished to ensure that the various military frameworks in the area solve not only the problems raised by the petitioners, but also new problems that, in the nature of things, will arise tomorrow. In this respect, it was agreed that Col. Mordechai would appoint a senior officer who will be in direct contact with the organizations of the petitioners. This is the least that could have been done around the time of the events themselves. The main steps that should be taken will come after studying the lessons at the end of the events.[...]The result is that six of the seven reliefs that were requested by the petitioners have been satisfied. The petitioners are not entitled to the seventh relief – the entry of Israeli doctors on behalf of the first petitioner into the area in general and A-Najar Hospital in particular – because of the danger that the doctors will be taken hostage. In this regard, the respondent's proposal that doctors who are not Israeli (whether from the Gaza Strip, from Judea and Samaria, from Israel, or from anywhere else in the world), will be allowed to enter the area – which was rejected by the petitioners – must suffice.[...]Petitions denied.30 May 2004.

## Discussion

1. How would you qualify the combat activities that took place in Rafah between 18th and 24th May 2004? What provisions of IHL cover this type of combat activity? Do you agree with the Court's assessment of the applicable Conventions (para. 10)?
2. What do you think of the preventive measures that were taken before the start of the operation, such as the "Humanitarian Hotline"? To what extent do they fulfil Israel's obligations as the occupying power?
3. a. What are Israel's obligations for the provision of water? Have these been respected? According to the petitioner? The respondent? The Court? What do you think? (GC IV, Arts 56 and 60; P I, Arts 14(1), 54 and 69; CIHL, Rule 55)  
b. How about the provision of electricity?
4. Did the military commander fulfil his obligations to provide medical equipment and medicines? If not, should the Court have ordered additional remedies? Why did it not do so? (GC IV, Arts 55, 57 and 69; P I, Arts 14 and 69)
5. What do you think of the Court's decision pertaining to food distribution? Did the defendant fulfil his obligations under IHL? (GC IV, Arts 55, 56 and 60; P I, Art. 14)
6. a. According to the petitioners' description of the facts, which provisions of the Geneva Conventions were being breached by the restrictions imposed on the evacuation of the wounded? (GC IV, Art. 17; P I, Arts 21-31; CIHL, Rules 109 and 110)  
b. Do you think the restrictions described by the respondent are justifiable? In light of the past abusive use of medical facilities by the Palestinian forces?
7. According to IHL, what are the respondent's duties towards the dead? As by the end of the case the dead had been or were going to be buried according to their faith, even though no agreement had been reached between the parties, was the issue resolved? What more could the Court have done? (GC IV, Art. 130; P I, Art. 34; CIHL, Rule 115)
8. Does the IDF appear to have respected IHL during the shelling of the march (para. 28)? Is the shelling

of an abandoned building in close proximity to a large number of civilians a violation of IHL? Was there a clear military objective in the attack? If yes, how would you assess the balance between the expected military advantage and the civilian deaths? Does the death of an armed activist change the balance?

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