

HCJ 3114/02
HCJ 3115/02
HCJ 3116/02

HCJ 3114/02

MK Mohammed Barake

v.

1. **The Minister of Defense, Benjamin Ben-Eliezer**
2. **The Chief of Staff, Shaul Mofaz**
3. **The Commander of the IDF Forces in the Jenin Area**
- 4.

HCJ 3115/02

MK Ahmed Tibi

v.

5. **The Prime Minister, Ariel Sharon**
6. **The Minister of Defense, Benjamin Ben-Eliezer**
7. **The Chief of Staff, Shaul Mofaz**
8. **The Commander of the Central Command, Yitzchak Eitan**
- 9.

HCJ 3116/02

1. **Adalah—The Legal Center for Arab Minority Rights in Israel**
2. **LAW—The Palestinian Organization For the Defense of Human Rights**

v.

The Commander of the IDF Forces in the West Bank

The Supreme Court Sitting as the High Court of Justice
[April 14, 2002]
Before President A. Barak, Justices T. Or, D. Beinisch

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

Facts: This petition was submitted during IDF operations against the terrorist infrastructure in the areas of the Palestinian Authority. (“Operation Defensive Wall.”) Petitioners requested that the IDF be ordered to cease checking and removing the bodies of Palestinians that had been killed during the course of warfare in the Jenin refugee camp. Petitioners also requested that the IDF be ordered not to bury those ascertained to be terrorists in the Jordan valley cemetery. Petitioners request that the tasks of identifying and removing the bodies be the responsibility of medical teams and the Red Cross. Petitioners also request that the families be allowed to bring their dead to a quick and honorable burial.

Held: The Supreme Court held that the respondents were responsible, under international law, for the location, identification, and burial of the bodies. As such, and according to guidelines that will be set out by respondent, teams will be assembled for the location, identification and removal of bodies. Respondent agrees that the Red Cross should participate in these activities and is prepared to positively consider the suggestion that the Red Crescent also participate, according to the discretion of the Military Commander. The identification process will be completed as quickly as possible, and will ensure the dignity of the dead as well as the security of the forces. At the end of the identification process, the burial stage will begin. Respondents’ position was that the Palestinian side should perform the burials in a timely manner. Of course, successful implementation requires agreement between the respondents and the Palestinian side. If it becomes clear that the Palestinian side is refraining from bringing the bodies to an immediate burial, in light of the concern that such a situation will compromise national security, the possibility that respondents will bring the bodies to immediate burial will be weighed. Burials be carried out in an appropriate and respectful manner, while ensuring respect for the dead. No differentiation will be made between bodies, and no differentiation will be made between the bodies of civilians and the bodies of armed terrorists.

Israeli Supreme Court Cases Cited:

- [1] HCJ 2901/02 *The Center for the Defense of the Individual v. The Commander of the IDF Forces in the West Bank* IsrSC 56(3) 19
- [2] HCJ 2936/02 *Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank*, IsrSC 56(3) 3
- [3] HCJ 2977/02 *Adalah—The Legal Center for the Arab Minority Rights in Israel v. The Commander of the IDF Forces in the West Bank*, IsrSC 56(3) 6.
- [4] HCJ 3022/02 *LAW—The Palestinian Organization for the Defence of Human Rights and the Environment v. The Commander of the IDF Forces in the West Bank* IsrSC 56(3) 9
- [5]
For the petitioner in HCJ 3114/02—Ihab Iraqi
For the petitioner in 3115/02—Saadi Usama
For petitioner 1 in HCJ 3116/02—Hasan Jubran
For petitioner 2 in HCJ 3116/02—Jamal Dkoar
For the respondents—Malchiel Blass, Yuval Rotman

Judgment

President A. Barak

1. Since March 29, 2002, combat activities, known as “Operation Defensive Wall,” have been taking place in areas of Judea and Samaria. Their objective is to prevail over the Palestinian terror infrastructure, and to prevent the recurrence of the terror attacks which have plagued Israel. In the context of this operation, on April 3, 2002, IDF forces entered the area of the city of Jenin and the refugee camp adjacent to it. According to respondents, an extensive terror infrastructure (in their words—a bona fide “Palestinian Military Industries”) 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 quarter of all terrorists who have executed suicide bombing attacks, including the attacks during Passover, the attack in the Matza Restaurant in Haifa, in the Sbarro Restaurant in Jerusalem, in 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 IDF forces entered the refugee camp, they found that a large proportion of the houses were empty. The civilian population was concentrated in the center of the camp. As IDF forces arrived, they appealed to residents to come out of their houses. According to the information before us, this 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, and locate weapons and explosives, IDF forces began house to house combat activity. This technique was adopted, among other reasons, in order to prevent casualties to innocent civilians. It became clear that the empty houses had been booby-trapped. As a result of this fighting, twenty three of our soldiers fell in battle. After several days of house to house combat, the army achieved control of the camp. According to respondents, during the fighting, after calls to evacuate the houses, bulldozers were deployed in order to destroy houses, and some Palestinians were killed.

