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**At the Supreme Court**  
**Sitting as the High Court of Justice**

**HCJ 4764/04**  
Set for: 21 May 2004

- 1. Physicians for Human Rights**
- 2. The Association for Civil Rights in Israel**
- 3. HaMoked: Center for the Defence of the Individual**
- 4. B'Tselem – The Information Center on Human Rights in the Occupied Territories**

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**The Petitioners**

v.

**Commander of the IDF Forces in Gaza**

by the State Attorney's Office  
Ministry of Justice, Jerusalem

**The Respondent**

## **Response on behalf of the Respondent**

In accordance with the decision of the Honorable Court, of 20 May 2004, the State Attorney's Office respectfully submits the preliminary response of the Respondent to the petition, as follows:

### **Preface**

1. This petition involves various claims made by the Petitioners regarding the possibility of Palestinian medical teams providing medical treatment to injured Palestinians in the Rafah area, where fighting has been taking place since 18 May 2004. In this context, the Petitioners request that a delegation of three physicians on behalf of Petitioner 1 be allowed to enter hospitals in the Gaza Strip.

2. The Court is also requested to order the Respondent to renew the supply of electricity and water to the Tel a-Sultan neighborhood in the Rafah area, and to enable the provision of food and medicines to the neighborhood's residents.
3. Finally, the Court is requested to order the Respondent to investigate immediately an incident that the Petitioners describe as the shelling of a gathering of civilians in Rafah on 19 May 2004, and that the Respondent issue an unequivocal order that absolutely forbids the firing or shelling of civilian crowds, even if the crowd includes armed persons, where the armed persons do not constitute an immediate threat to life.
4. The Respondent believes that the petition should be dismissed, and will set forth below the reasons supporting this position.

By way of preface, we would like to update the Honorable Court and state that, during the night, IDF forces began to redeploy in the Rafah area. As a result, most of the forces have left the Tel a-Sultan neighborhood.

We would also like to mention that, with difficult combat actions being conducted in the area, and with the Respondent doing everything possible to minimize the harm to the area's residents who are not taking part in the fighting, and to enable, as much as possible, the provision of suitable medical treatment and burial of the dead, it appears that the Honorable Court is not able, from a substantive and institutional perspective, give efficient and effective relief; if for no other reason than that it is impossible to present before the Honorable Court, in real time, the dynamic picture of the battlefield in one place or another. Thus, issues raised in the petition have already been resolved by IDF forces, and it may be that, in the meantime, other situations have arisen that require response and handling.

5. Also, we should mention that the petition was filed a very short time ago, and with difficult combat actions taking place, it is impossible to investigate all the specific cases mentioned in the petition, and clearly it is not possible to relate to all of them in this response to the Honorable Court (compare, on this point, HCJ 2936/02, *Physicians for Human Rights v. Commander of the IDF Forces in the West Bank*, *Piskei Din* 56 (3) 3; HCJ 3022/03, *Law – The Palestinian Society for the Protection of Human Rights and the Environment v. Commander of the IDF Forces in Judea and Samaria*, *Piskei Din* 56 (3) 9).
6. Furthermore, it is improper to hear the specific contentions raised in the petition for another reason: the petition is supported only by the affidavit of a fieldworker of the Association for Civil Rights, all of whose testimony is "hearsay," which is not a sufficient basis for the issuance of an Order Nisi. It may be that that this is one of the

reasons for the great disparity between the contentions made by the Petitioners in their petition and the reality that prevailed and prevails in the field.

It is worth noting that the Palestinian side has a clear interest in painting a very gloomy picture of the humanitarian situation, *including wild exaggerations*, as it did during Operation Defensive Shield in Jenin. In the present operation, as regards the unintentional harm to persons participating in the procession, the situation was first presented by the Palestinians as if more than twenty persons were killed (in fact, eight persons were killed, one of them a military activist in the ranks of Islamic Jihad).

