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HCJ 3451/02

1. Mohammed Almandi
 2. MK Ahmed Tibi
 3. MK Mohammed Barakeh
- v.
1. The Minister of Defense, Mr. Benjamin Ben-Eliezer
 2. The Chief Of Staff
 3. The Commander of the Central Command of the Israeli Defense Forces

The Supreme Court Sitting as the High Court of Justice

[April 25, 2002]

Before President A. Barak, Justices D. Beinisch, I. England

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.”) It concerns the situation in the Church of the Nativity in Bethlehem, in which armed Palestinians had fortified themselves. In the church compound there were also unarmed Palestinians civilians, as well as clergymen. The clergymen, who were not in the same part of the compound as the Palestinians, received food, though the Palestinians did not. Petitioners requested that food be allowed into the compound. They asserted that preventing food from entering the compound was a violation of international law. Respondents reply that they are

not preventing the civilians from exiting the compound—indeed, they are encouraging them to do so—and assuring them that no harm shall befall them. In response, petitioners asserted that the armed Palestinians were preventing the civilians from exiting the compound, and that the only way to ensure that food reached the civilians was to allow food into the compound for all inside.

Held: The Supreme Court held that Israel, finding itself in the middle of difficult battle against a furious wave of terrorism, is exercising its right of self defense under the Charter of the United Nations. This combat is being carried out according to the rules of international law, which provide principles and rules for combat activity. The Court found that, regarding the treatment of the armed Palestinians, the State had not violated international law. The problem was with the unarmed civilians inside the Church compound, those that were not connected to terror. The Court held that, in view of the reality in the compound, in which there was a well providing a certain amount of water, and food, even if it was only basic, and in view of the willingness of the respondents to provide extra food to the civilians even if they do not leave the compound, the respondents had fulfilled their obligation under international law.

Treaties Cited:

The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949

Israeli Supreme Court Cases Cited:

- [1] HCJ 3436/02 *La Custodia Internazionale di Terra Santa v. Government of Israel* (unreported decision)
- [2] HCJ 168/91 *Marcus v. The Minister of Defense* IsrSC 45 (1) 467
- [3] HCJ 3114/02 *Barake v. The Minister of Defense* IsrSC 56(3) 11
- [4] HCJ 320/80 *Kawasma v. The Minister of Defense* IsrSC 35 (3) 113

Israeli Books Cited:

- [5] Y. Dinstein, *The Laws of War* (1983)

For the petitioners—Saadi Usama

For the respondent—Yochi Jensin

Judgment

President A. Barak

1. On March 29, 2002, the government decided to carry out a military operation—"Operation Defensive Wall"—against the Palestinian terror infrastructure in Judea and Samaria. The goal of the operation was to prevent the recurrence of the terror attacks which have plagued Israel. In the context of this operation, IDF forces entered Bethlehem on April 14, 2002. As IDF forces entered Bethlehem, approximately thirty to forty wanted Palestinians terrorists list broke into the Church of the Nativity, shooting as they entered. According to information in the hands of the security services, these men are responsible for the murder of Israeli civilians. Scores of armed Palestinian security services personnel also burst into the church compound. In addition, a number of civilians, unarmed and unconnected to the others, also entered the church. In total, approximately two hundred Palestinians entered the compound. The armed Palestinians positioned themselves in the Basilica of the church.

2. The IDF surrounded the church compound. Several times, the IDF requested of all Palestinians, especially of the ill requiring medical care, to exit the compound. The message was conveyed to those in the compound that those who were not involved in terror activity, and who were not wanted by Israel, could leave the compound and go free. Those who were wanted—and these constituted a minority of the armed persons in the compound—were given the options of either standing trial in Israel or leaving Israel and the areas of the Palestinian Authority.

3. Many of those who entered the compound of the Church of the Nativity have since left. Those who left the compound included the wounded and the ill. These were examined by a medical team which had been set up adjacent to the church compound, and were evacuated to hospitals when necessary. Two bodies of armed persons were taken out for burial. In addition, a number of civilians, including nine youths, took advantage of the opportunity they were given and left the compound.

