Introduction

[**N.B.**: As from June 2002, the detainees were no longer held in "administrative detention", but as "unlawful combatants".?End June 2002, the ICRC was able to hold its first visit to Mr. Dirani since his arrest and the first visit in two years to Mr. Obeid. Both detainees have since been released and repatriated.]

N.B. As per the disclaimer [1]**, 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**: High Court of Justice, *Cheikh Abdal Karim Obeid and Mustafa Dib Mar'i Dirani v. The Ministry of Security*, H.C.J. 794/98, 23 August 2001; unofficial translation.]

In the Supreme Court in its capacity as the High Court of Justice

H.C.J. 794/98

Before:
The Honorable President A. Barak
The Honorable Vice President Sh. Levin
The Honorable Justice T. Or
The Honorable Justice M. Heshin
The Honorable Justice Y. Englard

The Applicants: 1. Sheik Abdal Karim Obeid
Mustafa Dib Mar'i Dirani

v.
The Respondents: 1. The Minister of Security
Batya Arad
Tami Arad
Chen Arad
David Arad

Hearing

Date of the hearing: January 11, 2001, 16th of Tevet – 5761 [...]

Judgment

Hearing President A. Barak

1. The Applicants are held in administrative detention: Applicant No. 1 (Obeid) since 1989, Applicant No. 2 (Dirani) since 1994. The legality of their administrative detention has been examined in the Courts. It was held that the administrative detention of the Petitioners was lawful, and that their release, at this time, poses a danger of causing a real damage to the security of the State and the well-being of the inhabitants. The danger posed by the Applicants is learned both from the nature of their acts prior to their detention and from their senior status in the organizations to

which they belong (Administrative Detention Appeal 5652/00) *Obeid and others v. The Minister of Security* (as yet unpublished). While in administrative detention, the Applicants requested to be permitted to meet with Red Cross representatives. The request was denied. The Petition before us was submitted against that decision and an order nisi was granted. While the Application was still pending, the Respondent notified that he decided to allow meetings between Applicant No. 1 (Obeid) and Red Cross representatives. Based on this notification, Obeid's Application was struck off [the record]. We continued to hear Dirani's application, while first waiting for a ruling to be handed down (in Administrative Detention Appeal 5652/00) concerning the legality of the administrative detention. After it was ruled that the administrative detention was valid, we continued to hear his claims concerning meetings with the Red Cross representatives. At their request, we added the Arad family [**N.B**.: Ron Arad is an Israeli soldier who has disappeared. Israel considers that the organizations which the detainees belonged to hold Arad, held him or disposed of his body if he is dead or at least have information on his fate.] as additional Respondents (2-5). While Dirani's Application was pending, it was again decided to prevent the Red Cross visits to Obeid. At his request, we again added Obeid as an Applicant in the application.

2. Counsel for the Applicants bases his application on international law as well as our own internal law. As for the first source, he claims for the application of Article 143 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War. He also maintains that this provision has a customary force, therefore constituting part of Israel's internal law. It has also been argued that under our internal law (Regulation 11, State of Emergency Powers Regulations (Detention) (Administrative Detention – Detention Conditions))-1981 (hereinafter: "the Regulations"), the requested visits have to be allowed.
3. Mr. Nitzan claims for Respondent No. 1, and counsel for Respondents 2-5 joins in these claims, that the provisions of the Fourth Geneva Convention in general, and the provision of Article 143 of this Convention in particular, are of mere conventional force and, therefore, do not constitute part of the law of the State. In addition, he claims that even if this provision applies in the case before us, then, by virtue of the

provision of the first sentence of Article 5 of the Convention, it is possible to deny "such rights and privileges under the present Convention" as would "be prejudicial to the security of such State", and that such is the case before us. As regards Article 11 of the Regulations, it was argued before us that the decision to prevent the meeting of the Applicants and the Red Cross personnel is reasonable. At the basis of this decision lies the position of Respondent No. 1, according to which the holding of visits of the Red Cross to the Applicants might harm the security of the State. In this regard we heard, with the consent of the Applicant's Counsel and in their absence, information concerning the security considerations which form the basis for Respondent No. 1's position.