### **The Respondent's position**

7. Since 18 May 2004, wide-scale combat actions have been taking place in the Rafah area. These actions are aimed at the Palestinian terrorist infrastructure in the area, including the attempt to locate tunnels used to smuggle weapons and materiel from Egyptian territory into the Gaza Strip; to arrest Palestinians who are wanted for terrorist activity; and to locate weapons and material used in the Rafah area. The fact that combat actions are taking place in the Rafah area was pointed out by the Honorable Vice-President Mazza a few days ago in H CJ 4694/04, *Abu Atrah v. Commander of the IDF Forces in the Gaza Strip* (not yet published), when he stated:

**It is undisputed that, in the city of Rafah and its environs,  
for a few days now, IDF forces and terrorist organizations  
have been engaged in combat against each other.**

The IDF combat actions have been conducted against armed persons. Many explosive charges have been directed against IDF forces in Rafah; soldiers have been fired at from weapons of different kinds; and there has been intensive fighting between the IDF and these armed individuals. As stated above, last night, IDF soldiers began to redeploy in the Rafah area.

8. Contrary to the picture presented in the petition, IDF forces are making a supreme effort, which has more than once endangered soldiers' lives, to enable the provision of suitable medical treatment, in the circumstances prevailing in the field, to Palestinian residents. In this context, and contrary to the contentions made, IDF soldiers allow the evacuation of wounded to hospital; IDF forces allow ambulances and vehicles carrying medical equipment to pass; IDF forces allow evacuation of the dead; IDF forces allow hospitals to continue operating, and to be equipped with the necessary means of operation. In doing this, the forces take into account the harsh and intensive fighting taking place in the Rafah area.

9. In order to ensure the aforesaid, the IDF, primarily through the District Civil Liaison Office (hereinafter: DCO), maintains direct and ongoing contact with officials of the Palestinian Ministry of Health, and with officials of the Palestinian Red Crescent and the International Red Cross, on humanitarian matters that naturally arise in time of warfare. Thus, the head of the southern DCO is in direct contact with officials of the Palestinian Ministry of Health and with hospitals in the area, and his task is to seek and find solutions to these and other troubles that arise.

Contrary to the picture portrayed in the petition, cooperation exists and is aimed at providing necessary medical services, all with the purpose of providing the requisite humanitarian aid, including evacuation of wounded and bodies of the dead, and provision of medical treatment, all as quickly as possible, depending on the relevant time and place.

10. Furthermore, every battalion engaged in the fighting has an officer from the DCO whose task is to deal with the humanitarian matters that arise as a result of the fighting. These matters include finding ways to evacuate the dead and wounded among the Palestinians. An IDF Humanitarian Hotline is also active in handling inquiries it receives and in providing aid in real time to solve concrete problems of distress that arise as a result of the fighting. Requests and inquiries from human rights organizations and others are checked in this framework, and an attempt is made to provide a concrete and swift solution, to the degree possible, to every case that is raised.
11. On the backdrop of the above, we want to discuss – to the extent possible – the contentions raised in the petition.
12. IDF forces allow the entry of ambulances and medical teams into Rafah to evacuate the dead and wounded. The number of ambulances allowed to enter depends on the nature of the event and the number of casualties. In any event, the matter is coordinated by the DCO in the south Gaza strip, through its representatives in the field who are attached to the forces, and through the representatives in brigade and division headquarters. There is coordination with Red Cross officials, Red Crescent officials, the Palestinian DCO, UNRWA officials, various Palestinian officials, and Israeli human rights organizations, which contacted the Humanitarian Hotline. *As a rule, IDF forces do not prevent the entry of ambulances into the Rafah area, nor do they prevent the movement of ambulances from Rafah to Khan Yunis.*
13. In this framework, the Respondent allows the regular entry of medical equipment and medicine into the Rafah area and does not prohibit the movement of medical

equipment from area to area. We should mention that IDF forces also opened the international border crossing in Rafah at unconventional hours, even though the Rafah crossing is closed during the current fighting, in order to allow the entry of trucks carrying medical equipment from Egypt to the Gaza Strip. A conversation between DCO officials and officials at An-Najar Hospital, in Rafah, indicates that there is no shortage of medical equipment in the hospital, that blood donors have given blood, and that the Red Cross has been able to bring in medical equipment.