4. Initially, there were approximately forty eight clergymen in the Church of the Nativity. They congregated outside the basilica, in several compounds. The IDF, of course, allowed all clergymen the opportunity to leave the compound. Seventeen of them left the church. Water and food is being inserted into the compound for the clergymen, as per their needs. See H CJ 3436/02 *La Custodia Internazionale di Terra Santa v. Government of Israel* (unreported decision) [1].

5. Currently, negotiations toward a resolution of the situation are being conducted between the Palestinians in the compound and the State of Israel. The negotiations are being conducted by special teams that were established for that purpose. During these negotiations, the *La Custodia* [1] petition was filed. That petition contained demands to provide food, water, medicine, and other necessary items to the clergy in the church, to connect the compound to electricity and water and bring a doctor into the compound, and to allow two bodies in the compound to be removed. The petition was filed by the owner and possessor of the compound.

As arguments in the petition were being heard, negotiations were also being conducted on these same issues. As such, the *La Custodia* [1] petition was rejected. There, Justice Strasberg-Cohen stated that “at the moment, the sides are in contact for the purpose of arriving at an arrangement. In the middle of a military operation, the Court should not interfere in such developments. In addition, as clarified by respondents, the IDF is doing all that is necessary to care for the clergy in a sensitive and humane manner.” Regarding the substantive issue, this Court noted that the clergymen were already receiving all assistance that they had requested. We have already noted that seventeen priests, out of the forty eight in the compound, left of their own volition. Water and food are being brought in as necessary. Medication was brought in to the compound, according to prescriptions relayed by the clergymen to the IDF.

6. The petition before us was filed by the Governor of Bethlehem (petitioner 1), who is inside the compound, and by two Israeli Members of Knesset (petitioners 2 and 3). They request that medical teams and representatives of the Red Cross be allowed to enter the compound, in order to provide food and medicine. In addition, they request that medical teams and representatives of the Red Cross be allowed to collect the bodies in the compound, and to provide medical care to the ill. They also request that ill persons requiring medical care be allowed to leave the compound. As noted, the solution to the problem of collection and burial of bodies has already been found. The problem of the ill that required medical treatment has also been solved. The only remaining problem is the issue of water and food for those in the compound. Even this problem has been solved, as far as the clergymen are concerned. As such, the problem reduces to the question of the Palestinians in the basilica.

7. Respondents has notified us that the IDF has disconnected most of the compound from water and electricity. However, to the best of the army's knowledge, there is a well in the compound, from which water is being pumped. In addition, in certain areas of the compound, electricity is being provided by a generator. Furthermore, Palestinians who left the compound reported that there are bags of rice and beans inside. It is clear, however, that there is a shortage of food, and the petition here concerns that shortage.

8. Petitioners, during oral arguments of April 24, 2002, argued that the fact that Palestinians in the compound are being deprived of food is a severe breach of international law. Respondents reply that the petition is not justiciable. They assert that there is no justification for judicial intervention when the parties are in the middle of negotiations. Substantively, respondents argue that they are acting according to international law.

9. Israel finds itself in the middle of difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. *See* The Charter of the United Nations, art. 51. This combat is not taking place in

a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, “when the cannons roar, the muses are silent,” is incorrect. Cicero’s aphorism that laws are silent during war does not reflect modern reality. I dealt with this idea in HCJ 168/91 *Marcus v. The Minister of Defense* [2], at 470-71, noting:

When the cannons roar, the muses are silent. But even under the roar of the cannons, the Military Commander must uphold the law. The strength of society in withstanding its enemies is based on its recognition that it is fighting for values that are worth defending. The rule of law is one of those values

In HCJ 3114/02 *Barake, v. The Minister of Defense* [3], decided only a few days ago, during the height of combat activities in “Operation Defensive Wall,” we stated

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.

The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law’s war against those who rise up against it. See HCJ 320/80 *Kawasma v. The Minister of Defense* [4], at 132. Moreover, the State of Israel is founded on Jewish and democratic values. We established a state that upholds the law—it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these—the vision and the law— there lies only harmony, not conflict.