4. Concerning the reasonableness of the decision to prevent a meeting between the Applicants and Red Cross personnel, there has been a change in the position of the Attorney General. At first we were told that while the Chief of Staff is of the opinion that the Applicants should not be allowed meetings with Red Cross personnel, whereas the position of the Attorney General differed. The Attorney General was of the opinion that, taking into consideration all of the circumstances of the matter, and especially the period of time that has elapsed since the Applicants were first detained, it was right and proper to enable a meeting of Red Cross representatives with them. The Attorney General emphasized that "the passing of time is a substantial consideration. Another consideration is that at the end of the day, Israel, in its behavior, is not like those who hold Ron Arad captive. Israel will do its best to obtain his liberation and to achieve this it will continue to demand the right to hold in administrative detention people whose detention can help in this. However, in these very circumstances, it is appropriate to allow the meeting with Red Cross representatives." Summarizing his position, the Attorney General noted that the reasonable approach would be to preserve the framework of the administrative detention and to enable the Applicants to meet with Red Cross representatives. "This manner of proceeding would be reasonable given, on one hand, the weight that must be given to the humanitarian aspect, and on the other hand. to the real possibility that today, with the passing of time, the prevention of a meeting with Red Cross representatives [will not] aid in the matter of Ron Arad in any way."

5. While the Application before us was pending, three IDF soldiers (Staff Sargeant Binyamin Avraham, Staff Sargeant Omar Sawayid and Sargeant Adi Avitan) were abducted by the Hizbullah (on October 7, 2000). At about the same time Colonel (Reserve) Elhanan Tannenbaum was also abducted. The Hizbullah organization refuses to provide Israel with any information whatsoever about the abductees, their welfare and their health. It also refuses to allow Red Cross representatives to visit them. Against this backdrop, the Attorney General reached the conclusion that for the time being, it would not be reasonable to allow the Red Cross to conduct visits to the Applicants. The Attorney General emphasized before us (in a Supplementary Notification dated January 4, 2001) that "these developments constitute a substantial change of circumstances as regards the relief sought by the application, since it is obvious that the State of Israel has a supreme interest – and a supreme obligation – to make every effort to obtain information on the welfare and health of the abductees. Therefore, for the time being, it would not be reasonable to allow the Red Cross to hold visits to the Applicants." In this, he joined his position to that of the Chief of Staff. In this context it was emphasized that the Applicants are not cut off from the outside world. They have been seen by the public. They have been photographed by the media. All of these clarified to the world that they are healthy and well. They regularly meet with their attorney. They turn to the courts in their concerns. Under these circumstances, the importance of allowing the Red Cross visits to the Applicants is much decreased, as opposed to the situation where all these steps are not permitted to people held in detention.

6. We heard interesting and comprehensive legal claims during the hearings in which we deliberated on this application in its various stages. We wish to leave most of these claims for future determination. Our position is founded on the perception that, at the end of the day, the real question before us is the reasonableness of the decision to not to allow the Applicants to meet the Red Cross representatives. This is certainly the case if the rules of international law do not apply in our case, and the ruling [of the Court] must be taken based on the exercise of the discretion of the security authorities according to Article 11(a)(2) of the Regulations, which states:

    a. "a detainee is permitted to see visitors in a place determined by the commander

for a period of half an hour as set forth below:

1. one visit of members of the family once in two weeks [...];
2. for a visitor of another degree of family relation or any other visitor who does not fall under Article 12 [dealing with visits by an attorney] – with special permission that the commander may grant at his discretion."

Even if the rules of international law apply in this matter, the exercise of security considerations (according to Article 5 of the Fourth Geneva Convention) must be made within the range of reasonableness. Hence, the key question is whether or not the decision not to allow the Applicants to meet with Red Cross representatives is reasonable.

7. In determining the reasonableness of this decision, two opposing considerations must be balanced: the first, the humanitarian consideration connected with the visits of Red Cross personnel to the applicants. The other, which is the security consideration, on which we have received information, and which concerns information on the navigator Ron Arad, and our four captives, we are not free to divulge the detailed contents of. Here also, we can leave for future determination [the question of] the proper balance between these opposing considerations during the time when the position of Respondent No. 1 was that the visits should continue to be prevented (in 1998), or when there has been a change in the Attorney General's position (at the beginning of 2001). What we have to determine is what the proper balance is now, after three years have elapsed from the time of the first decision, and after more than half a year has elapsed since the Attorney General changed his position. Moreover, it is appropriate to take into account the general context of a very prolonged administrative detention. To this question, our answer is that now, there is no longer any possibility to justify the prevention of the meeting of the Applicants with Red Cross representatives. With the passing of the years and months, the humanitarian consideration becomes weightier and weightier. On the other hand, the passing of time lessens the weight of the security consideration. In this matter we have asked the representatives of the army who appeared before us and we thoroughly examined the

considerations. We were convinced that in the proper balance between the humanitarian considerations and the security considerations, the humanitarian considerations prevail.