14. The Respondent also allows the regular movement of ambulances and transfer of the wounded from the hospital in Rafah to hospitals in Khan Yunis, subject to prior coordination by the Palestinian Ministry of Health and hospitals with the Israeli DCO officials. It is important to note that IDF forces do not prevent the movement of wounded from Rafah to Khan Yunis, not even if the wounded are not identified, and that the demand for prior coordination with Palestinian Ministry of Health officials is based on the desire to ensure that the persons being moved by Palestinian medical personnel are indeed wounded, and that they are being moved by an ambulance and not a vehicle used for another purpose. On this backdrop, we wish to point out that, based on past experience, Palestinian terrorists have also used ambulances in their terrorist actions (*inter alia*, for purposes of transporting armed Palestinians and for smuggling weapons and materiel from one area to another) (see H CJ 2936/02, *Physicians for Human Rights v. Commander of the IDF Forces in the West Bank*, *Piskei Din* 56 (3) 3). It goes without saying that IDF forces do not fire deliberately at ambulances, as such. It may be that soldiers fire at ambulances that are used by armed Palestinians.
15. The Petitioners contentions regarding the supply of water and electricity in the Tel a-Sultan neighborhood indicate the dynamic nature of the fighting, and the practical impossibility of the Honorable Court to conduct a hearing on the specific contentions raised by the Petitioners. Following the entry of IDF forces into the Tel a-Sultan neighborhood, the IDF realized there was an electricity problem in the area which resulted, apparently, from the fighting. Therefore, the IDF coordinated the entry of teams from the Rafah Municipality to repair the malfunction and to renew the flow of electricity, and the malfunction was indeed repaired. However, it should be noted, that there are, at times, breakdowns in the supply of electricity in this area. IDF forces arranged the repair of the breakdowns as soon as possible, within a few hours.  
  
Regarding the Petitioners' contention relating to the supply of water, in this matter, too, when IDF forces realized there was a problem, they acted immediately to enable the entry of teams to repair wells that are used to supply water to Rafah.

The same is true about distribution of food. Since the curfew was imposed on the Tel a-Sultan neighborhood, a result of the fighting there, the IDF allowed food to be brought into the neighborhood, and also lifted the curfew for a short time to enable the residents to re-supply. According to DCO figures, from the beginning of the IDF's action in the neighborhood until last night, IDF forces allowed the entry of some 46 ambulances, 4 fire engines, 4 trucks, 4 repair crews from the Rafah Municipality, and 6 teams from international organizations. Also, according to the Respondent's figures, during the fighting, the IDF has allowed the passage of some 43 ambulances between Rafah and Khan Yunis, and the movement of some 26 vehicles of international organizations, and some 14 trucks.

16. Regarding the entry of medical teams on behalf of Petitioner 1, we have not been able to locate the relevant request that was made to the Respondent prior to the filing of the petition, which should automatically be summarily dismissed for failure to exhaust proceedings. However, we should note that initial examination indicated that the entry of Israeli civilians into the Gaza Strip is forbidden out of fear that they will be injured or abducted, which would gravely complicate the security situation (compare H CJ 727/02, *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip*, *Piskei Din* 56 (3) 39; H CJ 9293/01, *Barakeh v. Minister of Defense*, *Piskei Din* 56 (2) 509). As an aside, where *foreign residents* want to enter the Gaza Strip, entry is allowed (subject to the individual being checked). We wish to point out that a team from the International Red Cross is present in the area, and that the head of the International Red Cross is in direct contact with IDF forces.
17. The Petitioners seek an immediate investigation of the event that took place on 19 May 2004, and further request that the Respondent issue an order, as described in the petition. The Respondent wishes to note that the IDF's existing rules of engagement, including the way to cope with crowds of civilians (which, for operational reasons, the army customarily does not publish) are based on the legal and normative conception that injury to innocent persons should be avoided, to the extent possible. However, it should be mentioned again that the situation is one in which our soldiers are engaged in combat and find themselves under threat in an area full of civilians, and in a situation in which combatants engaged against us do not distinguish themselves from the civilian population, who situate themselves among the civilians, and intentionally use the civilian population as human shields, in violation of the fundamental laws of war, and even constitutes a war crime. This basic understanding must be taken into account when examining each action taken by IDF forces that are fighting in an area under severe conditions. However, we again point out that, even in