10. Indeed, the State argues that it is acting according to the rules of international law. These are humanitarian laws, which Israel honors. Respondent asserts that “the means used by the IDF towards the Palestinians in the Church of the Nativity are not forbidden by international law. These means are proportionate—we have refrained from the use of military force in order to enter the compound, and allow armed Palestinians to leave the compound at any time that they wish to do so and, if they do so without their weapons, they will not be hurt, but rather arrested.” *See* para. 32 of respondents’ brief. On this issue we were referred to Articles 17 and 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter - the Fourth Geneva Convention].

11. We examined the arguments of the parties regarding international law. We are convinced that as far as the armed Palestinians are concerned, there is no breach of these rules. The majority of our attention was directed towards the Palestinian civilians in the compound. These civilians are not armed, they are not government authorities, and there is no charge that they are connected with terrorism. How can their rights be ensured? Respondents’ answer is that they are not preventing Palestinian civilians from exiting the compound, and are encouraging them to exit, while promising them that no harm shall befall them. Petitioners respond that, according to their information—information from Israeli sources, they claim—the armed Palestinians are preventing these civilians from exiting the compound, and the only way to ensure the provision of food to the civilians is by providing enough food for all who are in the compound. To this the State replies that there is enough food inside the compound now and that, in any case, there is no possibility to ensure that additional food brought into the compound will be consumed by the civilians only, and that, clearly, additional food will also be consumed by the armed persons.

This situation troubled us. On April 30, 2002, we held a special session in order to be updated on this issue. We asked how it can be ensured that extra food—beyond the essentials—be provided to the

civilians who remain in the compound. We asked whether respondents would be willing to allow civilians to leave the compound, receive extra food, and return to the compound. We received a positive answer. Like the clergy, who exit the church to tend to religious matters and then return, so unarmed civilians will be allowed to leave the compound, receive extra food according to their needs outside of the compound, and then return to the church. It appears to us that, in view of the reality in the compound, in which there is a well providing a certain amount of water, and food, even if it is only basic, and in view of the willingness of the respondents to provide extra food to the civilians even if they do not leave the compound, the respondents have fulfilled their obligation under international law. *See* Article 23(a) of the Fourth Geneva Convention; *see also* A. Rogers, *Law on the Battlefield* 62 (1996); Y. Dinstein, *The Law of War* 140 (1983).

12. Like many others, we hope that the events in the compound of the Church of the Nativity will come to an end quickly. It is difficult to describe the gravity of the taking of a holy place by armed Palestinians, the desecration of its sanctity and the holding of civilians hostage. Negotiations between the two sides are taking place in order to find a solution to the difficult situation which has been created. A solution to the problem must be found in the framework of these negotiations. Clearly, just as “this Court will take no position regarding the manner in which combat is being conducted,” *see* HCJ 3114/02 [3], we will not conduct the negotiations, and will not guide them. Responsibility for this issue rests on the shoulders of the executive branch and those acting on its behalf.

The petition is rejected.

Justice D. Beinisch

I agree.

Justice I. Englard

I agree with the opinion of my colleague, President A. Barak, and with his reasons. I would only like to add a few comments regarding the causes of this intolerable situation of the desecration of a Christian holy place—and not just any holy place, but one of the most ancient and significant holy places to the Christian communities. Who is responsible for the fact that thugs burst in, by force, to the ancient basilica and did “things that ought not to be done?” *Cf.* Genesis 34:7. Who had the obligation to protect this holy place and prevent its invasion by armed men? Who is responsible for the breach of the international law, which requires the protection of religious and cultural treasures from combat activities, and forbids their use for the purposes of war? See the provisions regarding holy places and cultural treasures in Geneva Protocol I, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977; and Geneva Protocol II, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977. Does this responsibility not rest on the shoulders of the Palestinian Authority which obligated itself to protect the holy places in areas under its control? Did the Palestinian Authority take substantial steps to prevent this desecration, and did it make an effort to end it immediately? We all deserve answers to these questions!

Decided according to the opinion of President Barak.
May 2, 2002