8. One may ask: are the Applicants entitled to have humanitarian considerations weighed in their matter? They are members of terror organizations. Humanity is beyond them and harming innocent people is the bread of their subsistence. Are the Applicants worthy of having humanitarian considerations made on their behalf, when Israeli soldiers and civilians are held by the organizations to which the Applicants belong, and these organizations do not weigh humanitarian considerations at all, and refuse to provide any information on our men whom they hold captive? Our answer to these questions is this: The State of Israel is a State of law; the State of Israel is a democracy that respects human rights, and gives serious weight to humanitarian considerations. We weigh these considerations, for compassion and humanity are ingrained in our character as a Jewish and democratic State; we weigh these considerations, for a person's dignity is precious in our eyes, even if he is one of our enemies (compare with High Court of Justice Case 320/80 *Kawasama v. The Minister of Defense*, P.D. 35(3) 113, 132). We are aware that such an approach seemingly gives an "advantage" to the terror organizations that are without any humanity. But this is a transient "advantage". Our moral approach, the humanity in our position, the rule of law that guides us – these are all important components of our security and our strength. At the end of the day, this is our own advantage. Things that were said elsewhere are appropriate here too:

"We are well aware that this judgment does not make it easier to deal with this reality. That is the fate of democracy, that not all means are legitimate to it, and not all methods employed by its enemies are open to it. Often democracy fights with one of its hands tied behind its back. Despite this, the hand of democracy prevails, since observing the rule of law and recognizing the liberties of the individual are an important component in democracy's perception of its security. At the end of day, these values strengthen democracy's spirit and *strength and enable it to overcome its difficulties." (High Court of Justice 5100/94, Public Committee Against Torture in Israel v. The State of Israel*

, P.D. 53(4) 817, 845).

9. It was not easy for us to reach our decision. We are aware of the efforts made on behalf of Ron Arad and our abducted soldiers and civilians. We are convinced that our decision cannot harm these efforts. It is this conviction that enables us, in the overall balance, to determine that the humanitarian considerations prevail. We are aware that many – who did not see the security information that was presented to us – may think otherwise. [...]

The result is that we allow the Application, in the sense that Respondent No. 1 has to make the acceptable arrangements to enable a visit of Red Cross representatives to the Applicants.

The President [...]

Hearing Justice Y. Englard

[...] The two Applicants [...] have been held in administrative detention in Israel for many years. Applicant No. 1 has been in detention since 1989, that is for twelve years; Applicant No. 2 since 1994. The question before us is whether to allow the Red Cross to visit them.

The heart revolts against the inhuman and cynical behavior of the terror organizations that cause additional pain and sorrow to the families of the abductees who know nothing on the fate of their loved ones. Our hearts are also with the Arad family, from whom the fate of their son has been hidden by the terror organization and the governments who stand behind them. This behavior is not only inhuman and inconsistent with the behavior of civilized people, but it also stands in explicit contradiction to international conventions, and it is doubtful whether the
international organizations and enlightened countries do enough to rectify this intolerable

situation.

All of this lies in the background of the decisions by the security authorities, who try in every way to bring about a solution to the humanitarian and political problem of the abduction of civilians and soldiers by terror organizations and holding them in captivity, and who act in a manner contrary to all humanitarian rules. The honest belief of the State of Israel's authorities is that the prevention of visits to the Applicants could help in the struggle for the basic rights of the abductees. If not for the hope that the pressure of the prevention of these visits might bring about a similar response on the part of terror organizations, the security entities would not have even considered taking this step against the Applicants.

As my colleague President Barak set forth in detail, Red Cross visits are a clear humanitarian matter, to which the State of Israel considers itself bound subject, of course, to urgent and vital security needs. I would like to add a number of remarks from the viewpoint of Judaism, as they are expressed in the Halachic tradition. It is ruled as Halacha in the Code of Jewish Law (Shulhan Aruch , Yoreh Dea, Samech' Resh-Nun-Bet,) that "there is no greater Mitzva than the redemption of prisoners" and that

> "anyone who ignores the redemption of prisoners, transgresses [the rule] you shall not harden your heart (*Deuteronomy 15, 7*) or close your hand (*Deuteronomy 15, 7*). [And the rule] you shall not stand aside while your fellow's blood is shed (*Leviticus 19, 16*). [And the rule] he shall not subjugate him through hard labor in your sight (*Leviticus 25, 53*) [And] negates the rule you shall open your hand to him (*Deuteronomy 15, 8*). And the Mitzva of let your brother live with you (*Leviticus 25, 36*). [And the rule] you should love your fellow as yourself (*Leviticus 19, 18*). [And the rule] deliver them that are drawn into death. (Proverbs 24, 11). And many things of this kind (*Code of Jewish Law* – Shulhan Aruch, Yoreh Dea, Mark Resh-Nun-Bet, Section B)"

It was also ruled that “any moment of delay in the redemption of the prisoners, where it can be made earlier, it is like the shedding of blood”. (*ibid.*, Section).