time of warfare, the IDF continues to refrain from harming innocent persons, to the extent possible. In this matter, we refer the Honorable Court to the comments of the Honorable Court in H CJ 2977/02, *Adalah – The Legal Center for Arab Minority Rights in Israel v. Commander of the IDF Forces in Judea and Samaria, Piskei Din* 56 (3) 6, 8:

**It is assumed that the Respondent – and it is not argued otherwise –instructed and instructs the combat forces to do what is necessary to prevent unnecessary harm to innocent persons.**

In the matter of the circumstances described in the petition, we note, first, that an initial debriefing of the incident was conducted by the IDF, and details of the incident were brought to the attention of the Chief of Staff. In addition, a complete and thorough investigation of the incident will be made. However, it is important to note that the preliminary debriefing indicates that IDF forces opened fire only after other actions were taken by the forces to prevent the procession, which contained armed Palestinians, from approaching IDF forces. *It should be noted that, based on the preliminary debriefing, the fire was not aimed at the demonstrators.* We repeat that IDF forces were involved in heavy combat in the Rafah area, against armed terrorists who do not hesitate to use the civilian population, including for purposes of drawing near, while in disguise, to IDF forces and attacking them.

18. It should be noted that the events underlying the filing of the petition herein constitute warfare in every sense of the word, as to which the Honorable Court relates very carefully when exercising judicial review. It can also be said that a petition of this kind brings the Court to the borderline of institutional judicial jurisdiction. On this point, the comments of the Honorable President in H CJ 3114/02, *MK Barakeh v. Minister of Defense, Piskei Din* 56 (3) 11, 16, are appropriate:

**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.**

19. Furthermore, in light of the circumstances described above, in exercising judicial review, the Honorable Court must give due consideration to the discretion of the commanders in the field, since only they are aware of the specific circumstances, and they have the responsibility to cope with the constantly changing events.



## AFFIDAVIT

I the undersigned, Col. Yoav (Poli) Mordechai, Military Service No. \_\_\_\_\_, hereby declare as follows:

1. I serve as head of the District Civil Liaison office in the Gaza Strip.
2. I give this affidavit in support of the preliminary response of the Respondent in HCJ 4764/04, *Physicians for Human Rights v. Commander of the IDF Forces in Gaza*.
3. The facts set forth in the response are true to the best of my knowledge and belief. The facts stated in Section 17 of the preliminary response are consistent with the information provided to the State Attorney's Office by the Southern Command. According to legal advice that I have been given, the legal contentions are true.
4. I declare that this is my name, this is my signature, and the contents of this affidavit are true.

\_\_\_\_\_  
*[signed]*

Yoav (Poli) Mordechai

## Certification

I the undersigned, Yuval Roitman, Attorney, hereby certify that on 21 May 2004, appeared before me Col. Yoav (Poli) Mordechai, who identified himself with his officer's card, Military Service No. \_\_\_\_\_, and after I warned him that he must tell the truth and that he is subject to statutory punishment if he does not do so, he signed his affidavit.

\_\_\_\_\_  
*[signed]*

Yuval Roitman, Attorney