3. Bodies of Palestinians remained in the camp. Until the camp was completely under IDF control, it was impossible to evacuate them. Once the camp was under control, explosive charges, which had been scattered around the refugee camp by Palestinians, were neutralized and removed. As of the submission of these petitions, thirty seven bodies had been found. Eight bodies were transferred to the Palestinian side. Twenty six bodies have yet to be evacuated.

4. The three petitions here ask us to order respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp. In addition, they request that the respondents be ordered to refrain from burying, in the Jordan Valley cemetery, the bodies of those ascertained to be terrorists. 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 family members of the deceased be allowed to bring their dead to a timely, appropriate and respectful burial.

5. The petitions were submitted on Friday afternoon, April 12, 2002. We requested an immediate response from the Office of the State Attorney. That response was submitted on Friday evening. After reading the petitions and the response, we decided that arguments would be heard on Sunday, April 14, 2002. The President of the Court granted a temporary order forbidding, until after the hearing, the evacuation of the bodies from the places where they lay.

6. At the beginning of arguments this morning, April 14, 2002, a group of reserve soldiers, who had served in the area of the Jenin refugee camp, requested to be added as respondents to this petition. We read their submissions and heard the arguments of their attorney, Y. Caspi. We requested the State's position. The State responded that the reservists did not present anything that was not already present in the position of the State and, as such, there was no place to grant their request. As such, and according to our procedures, we rejected the request to join as respondents to this petition. We allow the addition of a petitioner or respondent when their position adds to what has already been put before us. As the State correctly noted, this is not the case in this situation.

7. Our starting point is that, under the circumstances, respondents are responsible for the location, identification, evacuation, and burial of the bodies. This is their obligation under international law. Respondents accept this position. Pursuant to this, and according to procedures that 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 location. In response to our questions, respondents stated that they are prepared to include representatives of the Red Cross in the teams. In addition, they are willing to consider, according to the judgment of the Military Commander and in consideration of the changing circumstances, the participation of a representative of the Red Crescent in the location and identification process. We recommended that a representative of the Red Crescent be included subject, of course, to the judgment of the military commanders.

Respondents also state that it is acceptable to them that local representatives will assist with the process of identification, following the location and evacuation of the bodies. Identification activities on the part of the IDF will include documentation according to standard procedures. These activities will be done as soon as possible, with respect for the dead and while safeguarding the security of the forces. These principles are also acceptable to petitioners.

8. At the end of the identification process, the burial stage will begin. Respondents' position is that the Palestinian side should perform the burials in a timely manner. Of course, successful implementation requires agreement between the respondents and the Palestinian side. If it becomes clear that the Palestinian side is refraining from bringing the bodies to an immediate burial, in light of the concern that such a situation will compromise national security, the possibility that respondents will bring the bodies to immediate burial will be weighed. Though it is unnecessary, we add that it is respondents' position that such burials be carried out in an appropriate and respectful manner, while ensuring respect for the dead. No differentiation will be made between bodies, and no differentiation will be made between the bodies of civilians and the bodies of armed terrorists. Petitioners find this position acceptable.

9. Indeed, there is no real disagreement between the parties. The location, identification, and burial of bodies are important humanitarian acts. They are a direct consequence of the principle of respect for the dead—respect for all dead. They are fundamental to our existence as a Jewish and democratic state. Respondents declared that they are acting according to this approach, and this attitude seems appropriate to us. As we have said, in order to prevent rumors, it is fitting that representatives of the Red Crescent be included in the body location process. It is also fitting, and this is acceptable to the respondents, that local Palestinian authorities be included in the process of the identification of the bodies. Finally, it is fitting, and this is the original position of the respondents, that burials should be performed respectfully, according to religious custom by local Palestinian authorities. All these acts should be

performed in as timely a manner as possible. All the parties are in agreement in that regard. Needless to say, all of the above is subject to the security situation in the field, and to the judgment of the Military Commander.

10. Indeed, it is usually possible to agree on humanitarian issues. Respect for the dead is important to us all, as man was created in the image of God. All parties hope to finish the location, identification, and burial process as soon as possible. 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 agree that burials should be performed with respect, according to religious custom, in a timely manner.

11. Petitions claimed that a massacre had been committed in the Jenin refugee camp. Respondents strongly disagree. There was a battle in Jenin, a battle in which many of our soldiers fell. The army fought house to house and, in order to prevent civilian casualties, did not bomb from the air. Twenty three IDF soldiers lost their lives. Scores of soldiers were wounded. Petitioners did not satisfy their evidentiary burden. A massacre is one thing; a difficult battle is something else entirely. Respondents repeat before us that they wish to hide nothing, and that they have nothing to hide. The pragmatic arrangement that we have arrived at is an expression of that position.

12. It is good that the parties to these petitions have reached an understanding. This understanding is desirable. It respects the living and the dead. It avoids rumors. Of course, the law applies always and immediately. Respondents informed 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 laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population. *See* HCJ 2901/02 [1]; HCJ 2936/02 [2]; HCJ 2977/02 [3]; and HCJ 3022/02 [4]. Clearly this Court will take no

position regarding the manner in which combat is being conducted. As long as 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 endangered the lives of soldiers. Nor was it claimed that the temporary order endangered the lives of soldiers. On the contrary; the arrangement at which we arrived is an arrangement in which all are interested.

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

April 14, 2002