With all of the great importance attached to the Mitzva of the redemption of prisoners, Jewish law sets some exceptions to the manner in which prisoners shall be released. This means that, in choosing the manner in which the prisoner shall be released, we must weigh wider considerations, such as the influence of the act of release on future prisoners who will fall into the hands of evil men. In our time, we also see ourselves as obligated to the maintenance of humanitarian values as a form of restoration of the world order in the wide sense of the word. There is no need to elaborate on this. In the special circumstances of this case, it seems, for the time being, that this consideration compels giving permission to Red Cross visit to the Applicants.

Therefore I join in the conclusion of my colleague, President A. Barak. [...]

Discussion

1.
    a. Is the internment of the Applicants lawful under IHL? Can the acts imputed to the Applicants justify their administrative internment without trial, or only their criminal prosecution? (GC IV, Arts 42 [2], 43 [3] and 78 [4])
    b. Since the Applicants were arrested in southern Lebanon, is it acceptable to intern them in Israel? After Israel withdrew from southern Lebanon, could it continue to hold the Applicants? (GC IV, Art. 49(1) [5]; CIHL, Rule 129 [6])
2.
    a. Why was the family of Ron Arad involved in this trial?
    b. Do the families of Ron Arad, the three Israeli soldiers captured on 7 October 2000, and Colonel Tannenbaum have the right to know the fate of their loved ones? Does the ICRC have the right to visit these persons? Can a violation of these rights justify the Applicants’ detention? Can it justify the refusal to allow the ICRC to visit the Applicants? Can it justify the denial of the right of the

Applicants' families to know the Applicants' fate via the ICRC? Is the demand for reciprocity an acceptable way of obtaining compliance with IHL? Does it contribute towards compliance? Can reciprocity take the form of reprisals? Would such reprisals be acceptable? (GC III, Arts 70 [7], 71 [8], 122 [9], 123 [10] and 126 [11]; GC IV, Arts 25 [12], 33(3) [13], 106 [14], 107 [15], 136 [16], 137 [17], 140 [18] and 143 [19]; P I, Arts 32 [20] and 33 [21]; CIHL, Rules 146 [22]-148 [23]; Vienna Convention on the Law of Treaties (available at http://untreaty.un.org [24]), Art. 60(5); Part I, Chapter 13, IX. 2. c) dd) but no reciprocity, p. 301)

c. Would it be acceptable to detain the Applicants for as long as they fail to provide information on the fate of Ron Arad (and other missing persons) for the families concerned? For as long as the organizations to which the Applicants belong fail to provide such information? Does Israel have "the right to hold in administrative detention people whose detention can help in" the release of Ron Arad? Did the judges violate IHL when they decided that this was the case? Did they commit a grave breach of Convention IV? (GC IV, Arts 34 [25], 42 [2], 78 [4] and 147 [26]; CIHL, Rules 125 [27]-126 [28])

d. How do you view the ban on ICRC visits to the Applicants and the claim that such a ban furthers the cause of Ron Arad?

3.

a. Does IHL give the Applicants the right to be visited by the ICRC? Does it give the ICRC the right to visit the Applicants? (GC IV, Art. 143(5) [19]; CIHL, Rule 124 [29])

b. What is the real issue to be decided by the Court: whether the ban on such visits is reasonable, or whether the right to conduct such visits is guaranteed by international law?

4. Why is it important to know whether Art. 143 of Convention IV is customary law, given that Israel and Lebanon are both party to this Convention? Can Israel – which belongs to the dualist tradition in terms of the relationship between international treaties and domestic law – argue that because it has not adopted national legislation to enact and implement Convention IV it is under no obligation to comply with it?

5.

a. Can security reasons justify depriving a protected person of the rights laid down

in Convention IV? Does the first paragraph of Art. 5 of Convention IV apply to the Applicants arrested in southern Lebanon? Can Art. 5(2) of Convention IV be invoked to ban ICRC visits to protected persons?

b. What security reasons could justify a ban on ICRC visits? Can these reasons be invoked in the case in point?

6. What is the “humanitarian aspect” of ICRC visits to the Applicants? Which rights are more easily exercised because of ICRC visits?
7. What are the advantages and disadvantages of showing, as does Judge Englard, that the requirements of IHL correspond to those of the Code of Jewish Law?

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[24] http://untreaty.un.org

[25] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600039?OpenDocument

[26] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600169?OpenDocument

[27] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule125

[28] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule126

[29] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule124